OVERSIGHT OF THE U.S. PATENT AND TRADEMARK OFFICE

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

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APPENDIX

QUESTIONS AND RESPONSES FOR THE RECORD

OVERSIGHT OF THE U.S. PATENT AND TRADEMARK OFFICE

Thursday, April 27, 2023

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to notice, at 9:08 a.m., in room 2141, Rayburn House Office Building, the Hon. Darrell Issa [Chair of the Subcommittee] presiding.

Present: Representatives Issa, Massie, Fitzgerald, Cline, Kiley, Moran, Lee, Fry, Johnson, Lofgren, and Ivey.

Mr. ISSA. The Subcommittee will come to order.

Without objection, the Chair is authorized to declare a recess at any time.

We welcome everyone here today to today's hearing on "Oversight of the United States Patent and Trademark Office."

I will now recognize myself for a short opening statement.

First, although I'll welcome you officially later—welcome to the Committee, and welcome to the work that you've already had under our time, 100 days, but much longer to do. This Committee, like no other, is interested in seeing and hearing what you have to say about what you're doing today and what, by definition, we will have to do in the future, in areas like AI and the development of what we might consider to be patentable products that, today, would be invented by men and women and, tomorrow, certainly will be conceived of and refined by machines.

The United States Patent and Trademark Office plays a critical role in the Nation's ability to innovate and grow. That has been true since our founding. The first patent, which I'm honored to have a copy of in my office, is signed by none other than George Washington and Thomas Jefferson. In those days, the first five patents were reviewed, in fact, by the Secretary and the President.

Last year alone—and I'm sure that the Director will have numbers for us that are accurate and much more timely than mine—but, last year, over half a million patents were applied for and certainly over 300,000, again, were granted. That means that every 2–3 years we are currently adding a million patents.

To put that in perspective, my first patent, not that long ago by my perspective, was in the four-millions. During the last administration, I was honored to be at Mount Vernon for, in fact, the 10-

millionth patent, granted to Raytheon Corporation. We are certainly past 11 million as we speak. More importantly, it means that more than a third and nearly a half of all patents ever granted are currently valid and enforceable—an amazing number, an amazing statement to current innovation.

It also means that the Patent and Trademark Office has a job which is harder than ever before. Everyone can understand that innovation is going very quickly, but we also understand that overlapping innovation is greater than it ever has been before. What is overlapping innovation? Overlapping innovation is the fact that, although each patent individually must have a piece of uniqueness, many, many patents, in many disciplines, speak to the same basic product and to similar aspects of it. That makes the job of examiners harder than ever.

In addition to that, because of artificial intelligence in its early days, people are now putting together patents which have hundreds or thousands of very similar claims, designed with the assistance of computers, to bracket the invention, meaning patents may have one independent claim and up to thousands—I repeat—thousands of dependent claims.

That makes it very difficult for any examiner, or even any examiner with the aid of a computer, to really see and be accurate. Now, more than ever, the reexamination process, in light of the scrutiny that comes after the granting of a patent against overlapping patents, is essential. That is not without conflict.

Obviously, one of the things that this office has, and the Director's office has is a responsibility to provide the greatest degree of patent certainty on the day of issue and, if, in fact, it is challenged through ex parte or inter parte reexamination, to, in a timely fashion, again reinstate that patent certainty.

That is the most important thing I believe we will discuss here today. It is the goal of this Committee and of the Under Secretary.

We have had countless meetings over the years to try to refine the Patent and Trademark Office's mission. We did so nearly a decade ago successfully on a bipartisan, bicameral basis. We have now gone a decade. We have seen some of the best fruits of that work. We have also seen some of the challenges that continue.

Although it is not within her purview, this Committee does and intends to resolve the problem of selectively finding places to go to get your patent—or, sorry—yes, to get your patent enforced. The kind of shopping that's happened in East Texas and West Texas even has gained the direct attention of the U.S. Supreme Court, and that should not be necessary. This Committee has the jurisdiction and the authority to find ways to stem that trend.

We also have the situation with the United States ITC, and the ITC also represents a lack of patent certainty for the patent holder and for people who are practicing arts that do not infringe patents.

So, as we speak here today, we do not claim to have jurisdiction over every Article III judge's decision. We do not claim to have jurisdiction over the ITC. In fact, under the act, 10 years ago, we gave rulemaking authority to the Patent and Trademark Office.

It is our goal to make sure that the Patent and Trademark Office is able to produce and make those adjustments as facts change,

while at the same time recognizing that the role of Congress is essential in actually creating the underlying statute.

For that reason, I want to thank Director Vidal for appearing here today and, on a separate note, repeatedly being available to both the Chair and Ranking Member over the last several years for the kinds of consultation that is essential.

That does not mean that we will not have things to discuss here today that represent disagreements between this side of the dais and that side of the dais. I think it is clear, we cannot do it alone from Congress, and you cannot do it alone from your role.

So, I look forward to the discussion today, those to follow.

With that, I would recognize the Ranking Member for his opening statement.

Mr. JOHNSON of Georgia. Thank you, Mr. Chair.

Director Vidal, thank you for being with us today, and I look forward to hearing your testimony on the status of your 13,000-person agency—perhaps on the smaller side by government standards but with outsized importance to the direction of this country.

For example, employees of your office get to decide who gets a patent, who gets a trademark registered, and who gets their patent or trademark taken away upon further review. This is an immense amount of power for a Federal agency to have. As a result, the job that you hold, which is to run this agency responsibly, to try to make the decisions consistent and fair, with so many individual decisionmakers, is a unique challenge.

While there are many topics that we could discuss, in the interest of time, I will focus on two that have been of special concern to me.

First, it is now well-known that there is an ongoing problem with fraudulent trademark applications being filed and approved. The presence of these fraudulent marks complicates the path for legitimate businesses to file for their own trademarks, ultimately hurting consumers and our economy.

I was proud to lead the effort to pass the Trademark Modernization Act of 2020. This act created new proceedings at the office to allow for a quicker and less expensive challenge to applications for trademarks that had not been used. This provides a way to target some of these fraudulent applications. While there are indications that it's been successful, I'm afraid it might not be enough.

Likewise, although the office has put in place new requirements on who must sign applications, there are signs that this is being manipulated also. It seems clear that the office needs to find more ways to be vigilant on the front end to better spot the tell-tale signs of false information.

Second, I have concerns about the Patent Trial and Appeal Board, or PTAB, being able to operate as a judicial body free from political interference. Congress's original design for the board was for its decisions to be final and nonreviewable by Executive-Branch appointees, while there was always a right to appeal to the Judicial Branch.

The Supreme Court decided that this arrangement was unconstitutional and, consequently, created a new mechanism by which a Director could single-handedly decide to review and alter a case. I'm concerned about the degree to which this has opened the PTAB

up to political influence rather than a judicial application of facts to the law.

The degree of change in PTAB proceedings under different Directors has done nothing to allay my fears. The patent system is not meant to be subject to frequent and unpredictable fluctuations. The point of a 20-year patent is to allow for planning, investment, and realization of new inventions. I'm concerned that we have allowed law in this area to become too subjective and too subject to the particular views of different administrations. This is not the stable basis on which our country's innovation ecosystem should rest.

Ms. Vidal, I look forward to hearing your thoughts on these important issues as well as the rest of your testimony, and I thank you.

I thank you, Mr. Chair, and I yield back.

Mr. ISSA. I thank the Ranking Member.

Without objection, all opening statements will be included in the record.

Mr. ISSA. I now would like to introduce our one and most important witness, the Hon. Kathi Vidal.

Ms. Vidal is the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office—a long title, and it's the reason we end up saying "Director" a lot.

The Under Secretary uniquely leads an agency, as the Ranking Member said, of 13,000 employees charged with protecting U.S. innovations, entrepreneurship, and creativity. In fact, one of the most important mandates in the Constitution rests squarely on her shoulders.

Before her appointment, she worked in private practice, where she represented clients in IP matters.

We welcome the witness today for appearing.

