

# HOW KATHI VIDAL AND MICHELE LEE TURNED THE US PATENT OFFICE INTO A WHORE FOR BIG TECH

By Tangible IP

Every four years, a new presidential election brings in a slew of administrative changes in the US government from the top down, as most political appointees from the previous administration are soon replaced. This is no different for the USPTO (which reports to the Secretary of Commerce), whose director is appointed by the incoming president and must be confirmed by the US Senate.

On October 26, 2021, Kathi Vidal was appointed by President Biden and was confirmed into her role a few weeks later. During her confirmation, when asked about her stance on patent eligibility, she answered “*we can work together to build an intellectual property system that is more predictable, reliable and transparent*”. Mrs. Vidal also said that there needed to be “*more clarity when it comes to patent eligibility,*” *whether it “comes via legislation or whether the Supreme Court takes a case.”* On the PTAB being a patent “death squad”, she noted her experience on “both sides” of PTAB proceedings and said she would consult with stakeholders and investigate potential reforms.

Here is what I [wrote at that time](#) regarding her testimony during the confirmation process:

*(...) So, to me, these guarded statements by candidate Vidal bring very little comfort, as they can easily be read to appease opposite sides at the same time, regardless of their respective agendas. Let's not forget that, according to the US Inventors nonprofit organization, “Vidal's clients have filed a combined 2,381 challenges at the PTAB. She has been paid millions of dollars by Apple, Samsung, Microsoft, Cisco, Micron, Netflix, Dell, Roku, and HP. She is attorney-of-record in 14 pending cases at the PTAB, all on behalf of the infringer/petitioner.”*

Four years and four thousand [selfies](#) later, it is worth revisiting Mrs. Vidal's tenure, which has generally been marked by a proactive approach to several critical areas within the IP landscape. When she assumed the role, expectations were high that her extensive background in IP law, coupled with her experience representing both large corporations and independent inventors, would bring a balanced perspective to the agency's priorities. Vidal's focus areas have included improving patent and trademark application processing, bolstering IP rights, addressing challenges related to patent eligibility (particularly under Section 101), and managing the often-contentious Patent Trial and Appeal Board (PTAB) proceedings.

Key Accomplishments:

## 1. Administrative reforms

- Streamlined PTAB procedures and increased transparency in decision-making
- Implemented new guidance on discretionary denials under Fintiv
- Enhanced stakeholder engagement through expanded outreach programs
- Introduced programs to expedite examination of key technologies like climate change solutions

## 2. Access initiatives

- Launched Pro Se Assistance Program expansion
- Created the Council for Inclusive Innovation (CI2)
- Expanded the Patent Pro Bono Program
- Implemented fee reductions for small and micro entities

## 3. Quality measures

- Strengthened patent examination quality through enhanced training
- Implemented AI tools to improve prior art searches
- Increased focus on Section 101 clarity following Supreme Court decisions

One of Vidal's notable achievements has been her work to reduce application backlogs and improve patent quality. She introduced new measures aimed at reducing the pendency of both patent and trademark applications, which had surged due to pandemic-driven shifts in business and e-commerce. Unfortunately, the situation is still dire: as of mid-2024 the backlog of unexamined patent applications reached approximately 785,387, nearing an all-time high and the total pendency—the time from application to decision—stands at around 25.6 months, with an average of 20 months before the first office action on applications.

Her administration has also focused on improving examiner training in emerging fields like AI and clean energy, ensuring that new technology applications are examined with rigor and accuracy.

She and her administration have also received their share of critiques, notably around the following points:

### 1. PTAB Policy Decisions

- Perceived weakening of Fintiv discretionary denial factors
- Criticism that PTAB remains too “patent owner unfriendly”
- Concerns about her involvement in specific IPR cases (like OpenSKY/VLSI)
- Arguments that Director review process remains too opaque

### 2. Subject Matter Eligibility

- Lack of concrete progress in clarifying Section 101 guidance
- Continued uncertainty in software and biotech patents
- Criticism that USPTO guidance hasn't sufficiently aligned with court decisions
- Perceived inconsistency in examination across art units

### 3. Administrative Decision-Making

- Claims of overstepping authority in certain policy decisions
- Criticism over use of Director review powers
- Questions about transparency in decision-making processes
- Concerns about political influences on patent policy

### 4. Small Inventor Advocacy

- Arguments that initiatives favor large corporations over individual inventors
- Criticism that pro se assistance programs don't address fundamental systemic barriers
- Concerns about rising costs despite fee reduction programs
- Claims that patent quality initiatives disproportionately burden small entities

## 5. Examination Quality

- Ongoing issues with examination consistency
- Criticism about examination pendency times
- Concerns about over-reliance on AI tools in examination
- Questions about examiner training and oversight

So, the list is long. Unfortunately, for Mrs. Vidal, the most visible metric from the outside world is how many patents issued by the USPTO end up being declared invalid years later by its offspring, the PTAB. Based on what has been widely [reported](#), the PTAB “kill rate” (i.e. the percentage of [issued](#) patent claims being invalidated) still hovers between 70% and 80% depending on how one [calculates](#) it. Either way, this is absolutely unacceptable and no other industry than the government could survive with even a 20% product defect rate, let alone 80%!

While Mrs. Vidal's tenure has not done the same substantial damage as was felt under one of her predecessors (Michelle Lee) under the previous Democrat President (Obama), she certainly has made patent owners feel nostalgic of Andrei Iancu whom she replaced in 2021 and who had been nominated in 2017 by a certain...President-elect Donald Trump.

In our next issue, I will discuss what we see in our crystal ball when it comes to the next 4 years. How will a new president impact US based IP policy, especially combined with a new leadership in the powerful Senate Judiciary Committee? Fewer selfies for sure at the USPTO, but a lot more changes to come. Stay tuned!