Pursuant to—you've seen this before, but you're required to be sworn in. If you would please rise to take the oath.

Do you solemnly swear or affirm, under penalty of perjury, that the testimony today you're about to give is true and correct, to the best of your knowledge, information, and belief, so help you God?

Ms. VIDAL. I do.

Mr. ISSA. Please be seated.

The record will reflect that the witness answered in the affirmative.

With that, I would inform you that—and this one I can do by heart. You know the routine. Five or so minutes. We won't knock you off at the end, but your entire statement will be placed in the record.

Pursuant to the tradition of this Committee, Members will afterwards ask questions for five minutes. I will also not gavel you if you're answering a question at the end of it. I may gavel the member if they try to come back with several more. The reason today is that at 10:30 we will have the South Korean President, and we, by definition, will recess at that point.

So, we'll try to get through this as pithy as we can. Please make sure that your answers are full and complete, and we won't stop you in the process of answering.

With that, I'm going to use the Jordan rule—one second. Oh, I'm sorry. I wanted to announce that I will use the Jordan rule and recognize Members in the order in which they want to be received. So, if both sides would both have that.

So, with that, Director, we're honored to have you here. Please continue.

STATEMENT OF THE HONORABLE KATHI VIDAL

Mr. ISSA. That's the other one I was going to mention.

Ms. VIDAL. OK. You'd think I would know that by now.

Chair Issa, Ranking Member Johnson, and Members of the Subcommittee, I am honored and humble to sit before you today, and I am heartened by the opening statements.

At the USPTO, we share a vision for America—a vision of good-paying jobs and economic prosperity for all your constituents, where access to jobs and the innovation ecosystem will not depend on where you live or how much money you have, where it won't depend on your gender or ethnicity, or whether you took time to raise your children or for other endeavors. We will continue to drive innovation without discouraging the competition that allows family farmers to thrive and does not unnecessarily delay lower-cost medications needed by many.

To achieve these objectives, my first goal was to listen to you and to those our system is meant to serve.

As I start my second year, we are focused on action. We recently started rulemaking around challenges to patents after they issue to evolve our practices to better serve America and the mission of the USPTO, while also better aligning with the America Invents Act.

We have received your constituents' comments on how we can issue more robust and reliable intellectual property protections that will attract investment and grow jobs.

We are continuing our work to protect the trademark register from harmful actions that threaten the accuracy and integrity of the trademarks the USPTO issues and harms American businesses.

We are continuing to provide greater education and access to America's intellectual property system, complementing the goals of the Unleashing American Innovators Act that Congress passed last year.

I'm proud to say that, because of the great work of the USPTO and Congress, the U.S. is again ranked No. 1 in the world on the U.S. Chamber of Commerce IP Index.

As you know, we can, must, and will do better. The agency is committed to making strategic and targeted changes where they are needed while upholding the strong intellectual property system that has made America the innovation engine that it is.

Chair Issa and Ranking Member Johnson, I am honored and proud to lead the USPTO and to work with my over 13,000 incredibly talented and dedicated colleagues. We cannot do it alone. Together, we will work with you to fully realize our Founders' vision.

Thank you again for the opportunity to testify today, and I look forward to your questions.

[The prepared statement of the Honorable Kathi Vidal follows:]

Mr. ISSA. I thank the gentlelady. That's a record opening statement time.

With that, we go to the gentleman from Texas, Mr. Moran, for his opening statement—or opening questions.

Mr. MORAN. Thank you, Mr. Chair.

Thank you, Director Vidal, for coming today. I appreciate your time and answering some questions.

I'm going to tell you at the outset that I'm in a position where my opinions are forming, they're not yet formed, about a lot of the PTAB. I have a lot of concerns about some of the things that I see.

I appreciate the rulemaking process that you've gone through and the thoughtfulness behind some of those rules. I have great concerns about whether or not that should happen on our side of the ledger or your side of the ledger. In fact, I'm someone that believes strictly in separation of powers and think that, in this instance, I'm seeing a lot of overstep that I don't quite care for. I'd like to see a lot of what you've proposed come through the legislative process.

So, I don't want you to take some of my comments in a negative way as it relates to the substance of what you've been doing but, really, more the process and the structural protections that I think here in America we hold dear to—namely, separation of powers.

I do want to thank you for your work in that regard. I actually represent the Eastern District of Texas, so patent and IP cases are close to my heart. So, I've got a couple questions I want to go through with you in particular.

Some of the problems that I—as I talk to some of my counsel back in East Texas about PTAB and what's going on in the IP world, they have great concerns that what we're seeing over time is we're seeing, really, the USPTO shoving us away from Article III resolution of these cases into the PTAB system and more and more judges deferring to the PTAB system for invalidity decisions.

Are you seeing—first, are you seeing some of those trends where Article III judges that are not experienced in IP litigation are simply saying,

> You know what? I don't want to have to deal with this. I'd rather PTAB make that decision, and hopefully this case will go away.

Are you seeing that?

Ms. VIDAL. We are not seeing that from a USPTO perspective.

Mr. MORAN. OK.

In the Western District of Texas, I know there's a lot of concern about a particular judge handling so many cases, and so there's been some distribution efforts to try to get other judges to handle those cases.

So, you're telling me, you're not seeing those other judges stay their cases in deference to the PTAB?

Ms. VIDAL. Speaking from the USPTO, that is not something we monitor. I, of course, have a history litigating patent cases, so I may have seen some of that in my past life, but that is not something that I'm aware the PTO has information on.

Mr. MORAN. Does that give you concern, that we're moving away from an Article III resolution of a lot of these cases into this Article II resolution?

Ms. VIDAL. It does not, for a couple reasons.

(1) The judge has the option to stay the case. So that's up to judicial management of individual cases.
(2) The PTAB is a group of judges who are very skilled in the technology, and if the judges do decide to stay, that just reduces the cost while those issues are being sorted out at the PTAB.

Mr. MORAN. One of the biggest issues as we look at the PTAB system, it seems there's very little standing or no standing requirement, effectively.

I know you guys are proposing a rule that might deal with the standing, and I'd like for you to talk about the standing rule and whether or not you believe it's in the public's best interest to have more strict standing on who can and who can't bring a challenge to the validity of a patent.

Ms. VIDAL. You are correct that there is no standing requirement right now for people to engage in the PTAB practice.

In the ANPRM, we have made some proposals based on feedback we heard from stakeholders. So, some stakeholders have told us that, because we don't look at the entity that is filing the IPR or the other procedure within the PTAB, that some entities may be abusing the PTAB process and may be doing it for monetary purposes and not to actually benefit our mission or the intent behind the AIA.

So, that is fleshed out in the ANPRM, the Advance Notice of Proposed Rulemaking, that we have issued.

Mr. MORAN. These proposed rules, are they going to help reign in proxy entities that are coming in that really don't have a judicial interest in the matter but are serving as a proxy to continually and perpetually challenge certain patents?

Ms. VIDAL. That is an issue that we have flagged in the ANPRM. They are not rules per se; they are concepts that we will then shape into rules in the Notice of Proposed Rulemaking. That concept is absolutely in the Advance Notice of Proposed Rulemaking.

Mr. MORAN. What do you think the biggest challenge is or the biggest thing you're hearing back—I've got 24 seconds—in the PTAB process? What are you hearing from litigants about the PTAB process that needs to change, number-one issue?

Ms. VIDAL. I would say it's just the certainty, which is what I've tried to address as soon as I came onboard, that, for discretionary denial, I tried to make it more certain in the first instance while we awaited policymaking through the ANPRM.

Mr. MORAN. All right.

I will mention—I think Mr. Johnson, the Ranking Member, mentioned certainty for businesses, and I agreed with those comments.

I think the ultimate goal here is to promote and protect innovation and intellectual property. I like the PTAB system, but I think there's some tightening up to do. I would prefer that the Legislative Branch handle that. I'd love to have more discussions about that, be involved in that process, rather than see it come through the rulemaking process through the USPTO.

So, thank you so much.

I yield back.

Mr. ISSA. The gentleman yields back.

We now recognize the Ranking Member for his five minutes.

Mr. JOHNSON of Georgia. Thank you, Mr. Chair.

Director Vidal, as I mentioned in my remarks, I'm concerned about the patent system becoming unduly political over time under the decision of the Supreme Court in the Anthrax case—excuse me—the Arthrex case.

You have been one of the first Directors to have to confront how to use this review power granted by the Supreme Court. What steps have you taken to ensure that your Director review process is not overtly and overly influenced by political concerns or ex parte contacts that you have as a regular part of your job?

Ms. VIDAL. That is a very important question, and I appreciate the opportunity to address that.

I will say, procedurally, as soon as I came onboard, I clarified the Director review process, and I made it very clear what my role would be, as the Director, with regards to PTAB decisionmaking. So, I do not get involved at all, other than on the public record. So, once a decision is made, it can come up for review, and then anything that I do is in writing.

When I perform that role, I hold myself to the same standard of any Article III judge. I do not have any ex parte communications. I do not discuss the cases with parties. I do not discuss them with Members of Congress. I do not discuss them with anybody within the administration or anyone else.

To me, it's my job, then, to act fairly and publicly on the record so that may then be reviewed by the Federal Circuit.

Mr. JOHNSON of Georgia. So, you don't have any communications with the actual PTAB judges?

Ms. VIDAL. When they're making their decisions, I have no communications with them.

I do have some PTAB judges that help me sort through Director review and work on decisions. The original panel that makes the decision, they act autonomously. I have no input, no insight into that. I do not look at their decisions until they are final and written and public. That's when I will take them up for review, if I do review them.

Mr. JOHNSON of Georgia. What percentage of the cases that have been reviewed by you result in a reversal?

Ms. VIDAL. I don't have the exact statistics on that. I wouldn't want to speculate. I'm happy to get you that on the record.

Mr. JOHNSON of Georgia. Twenty-five percent? Ten percent?

Ms. VIDAL. I look at the facts and the merits. I don't think about the outcome, but I'm more than happy to provide that on the record for you.

Mr. JOHNSON of Georgia. Well, I'd appreciate it if you would.

Mr. JOHNSON of Georgia. I continue to be concerned about the prevalence of fraudulent trademark applications. Despite the USPTO's rule to require U.S. counsel for foreign registrants and despite the backstop of the Trademark Modernization Act, these fraudulent applications seem to continue to clutter the register.

What actions is the office taking to identify fraud on the front end? Is there anything else that Congress can do to help?

Ms. VIDAL. I share your concern. I am grateful for the Trademark Modernization Act. That has been very effective for use by individual stakeholders for expungement proceedings.

You are right that, even though we put the USPTO put the U.S. local counsel rule in place, people try to abuse the U.S. counsel rule. As a result, between December 2022–March 2023, 19 U.S. licensed attorneys were referred to our OED, Office of Enrollment and Discipline, for investigation. So, we are aware of the fraudulent activities, and we are on top of it.

We've also expanded our efforts on sanctions and investigations to ensure that we can identify patterns and we can make sure that we're on top of any of the fraudulent activity.

Unfortunately, it's not a one-off. It's very difficult for an individual examiner to identify fraud. It has to be work that we do across the trademarks organization to identify patterns of conduct. When we identify them, we sanction them, and then we remove the pending applications.

Mr. JOHNSON of Georgia. Are you using artificial intelligence to aid you in that process?

Ms. VIDAL. We are not at this moment using artificial intelligence. We are looking into that.

One of the challenges with artificial intelligence is we want to make sure we use it responsibly. So, we are doing a lot of investigations right now on all the new AI that is out there. We'd love to incorporate it as soon as possible, but we need to make sure that we're incorporating it responsibly.

We are using investigative services, people we bring onboard to help us with that, because we don't have all the capability to do that all in-house.

Mr. JOHNSON of Georgia. Thank you.

I've got 25 seconds, but I'm going to yield that back—

Mr. ISSA. Will you—

Mr. JOHNSON of Georgia. Well, I'll yield to the Chair.

Mr. ISSA. Yes.

Just following up on the Ranking Member, your consideration of those PTAB review, there are thousands of them, many thousands of them a year. What percentage of them do you physically look at when you do the review? Obviously, you don't review in earnest all of them.

Ms. VIDAL. It's a very low percentage. It's based on those who file for Director review.

Separately, we have a different process that you can file for review if you want to challenge an institution decision. So, I look at those, as well, to determine whether I should pull up any of them and address those.

It's a very small percentage of the overall—

Mr. ISSA. You consider them de novo?

Ms. VIDAL. I do.

Mr. ISSA. OK.

We now go to the gentleman from Kentucky, Mr. Massie.

Mr. MASSIE. Thank you, Mr. Chair.

Ms. Vidal, can you tell me what the purpose of the Patent and Copyright Clause is in the Constitution? What did the Founders have in mind?

Ms. VIDAL. The Founders had in mind that we needed to incentivize innovation, we needed to incentivize creativity for the good of the country.

Mr. MASSIE. What are the criteria that inventions have to meet at the Patent Office to be patentable?

Ms. VIDAL. Right now, they have to meet a number of criteria, including: They have to be directed to patent-eligible subject matter; they have to be novel; they have to be nonobvious; and they have to fulfill certain requirements as to the written description and enablement.

Mr. MASSIE. Talk to me about this patent eligibility subject matter.

Ms. VIDAL. So, that is informed not only by the statute, but by Supreme Court case law. Essentially, there are Supreme Court cases that hold that certain subject matter is not eligible for patenting, like abstract ideas and natural phenomena.

Mr. MASSIE. Let me ask you this: If the Founders intended to promote progress in the useful arts and sciences, why would we take entire fields of useful arts and sciences, such as AI or life sciences or diagnostics, and say, you know what, we're not going to promote the useful arts and sciences in these fields? Why would we let the Court do that, to say that those are off limits?

Ms. VIDAL. That is not a question I can answer.

Mr. MASSIE. You're running the Patent Office, right?

Ms. VIDAL. That is a decision—

Mr. MASSIE. Let me ask your opinion then, not any kind of legal thing or—and I'm not saying that you're in control of this. In fact, I think Congress is.

What's your opinion, given that you know and take to heart the Founders' intent to promote the useful arts and sciences?

Ms. VIDAL. I would agree with you that the law around patent eligibility needs more clarity, and we need to make sure that we are protecting innovation in this country.

Mr. MASSIE. I think we—the danger of not allowing patents in certain areas is that other countries, like China, are going to overtake us in those areas.

So, the PTAB was set up before I got here, right before I got here. It's supposed to be a cheaper, better, faster way of adjudicating patent eligibility or validity.

Why do every inventor I talk to, why are they upset about PTAB?

Ms. VIDAL. I believe that, from what I heard from speaking to them—so, when I started my time as the Director, I reached out and spoke to a lot of inventor communities. What I heard over and over again were that they had concerns about the way certain entities were using the PTAB process, that it was costing them more because there were serial petitions. They had to face the cost both in District Court and at the PTAB when the cases were not stayed in the District Court. They were concerned with the implementation of the PTAB, that it was removing their patents once they had invested money into it.

Mr. MASSIE. Those sound like valid concerns to me. Do you think they have valid concerns?

Ms. VIDAL. The USPTO has taken those concerns into consideration in shaping the Advance Notice of Proposed Rulemaking. So, there is specific language in there to attempt to address those concerns.

Mr. MASSIE. I share my colleague's view that we should be writing the laws, not the Supreme Court, and we shouldn't leave these open areas for you to have to do it.

Isn't it true that the biggest users of PTAB are Big Tech and foreign entities?

Ms. VIDAL. I believe that may be true. I'm happy to answer that off the record in terms of actual statistics.

Mr. MASSIE. Well, the top 20 users of the PTAB are large, wealthy, and powerful companies.

Do you think it's appropriate for us to give a special venue for these entities? I mean, they're the preferred users of PTAB, not American inventors. This gets them out of the court system. Do you think it's appropriate for us to cater to those entities?

Ms. VIDAL. I don't think the law should cater to any one entity, which is why I took into consideration everyone's views and input over the last year in exercising our rulemaking authority and moving forward with the Advance Notice of Proposed Rulemaking.

Mr. MASSIE. Should inventors have the right to have their day in court if they don't get a favorable ruling in PTAB?

Ms. VIDAL. For that one, I will say, that is up to Congress and not something that I can comment on.

Mr. MASSIE. What's the current situation? Do inventors have their right to a day in court?

Ms. VIDAL. I'm not sure how to answer that. It depends on what you mean by "day in court."

Mr. MASSIE. Can they appeal it? Will their appeals be heard in an Article III court?

Ms. VIDAL. Appeals from the PTAB?

Mr. MASSIE. Right.

Ms. VIDAL. Yes, those would be heard by the Federal Circuit.

Mr. MASSIE. Do you know what—Rule 36 is lawyer shorthand for—can you tell me what Rule 36 is in the context of patent appeals to the Article III court?

Ms. VIDAL. Yes. The Federal Circuit can issue—can Rule 36 a case, which means that they issue a decision without a full written opinion.

Mr. MASSIE. The opinion can be one word, affirmed. Is that correct?

Ms. VIDAL. That is correct.

Mr. MASSIE. So, as I yield back, I would just say that I think it's wrong that they don't get their day in court, that they get a one-sentence affirmation of PTAB, and I think we need to change that as well. No slight to you.

Thank you for your time.

Mr. ISSA. If I can—

Mr. MASSIE. I yield back.

Mr. ISSA. —piggyback just for clarity, if you come through a District Court to the same Fed Circuit, does Rule 36 apply?

Ms. VIDAL. Correct.

Mr. ISSA. So, either way, they can do that. They can do it after a full jury trial in a Federal Court.

Ms. VIDAL. They can.

Mr. ISSA. Thank you.

Mr. MASSIE. In that case, they've had a jury trial.

Mr. ISSA. The gentleman is correct, in both cases.

With that, we go to the Chair emeritus and my friend for so long on this Committee, the Ranking Member on Science, an area that hopefully will opine on how we add to the patentability of some new technologies, the gentlelady from San Jose, Ms. Lofgren.

Ms. LOFGREN. Well, I thank you, Mr. Chair. Much as I would like to have the Science Committee have jurisdiction over patents and trademarks we do not.

Mr. ISSA. We weren't going that far. You can opine in this Committee.

Ms. LOFGREN. I would just like to focus in on the role of the PTO versus the role of Congress.

You are very committed to patent quality. So, is Congress. When we enacted the change in the law, we assigned a role to the PTAB to achieve that goal. As I read through the proposed rule, I'm not sure that the proposed rules are, in fact, consistent with what Congress did in the act.

Now, if we got it wrong we could revisit that. Not all nonpracticing entities are trolls, but there were certainly some trollish behavior that was an objective of the act. If we have the balance wrong, this Committee will be eager to work on it.

I'd like to focus in on the issue of when you can file. The AIA is very consistent and very clear: You have 1 year to file a petition after your suit. If you look at the proposed rule, the review would be cutoff if a District Court's median time to trial is shorter than what the statute prescribes for a PTAB proceeding.

Now, this proposed rule outlines that if you're sued in a fast-moving district, you may have only a few months to prepare your petition. Further, in some districts, you might not be able to file at all.

Now, the median time to trial in the Eastern District of Texas is 16 months, which is two months quicker than the PTAB schedule. As a result, any plaintiff could potentially prevent access to a validity review just by filing a lawsuit in that district.

Now, the PTO proposal to shorten the 315(b) deadline clearly contradicts the text of the AIA and could create the very problems that Congress sought to avoid by enacting this one-year deadline.

As I noted earlier, if that's a good idea, if it's something that Congress should revisit, we can revisit it. The PTO is not a lawmaking body.

So, I'd like to address this concern that I have raised here with you.

Ms. VIDAL. Thank you for that.

The ANPRM, the Advance Notice of Proposed Rulemaking, contains provisions that we thought were positive provisions to move forward on in view of the comments the USPTO received in response to its request for comment on this very subject matter. It also contains some provisions that were proposed by stakeholders, by those in various jurisdictions.

So, it contains a myriad of options. We want to hear from stakeholders not only on how those provisions might affect them, how we should evolve them, but whether we even have the authority to move forward with them and whether they have economic signifi-

cance. So, we are hoping to hear from stakeholders on all of this and make it a very open process.

As to whether there is something in there that shorts the time period, I'm not sure I quite understand that, but happy to answer any questions on that.

Ms. LOFGREN. Well, I guess, just revisiting that, it's your proposed rule, and it may be—maybe it's a good idea. I'm not saying otherwise. It's great to reach out to the broader community that has an opinion, but if your proposed rule is inconsistent with the statute, having a proposal or a community that thinks it's a good idea really is irrelevant. If they think it's a good idea, they ought to come to us. We're the ones that write the statute, not the PTO.

I mean, why would you propose something that's inconsistent with the act?

Ms. VIDAL. The way I understood it, that, by doing the ANPRM, we were giving stakeholders a chance to shape the rule. So, to my understanding, those are not our proposed rules. Those are basically winnowing down the options and the feedback we previously received so that we can get stakeholder feedback as we shape the rules, and the rules would be in the Notice of Proposed Rulemaking.

So that was my understanding, and that was the approach the USPTO took when we went forward with it.

I'm not aware of anything within the body of the document that's inconsistent, but I'm happy to address anything now or offline. I'm more than happy to speak with you offline at any time about this to make sure we're solving for this in the proper way.

Ms. LOFGREN. Well, I'd be happy to take you up on that. There are a number of other items in the proposed rule, and I think it's really a surprise that the PTO that is publishing the proposed rules is now saying it's not their proposed rules. That is very odd. There are a number of proposals that are not consistent with the AIA.

As I say, if we got it wrong, we could revisit it. It's not up to the PTO to try and make the law and redo it in your rulemaking process.

With that, Mr. Chair, I yield back.

Mr. ISSA. I thank the gentlelady.

I share her feelings, that we're more than a stakeholder, and we have spoken as to that issue some 10 years ago.

With that, we go to the gentleman from California, Mr. Kiley.

Mr. KILEY. Thank you, Mr. Chair.

Thank you for your testimony, Mr. Vidal—or Ms. Vidal.

Do you have a sense of the average cost of an IPR for a patent owner to defend their patent through an IPR?

Ms. VIDAL. So, my sense is that the fees to the USPTO itself are around $30,000—oh, actually, for the patent holder, they're not. For the patent holder, it's just the legal fees. So, it depends on whether they can procure pro se assistance or whether they actually have to pay an attorney to go through that process.

Mr. KILEY. Yes. So, if they do have to pay an attorney, do you just have a ballpark figure for how much it generally costs?

Ms. VIDAL. I would estimate between $150,000 to over $300,000.

Mr. KILEY. Do you think that has any effect on the incentive to innovate and to invent?

Ms. VIDAL. I have heard from stakeholders that the IPR process is creating concerns with innovators in terms of the incentive to innovate and, more importantly, the incentive to patent.

Mr. KILEY. Right.

Have you heard of a recent report called "Wake Up, America," which found that China's gross innovation capabilities are now 40 percent greater than the United States?

Ms. VIDAL. I'm not aware of that.

Mr. KILEY. Do you think that sort of sounds right, that China has been gaining on us in key areas of innovation?

Ms. VIDAL. I know that is their intent, and that would not surprise me in certain areas.

Mr. KILEY. So, do you think there's a role in terms of reforming the patent system to try to reverse that trend? If so, what do you think it is?

Ms. VIDAL. So, I think we need to do what is best to promote a system that encourages and incentivizes innovation and that creates clear rights that stakeholders and individual inventors can rely upon.

Mr. KILEY. So, do you think—do you have anything specific in mind to move us more in that direction?

Ms. VIDAL. So, two things in mind.

One is, we are trying to work on measures related to the robustness and reliability of patent rights so that the patents we issue in the first instance are strong.

Mr. KILEY. Uh-huh.

Ms. VIDAL. That's everything from incorporating artificial intelligence into search, to a number of proposals we put out there through a request for comment that we are looking into now and moving forward on.

The second part relates to the PTAB, and that relates to the ANPRM that we recently issued, which contains various ideas on how we might reshape our practice as it relates to the PTAB to ensure that inventors have more—that inventors can rely on their patents.

Mr. KILEY. I see.

So, on the first point, do you believe that the PTO currently issues a large volume of invalid patents?

Ms. VIDAL. I don't know if I would go as far as saying that. I do believe that patents have been issued with search capabilities and other measures that are not as good as what we have today, and I know that we're going to get better into the future. So, there are definitely patents that are issued that are not, by any standard, looking at the prior art that's available, are not valid.

Mr. KILEY. I mean, the existence of the PTAB is sort of predicated on the belief that there are invalid patents being issued.

So, is there any argument to be made that maybe some of the vast resources that are going into the PTAB might be shifted to, sort of, pre-issuance examination of patents?

Ms. VIDAL. That is an interesting idea. I'm happy to take that back to the team.

Mr. KILEY. All right. Thank you very much.

What is the ability to make use of the IPR process for a patent that's already been deemed valid by a District Court?

Ms. VIDAL. Can you repeat that, please?

Mr. KILEY. What is the ability to challenge a patent through the PTAB that's already been adjudicated as valid by a District Court?

Ms. VIDAL. So, you still have the ability to challenge that at the PTAB. There's nothing stopping that other than the ability of the Director, and, by delegation, the board, to discretionarily deny the institution of the challenge.

Mr. KILEY. Do you think that sort of parallel form or duplicative adjudication is a healthy thing for the patent system and for innovation?

Ms. VIDAL. That is one of the things we're trying to flesh out through the ANPRM, is to figure out what kind of—how we can exercise our rulemaking authority to deal with issues like that?

Mr. KILEY. Sure.

Then following up on a question from Mr. Massie related to subject matter eligibility, you said that there does need to be greater clarity. Do you have any further thoughts on that and what role Congress might be able to play in providing clearer guideposts and more clarity for inventors?

Ms. VIDAL. I know that bills have been introduced in Congress, and we have a whole team that focuses on this, including working with the DOJ when it comes to these types of issues at the Supreme Court. We'd be more than happy to work with Congress on any bills and provide technical assistance.

Mr. KILEY. Thank you very much.

You also mention in your written testimony that the USPTO has launched its Climate Change Mitigation Pilot Program, which accelerates the "examination of patent applications involving innovations to reduce greenhouse gas emissions."

Is there any precedent for this, sort of giving privileged status to particular types of innovations in the patent examination process?

Ms. VIDAL. For years, the USPTO has had accelerated programs for different technologies that the government has tried to accelerate.

Mr. KILEY. So, there is precedent for this.

Ms. VIDAL. There is, correct.

Mr. KILEY. OK.

I don't know exactly how this particular program works, but I would note that you probably don't want to be too narrow in how you define what's eligible, because there might be a lot of innovations, say, in AI that are not specifically climate-change-related, but that might ultimately be very useful toward that goal.

Thank you very much for your testimony today.

Mr. ISSA. I thank the gentleman.

I might note that, if there's litigation on a pending patent, that has long been a source of acceleration. So, there are a number of reasons that they do have moving them up that many of us have experienced.

We now go to the patient gentleman from Maryland, Mr. Ivey.

Mr. IVEY. Thank you, Mr. Chair.

Director Vidal, welcome. I appreciate your appearance and your testimony today.

Like Judge Moran, I'm a little new to this area, so I'm going to ask a few questions. I welcome the opportunity for you to educate me and get me up to speed on these issues.

One of the things—and I'm focusing on the PTAB board, as well, and the discretionary denials. I'm not clear on the source of your authority to follow that path or to issue these kinds of denials. I wanted to get a sense—I know the AIA is a basis for the activity, but it does seem to be a bit of a stretch of the authority to do it.

So, I wanted to give you a chance to give me some guidance on how that works and how you operate using that tool.

Ms. VIDAL. Thank you. I would welcome the opportunity to speak with you offline as well, including going into more detail on that authority, and I'm happy to provide that off the record.

Just to give you an example, the AIA codified—I'm going to get a little bit nerdy here with the Code area—35 U.S.C. 316, which provides for the Director to prescribe regulation. So, Congress has directed our office to prescribe certain regulations.

In relation to that, there is language in here that says:

> For considerations in prescribing regulations under this section, the Director should consider the effect of any such regulation on the economy, the integrity of the patent system, the efficient administration of the office, and the ability of the office to timely complete proceedings instituted under this chapter.

Now, that ties into other statutory provisions. If it's OK with you, I would love to provide a full answer off the record that sets forth how the AIA envisioned that the USPTO would engage in rulemaking and what that would look like.

Mr. IVEY. OK. Thank you for that, and I look forward to it.

Mr. IVEY. As I understand it, with the discretionary denials, you can stop the process when a patent is being litigated in court. Is that right?

Ms. VIDAL. With discretionary denials, there are a number of things that could trigger a discretionary denial, but it would essentially result in the USPTO not instituting an IPR proceeding. It could happen when there is a parallel District Court proceeding. That could be one of the circumstances that would cause us not to move forward.

Mr. IVEY. All right. So, your view is that's regulatory and not adjudicatory?

Ms. VIDAL. So, the discretionary denial is within the discretion of the Director. So, the issue is really how the Director exercises that discretion to not move forward with institution.

Mr. IVEY. So, the denial is with respect to moving forward, but it's not a denial on the merits?

Ms. VIDAL. It is not a denial on the merits. The merits could be taken into consideration. So, under the current standard, if there is a parallel District Court case, we do look at the merits of the case. So, if it appears that the patent reaches a certain threshold in terms of invalidity, we will take that into consideration as to whether that patent should be removed.

Mr. IVEY. OK.

Then I had a second area I wanted to ask you about, and that's with respect to the "substantial relationship" language in the ANPRM.

I wanted to get a sense of—I guess concerns have been raised for me, with respect to how broadly that might be applied and the impact that it could have beyond, certainly, just simply one entity and the multiple relationships that could be subject to the decision that's made.

What's your take on that and how it's going to work? How are you going to figure out the parameters of how you're going to define that?

Ms. VIDAL. That was one of the issues that we raised as part of the Advance Notice of Proposed Rulemaking. We want feedback from stakeholders on how they think we should define it.

I'll tell you where that came from. That came from a sense from stakeholders that certain entities were trying to avoid some of what Congress put into place in terms of estoppel, in terms of not getting multiple bites of the apple and continuing to attack a single patent over and over and over again. There were some concerns that entities had enough of a relationship that they were essentially disguising so that they could avoid what Congress had put into action.

So, instead of trying to define it in the first instance through rulemaking, through a Notice of Proposed Rulemaking, we issued the Advance Notice of Proposed Rulemaking so that we could hear from stakeholders on: Should that be defined the way it is right now, which is real parties and interest and privy, or should it be expanded in some way to make sure that the parties really are related, that they're bound by what Congress set forth?

Mr. IVEY. Thank you.

I see my time has expired, so I'd yield to the Chair.

Mr. ISSA. We'll just take it back if you don't yield it back. Thank you for your very good questioning.

With that, we go to the gentleman from Wisconsin, Mr. Fitzgerald.

Mr. FITZGERALD. Thank you, Director, for being here.

It sounded like Mr. Ivey was kind of moving in this direction, but, last week, PTO submitted an Advance Notice of Proposed Rulemaking proposing substantive changes to the inter partes review process.

Can you just walk us through kind of what actions, either by Congress or industry—what prompted the proposed rule?

Ms. VIDAL. It started when there was some concern about how the USPTO exercises its ability to discretionarily deny petitions that we receive for IPRs. There was some case law and some guidance set forth before I took on the position of the Director.

From the beginning, what I've tried to do is initially just clarify what that guidance was so that stakeholders would have certainty and clarity.

What the ANPRM does is, it addresses stakeholders' concerns about the way the USPTO is implementing the AIA and activities by certain entities to avoid some of the language that the Congress put forth through the AIA.

So, we did issue a request for comment to hear stakeholders' views on discretionary denial. We received 822 comments. This was about 1½–2 years ago, something like that. We didn't feel like there was enough information there to go directly into rulemaking.

So, what we did was hear from more stakeholders over the course of the year, from small entities, from large corporations, from everyone, to hear what they were experiencing. We went back and read those 822 comments and tried to shape different ideas that we could move forward with to make it very clear how the Director, and, by delegation, the board, is going to exercise their discretion.

Mr. FITZGERALD. So, the rule that proposes a change in the test to determine the PTAB review, it kind of abandoned the statutory test from the Patent Act and went from "reasonable likelihood" to "compelling merits test."

Could you explain the difference between those two or how you see the effect of that?

Ms. VIDAL. So, it doesn't necessarily abandon that, because that overlays the discretion of the Director to institute. So what it really does is it clarifies that discretion, which has been in place for quite a long time. It takes it to the next step, seeks stakeholder input on how that should be clarified and how that should be shaped. So, that's the role that the ANPRM would play.

In terms of your questions about the test for institution independent of the discretion to deny institution, the thought with the substantial merits test is, prior to my position, to me being the Director of the USPTO, there was some thought that the USPTO was discretionarily denying even when there was a strong case. So, that's where that test came from, I believe the intent of the AIA was to get rid of the patents that really were invalid.

I wanted to make sure that the procedures we had took that into consideration when it came to discretionary denial and that we would not discretionarily deny if it reached a substantial merits test where we believed it was a strong case and we thought it was best for America not to have invalid patents out there.

Mr. FITZGERALD. So, the only thing I would say is, when I'm in the district or touring a business and—it doesn't come up often, but when patent law does come up, a lot of times there is kind of a level of frustration among small businesses, that they're viewed—they are not necessarily viewed in the same light that you might see with some of the major corporations that have an army of attorneys available to them.

So, I'm just wondering, how have you addressed that or kind of moved forward thinking what are the different levels of business, and how can they appropriately—how could you appropriately interact with them?

Ms. VIDAL. Well, and I appreciate that. In my past life, I represented both large organizations as well as startups. I spent a lot of time with startups. So, when I came onboard, what I did was look at all the stakeholders that USPTO engaged with. I expanded that to make sure we were getting out there more into communities, hearing from inventor groups, hearing from individual inventors.

So, the way we shaped the ANPRM was to make sure that we were getting out to people even if they didn't have the ability to come to us. So, we believe that the ANPRM really takes into consideration all stakeholders, not just those who might ordinarily have access. It's all been about access.

The other thing that I did is I started up a new "Engage with the Director" website so that anybody that has something they want to contribute or say can do that.

So, for me, it's all about, we need more people in the ecosystem. We need to support small inventorship and innovation. We need to give people access at all levels, including in this process.

Mr. FITZGERALD. Very good. Thank you.

Mr. Chair, I yield back.

Mr. ISSA. I thank the gentleman.

We now go to the gentleman from South Carolina, Mr. Fry.

Mr. FRY. Thank you, Mr. Chair, for having this hearing today.

Thank you, Director, for being here. Much like many of my colleagues on both sides of the aisle, I am a neophyte to this area, so a lot of this is very educational. So, I appreciate the testimony that you've given today.

I want to touch on a few areas. Let's start with the USPTO's Advance Notice of Proposed Rulemaking that came out a week ago.

Congress established the post-grant review programs in the AIA because there was consensus about the quality of patents coming out of the PTO, that they were poor. We needed an affordable and streamlined way for the PTO to check its work, as you said, "in the Advance Notice."

However, the limitations of the Advance Notice of Proposed Rulemaking suggests there are no patent quality problems at the PTO.

Are we putting the cart before the horse here? Shouldn't the PTO internally fix the problem with the examination process, instead of seeking to go beyond its statutory authority, limiting the ability of others to address the PTO's mistakes?

Ms. VIDAL. I appreciate that. I will say, on the statutory authority, it is not our intent to go beyond that, and we will work hard to make sure that does not happen.

Can you repeat your other question, please?

Mr. FRY. No, I think that was it. So, your testimony is that you're not going beyond the statutory authority. What I'm hearing from, really, both sides of the dais, at this point, is that there's concerns that maybe that is happening.

Is it possible to put that on hold, put these proposed rules on hold, pending an examination by this body?

Ms. VIDAL. So, first, I do remember your last question, and that was, should we be focusing on patent quality in the first instance? I'm happy to answer both of those questions.

As to the patent quality in the first instance, we are focused on that. We put out a request for public information and comment on our procedures for issuing patents. We are right now sorting through all those answers and trying to figure out the next steps to move forward—everything from that to additional training on artificial intelligence, to the way we route patents to the right examiner.

I could go on and on. That has been a huge focus of ours, to make sure that we're doing the best job possible to issue the strongest IP in the first instance.

As to the ANPRM and whether that should be put on hold, it is just an ability to collect comments. So, that gives stakeholders the ability to suggest if there are any ways in which we are going be-

yond our authority and what their reasoning or justification or backing for that is, given that we were given rulemaking authority by Congress specifically and given that we're trying to comport our practices to more closely align with the AIA and make sure there aren't any loopholes where people are escaping what Congress put into place.

So, on that, I would suggest that, once we see the comments, that would better inform this issue.

Mr. FRY. Thank you, Director.

Now, I want to talk about China. I'm going to shift gears.

A report recently issued by the Information Technology and Innovation Foundation found that China's gross innovation capabilities are now almost 40 percent greater than that in the United States.

The report, titled "Wake Up, America," finds that China has surpassed the United States in total innovation and is coming close to generating a greater proportion of all innovation. Patents issued by the USPTO are believed to be increasingly less enforceable since they are the subject of second-guessing in PTAB.

What reforms do you think must be part of any meaningful strategy to wake up our patent system and ensure that the U.S. remains competitive with China?

Ms. VIDAL. I would put it into a couple different categories.

One, to get to the point of patent-eligible subject matter, I think that needs clarity. I think that would be a good first step, wherever that clarity comes from. We are working with the Supreme Court, through the DOJ, to provide feedback on that. We are happy to provide technical comment to Congress on any bills when it comes to that.

In addition to that, we need to make sure we have more access to our innovation ecosystem. We are doing everything from educating children across the country in IP, innovation, entrepreneurship, so that we start from the beginning. We educated 280,000 children last year. We are trying to reduce barriers everywhere and meet people where they are, including people in our military, military spouses, et cetera, so that we get more people innovating within our country. I think that's going to be critical as well.

To the extent that there is a concern by those who are innovating about patenting, if they have concerns that if they patent it's not going to be upheld because of procedures, that's what the ANPRM is attempting to address.

Mr. FRY. OK. Thank you.

Huawei received more U.S. patents last year than any company except for IBM. It's expected to continue that pace moving forward. Huawei is essentially banned from selling any products in the United States due to sanctions.

Do you think that Huawei's continued and increasing acquisition of U.S. patents, despite those sanctions, represents a danger to the United States and its businesses?

Ms. VIDAL. I think we have to closely watch competition from other countries and make sure that we're doing our best to ensure that we're competing.

Mr. FRY. Thank you, Mr. Chair.

I know I'm out of time, but I yield back.

Mr. ISSA. I thank the gentleman.

We now go to the gentlelady from Florida, Ms. Lee.

Ms. LEE. Thank you, Mr. Chair.

Welcome to you. Thank you for being here with us today.

I would like to focus some questions on the operational status of USPTO and your IT modernization project.

We know that back in 2018 you experienced a very significant nine-day systems outage. The 2020 Inspector General report from the Department of Commerce detailed a number of critical areas in which it recommended improvement, modernization, and making sure that this type of outage would not happen again in the event of a disaster.

So, I have a few questions related to that IT modernization project. Let's start with the backups themselves and where you all are in terms of contingency planning and keeping backup logs and backup data where you can get back to a place of recovery.

What is the status of improvement and modernization in that regard?

Ms. VIDAL. Thank you for that question. There's a lot I could say on that, and I will provide more information on the record for you, if you will permit.

I will say that we critically need to move to more innovative systems. Our technology is very outdated; USPTO's technology is very outdated. We have been moving swiftly and deliberately to make changes.

We are moving to a new data center. That move has been very successful so far. I can provide you with the statistics on how much of the data has already been moved and how that gives us additional certainty when it comes to our data systems.

Ms. LEE. OK.

What about the legacy operating systems that you're using? That was another area that was identified as those needed to be modernized or replaced. What's the status of those legacy operating systems?

Ms. VIDAL. So, we are in the process, as well, when it comes to those. On the trademark side, around December of this year, we migrated a lot of the trademark data and the trademark processing to a new system. We are continuing to go through all our legacy systems and make sure that we prioritize and modernize as quickly as we can, given the fees that we have.

Ms. LEE. OK.

On the subject of cybersecurity, tell us the status—how do you feel about your level of overall cybersecurity, vulnerability to threat actors? What is the status over there on cyber?

Ms. VIDAL. From the data that I get from our CIO, we are very well-positioned. We have a lot of processes in place. We've hired experts in cybersecurity. We are looking to do best practices across government. We're doing them now, but we know that this continues to be an issue and that there are going to be new types of attacks.

So, it is front of mind, to the point where in every management meeting that's one thing that we talk about, is cyber, because it's so critical to everything that we do that we're secure when it comes to cyber.

We're working to ensure that our stakeholders are secure as well. So, we're doing outreach to help them understand how they need to be secure as well.

Ms. LEE. If you were to have a system failure today, do you have any sense of the actual time to recovery? If there was a significant breach, do you have a sense of your time to recovery and getting back to an operational status?

Ms. VIDAL. I would have to get back to you on the record on that.

Ms. LEE. OK.

Ms. LEE. I know that we've invested I believe it's hundreds of millions of dollars in modernization already to try to help with some of these problems—the legacy systems, the backup data, the time to recovery.

Can you tell us some of the highlights of where those dollars have been invested and some of the improvements that you've seen or made already?

Ms. VIDAL. One of the largest improvements is this data center that we are creating that's going have all the modern technology and really provide the USPTO with the resilience that it needs.

Then, beyond that, we're targeting systems based on the ones that are the most important to migrate to new technology. So, that's where a lot of that money has been spent. We've collected that through our rulemaking.

Ms. LEE. Uh-huh.

Another one of the specific recommendations that was in that IG report related to contingency planning and documenting those contingency plans so that there was a written protocol in place and something that everyone at USPTO would know, "This is what we're doing on data backup. This is our plan for recovery in the event of a disaster."

I believe the specific recommendation was to follow NIST 800–34 to ensure all that contingency planning documentation was in place.

Has that piece of this project, to your knowledge, been completed?

Ms. VIDAL. I will report off the record, but I will say right now that I believe it has. We definitely agreed with all the recommendations and immediately went to work putting them into effect.

So, I can verify that off the record, where we are in that process, to make sure that I have that correct.

Ms. LEE. Thank you very much.

Mr. Chair, I yield back.

Mr. ISSA. I thank the gentlelady.

We now go to the gentleman from Virginia.

Mr. CLINE. Thank you, Mr. Chair.

Thank you, Ms. Vidal.

Recently, you issued orders sanctioning two entities, OpenSky and Patent Quality Assurance, for flagrant abuse of PTAB proceedings by imposing monetary sanctions as well as removing both from those proceedings.

Both filed IPR petitions in an attempt to extort a patent owner out of a piece of a large patent judgment awarded in court. You

later rescinded part of those sanctions by reinstating both abusers back into the PTAB proceedings.

Why did you do that?

Ms. VIDAL. So, that is actually an ongoing controversy. I can't talk about the facts of that particular case.

I can talk about my decisionmaking generally, which is, as the Director, I make decisions based on the information before me. I work with our solicitor's office, and we work with the Department of Justice, as well, to make sure that every decision we make is the right decision and legally appropriate.

So, that's all I can say on that right now because I can't talk about the specific facts of that case.

Mr. CLINE. Are monetary sanctions alone sufficient to deter PTAB abusers, considering the massive payouts they're attempting to extort and the fact that they may be allowed to continue their PTAB cases all the way to the end?

Ms. VIDAL. I will say at a high level that there are only certain sanctions that we can issue, and so—and monetary sanctions are one of them.

Mr. CLINE. Are they alone sufficient?

Ms. VIDAL. I've not investigated that because I didn't have the authority to do more than that, so I wasn't balancing anything against each other.

Mr. CLINE. OK.

What steps have you taken to address the serious concerns raised in the GAO's investigation last year into improper influencing of PTAB decisions by agency leadership and the lack of transparency in the decisionmaking process?

Ms. VIDAL. So, first, I agree with all the recommendations from the GAO. The USPTO agrees with them.

When I came onboard, it was after the Arthrex decision, the Supreme Court decision that really changed the role of the Director vis-à-vis PTAB decisions. So, I immediately updated the Director review website that provides information to the public and the PTAB in terms of the role the Director will play. I made it very clear that the Director will not get involved in any decisionmaking until the Director plays her role under Arthrex. So, in that case, there is no interference between me and the PTAB until they issue a final written decision. Once they issue it, then anything that I do is going to be on the public record.

That is something that we set forth, we asked for comments on that process, and I intend to go into rulemaking, as well, to make sure that everything that we are putting into place to secure that system persists into the future.

Mr. CLINE. OK.

Your memorandum outlining reforms to internal review of PTAB decisions retains mechanisms for individuals other than the judges deciding the case to communicate with the judges and potentially influence their decision before it's issued.

Why are such mechanisms necessary, considering that you have the authority to review and change any PTAB decision after it's issued in a transparent way?

Ms. VIDAL. So, I'm not sure which portion of the memo that you're speaking to. I know that some of the PTAB judges will want

to consult with another PTAB judge in management or with our solicitor's office to ensure that they have the right understanding of something. So, we do have the ability for them to do that.

Nobody who they consult with has the right to direct their action. They are independent judges. Once they render their decision, then I would review it after that.

Mr. CLINE. OK.

I'd love for a second round to talk about your lack of compliance with the Congressional Review Act, but let me ask you about the use of nonstatutory discretion in PTAB cases.

The stated basis for many of USPTO's PTAB rules, such as the NHK-Fintiv rule, and many of the proposed rules in its recent notice is Section 314(a). Do you agree that Section 314(a) does not use the word "discretion" anywhere?

Ms. VIDAL. I don't have that in front of me. I'm happy to get back to you off the record on that.

Mr. CLINE. OK.

Ms. VIDAL. I'm happy to provide the entire authority for discretionary denial off the record.

Mr. CLINE. OK.

Mr. CLINE. All right. Well, at this point, I'm going to yield my final minute to the gentleman from Kentucky, who has some burning questions.

Mr. MASSIE. I thank the gentleman from Virginia.

Mr. Kiley had a great point earlier that I want to follow-up on. Are all the tools that are available to the PTAB court available to the patent examiners?

Like, is there something more we could do to improve the presumption of validity when a patent comes out or the presumption that it won't be invalidated by PTAB?

Ms. VIDAL. So, we have a feedback loop between the PTAB and the examiners to make sure that any lessons that were learned at the PTAB about examination are fed back to the examiners, including—one of the feedback loops is related to prior art. So, if there are additional patents in a chain of patents that are still before the examiner, then the prior art that's being cited to the PTAB is then sent back to the examiner. So, those types of tools are available.

What we often see at the PTAB is new art that is raised that just was not found by the examiners. In order to address that, that's why we are keenly focused on artificial intelligence, on rolling out new search tools. We have a global dossier where we can share search results across nations where there's related applications. We're now working with the FDA to make sure we're looking at all the right prior art when it comes to pharmaceutical patents.

So, we're doing everything we can to make sure that the prior art is found in the first instance and it's not something new at the PTAB where the examiner was not aware of it.

Mr. MASSIE. I yield back to the gentleman from Virginia.

Mr. CLINE. I yield back.

Mr. ISSA. OK. Well, that only leaves me, Madam, and about the right amount of time before people have to head to the floor.

So, I first want to ask unanimous consent that a letter from the Foundation for Human Rights in Cuba and a letter from the Cuban Studies Institute supporting H.R. 1505 be put into the record.

Mr. MASSIE. Without objection, so ordered.

Mr. ISSA. I ask unanimous consent to insert in the record an article from former PTO Director—my first PTO Director, I might add—James Rogan, the testimony from former PTO Director Bruce Lehman, and testimony from former USTR General Counsel John Veroneau.

I'd recognize the gentleman from Kentucky for his UCs.

Mr. MASSIE. Thank you, Mr. Chair.

I ask unanimous consent to enter into the record an article titled "No End in Sight for Rule 36 Racket at Federal Circuit." This is from IPWatchdog, January 29, 2019.

Mr. ISSA. Without objection.

Mr. MASSIE. Then I have another unanimous consent request for—it's just one page. It's from—the source is Docket Navigator, "Big Tech Companies Are the Biggest Users of PTAB." Top 20 petitioners since the PTAB was established.

Mr. ISSA. Additionally, materials from any Member that wanted to add to—the record will be open for five days in case you're not here at the end.

Mr. MASSIE. Did I get approval—

Mr. ISSA. Yes, you do.

Mr. MASSIE. OK. Thank you, Mr. Chair.

Mr. ISSA. Without objection.

Mr. ISSA. So, back to me.

Director, I want to first thank you for the co-authorship of a letter concerning the American Fairness Act, which directly affects primarily AM radio, AM and FM radio, terrestrial, and the fact that they currently receive no revenue on that. I know that sometimes that's viewed as political, but I think from your important role of the constitutional responsibility that people be incentivized, that inappropriately is not an incentive.

There's been a number of things brought up here today, and I want to just touch on them briefly. Many of the things in your proposed rulemaking, include items which have become part of an unofficial or a tradition or an operating procedure at the PTO. In other words, you've been doing them as though they were rules for a period of time, and now they're out there as comment.

Do you think it is appropriate to put them out for further comment when, in fact, you're already doing them? Or should they have gone directly to rulemaking, since you're already doing them, without going through the statutory process that we on this side of the dais have legislated for you?

Ms. VIDAL. I believe the current process of creating precedential decisions and guidance provides more certainty and clarity among the PTAB judges.

There are about 230 PTAB judges. They exercise my discretion by delegation. Without the ability to mark cases as precedential or to provide guidance, I would not have the ability to ensure they were exercising my discretion in the way I would exercise it. It would also mean that, depending upon which panel you got, you might get a different answer.

So, I always consider the guidance that I put into place as interim until final. I always intend it to go through rulemaking. I believe wholeheartedly in notice-and-comment rulemaking. Even with

the guidance—the first guidance I put in place was just meant to memorialize current practices; it was not meant to do any policymaking.

Going forward, any policymaking—I've been very clear about not doing that in my judicial decisions. I believe in due process. People should be able to rely on what was in place at the time. So, any policymaking was not through my judicial decisions, through marking something as precedent, or through guidance, other than what an Article III court might do in setting precedent.

Mr. ISSA. I might note my question included a great many that preceded you. Is that correct?

Ms. VIDAL. Yes.

Mr. ISSA. OK.

The comments today on additional areas of patentability—I'm presuming that in your role as the, in a sense, the chief innovation overview person of this administration, that you would welcome further expansion and defining of patentability including in AI.

Ms. VIDAL. I would welcome the opportunity to work with Congress on any bill that addressed AI or patent eligibility.

Mr. ISSA. Are there any areas of patentability where you believe the Constitution would prohibit a statutory decision coming through this process? In other words, do you believe that we should limit our patentability expansion or clarification on any particular areas that ultimately would prove to be unconstitutional?

Ms. VIDAL. That is something I'd have to take offline with my team as well, who are experts in this area, but would welcome the opportunity to work with you on that.

Mr. ISSA. OK. Particularly, Mr. Massie mentioned it—but, observation of natural science is the discovery of that which God created, so to speak, patentable, or he was just observing that which has always been there since the beginning of time.

I really would appreciate, I know Mr. Massie and others would appreciate your views on it. Because it is the intent of this Committee to go forward with defining those areas, some of which might prove to be expansions. Clearly, when we talk about, as we have today, artificial intelligence, some might be contractions of expectations. We'd like to work closely with you on that.

Mr. ISSA. I would ask—and you can do this off the record—but for you to provide us with the names of individuals at the PTO or other government agencies in the Executive Branch, or, for that matter, other branches, that you met with in the process of preparing this notice.

In other words, we'd like to understand a little of the deliberative process of how you came to the conclusion of what was included in your proposed rulemaking. I never really—I still look at it as proposed rulemaking because it certainly is a step.

Mr. ISSA. Earlier today, there was a lot of discussion about the 16 months going on in East Texas as a time. Isn't it true, based on your observation, that some courts—and I'll use West Texas for a moment—have chosen to set dates that preclude a PTAB, when, in fact, the actual date that they occur often gets delayed?

Ms. VIDAL. I can say that a lot of the dates that are set by courts do not stick.

Mr. ISSA. Pardon me? Say that again.

Ms. VIDAL. A lot of the dates set by courts for trial do not stick.

Mr. ISSA. So, in your rulemaking, how are you going to deal with—if it goes forward the way it's proposed, how are you going to deal with the fact that a historic time to trial may be inaccurate and judges—at least one, as somewhat sanctioned by the high court, was setting dates that it was clear were only for purposes of not allowing transfers and the like?

Ms. VIDAL. Our current practice already addresses that. The guidance I set forth on discretionary denial moves away from relying upon the date set for trial and moves toward looking at actual data. That's also addressed in the ANPRM.

Mr. ISSA. OK. I'm going to give you a considerable amount more for the record under the consideration of limited time, but I just want to highlight one.

As you're aware, under the law known as Section 211, which protects the U.S.—the original owners of trademarks and businesses that the Cuban government confiscated without compensation, is not in compliance with the World Trade Organization.

I've introduced H.R. 1505 that will bring the law into compliance with the WTO and continue to ensure the Cuban government is not enriched through its use of unjustly confiscated property who—rightful owners have not been compensated.

If you would opine on the underlying merits of true owners based on—not on court or World Trade Organization, but based on the U.S. Constitution and your understanding of your role?

Ms. VIDAL. Is that one I can take offline?

Mr. ISSA. Absolutely.

Ms. VIDAL. Thank you.

Mr. ISSA. OK. With that, even though there are many, many more questions—and I thank the Ranking Member for his indulgence by not pointing out that I was over time—as I said earlier, we will leave the record open for additional questions, if you'll agree to take them for the record.

Mr. ISSA. Last, I hope that this will be, in a formal or informal fashion, a nearly quarterly go-forward. Obviously, this kind of hearing is not always possible, but if you would—both the Chair and Ranking Member would appreciate it that your shaking your head is an affirmative that we will not wait another year before we have you back again.

With that, this concludes the Subcommittee hearing on the courts. Again, I thank the gentlelady. We're adjourned.

[Whereupon, at 10:32 a.m., the Subcommittee was adjourned.]

All materials submitted for the record by Members of the Subcommittee on Courts, Intellectual Property, and the Internet can be found at: *https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=115813*.

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