

## Leahy's Exit May Return Senate IP Control To PTAB Critics

By **Dani Kass**

*Law360 (November 15, 2021, 9:56 PM EST)* -- When Sen. Patrick Leahy leaves the Senate in 2023, the intellectual property subcommittee will likely be left in the hands of two lawmakers who want to weaken the Patent Trial and Appeal Board, a swift turn from the departing leader's focus on giving it more power.

Leahy — a Vermont Democrat who announced Monday he won't be running for reelection in 2022 — was the driving force behind the massive patent reform bill that created the PTAB, and as recently as September he introduced legislation to strengthen it. But now power will likely return to the subcommittee's former leaders, who think the board has overstepped its authority by canceling too many patents.

Sens. Thom Tillis, R-N.C., and Chris Coons, D-Del., tend to stand together in opposing Leahy's patent reforms. Given how few senators are active in intellectual property policy, and the lack of a clear successor to hold up Leahy's pro-PTAB position, it's likely the senators will be able to push legislation to weaken the board.

"Most senators are not interested in patent issues, and the ones who are interested are able to have an outsized impact on what happens with them," said Eli Mazour of Harrity & Harrity LLP.

### The Path to Patents

Leahy stands out in many ways in Congress: He's the longest-serving member, third in line to become president, and one of the body's oldest members. But perhaps what sets him apart the most from colleagues is the fact that he genuinely cares about patents.

"IP issues in D.C. get viewed as wonky and boring, and I'm guessing that if you start talking to a lot of members about it, their eyes will glaze over," said McKool Smith PC's Nick Matich, who had served as acting general counsel of the U.S. Patent and Trademark Office.

According to Leahy's former chief of staff, Akin Gump Strauss Hauer & Feld LLP partner Ed Pagano, the senator's interest likely relates back to Vermont's economy — and perhaps surprisingly to his love of Batman.

"He's an avid fan of Batman, probably one of the Top 10 experts," Pagano said. "We'd always semi-joke,

if you're going to have a conversation about Batman, it's going to be a serious conversation with Sen. Leahy."

While the superhero isn't particularly known for his patent collection, Pagano said that early interest in the character and films got the senator similarly interested in intellectual property — and got him a role in multiple Batman movies.

Patent big shot IBM, which has been granted more than 150,000 U.S. patents over the last century, had at one time been one of the largest private employers in Vermont, meaning Leahy knew how technology economically affected his constituents, Pagano said. He's also always had an interest in technology, helping found the first internet caucus and advocating for laws allowing encryption in private devices.

Leahy was interested in gadgets, but he also wanted to grow his state's economy, his former chief of staff said.

"With technology, a small state can now compete," Pagano said. "You can order Vermont maple syrup from California."

### **Leahy's Mark on IP**

The biggest patent bill in decades bears Leahy's name, which means he will long be associated with IP law. The Leahy-Smith America Invents Act, passed in 2011, most significantly created the Patent Trial and Appeal Board and its system of inter partes reviews.

Whether you love or hate the AIA, Matich said it "definitely had a very substantial change on patent practice."

"He's probably had one of the biggest impacts of any member of Congress in a while just because of that act," he added.

Even Tillis, who thinks the PTAB is harmful to patent owners, said in a statement Monday that Leahy is "one of the most important legislators to ever work in the area of intellectual property." Leahy has said the initial point of the PTAB was to tamp down on patent trolls, which were suing companies for infringement using weak patents, and the board quickly gained a reputation for invalidating patents at a high rate. Whether those first few years were a bloodbath or a necessary cleanup continues to divide the patent community.

"Under the Obama administration, that played out the way Sen. Leahy wanted it to play out," Mazour said. "I think he had an enormous impact on that."

But Robert Moore of Caldwell Intellectual Property Law faults Leahy for having "continued to buy into the narrative that the real challenge for U.S. innovation is these nefarious companies called patent trolls," even through 2021. He says that perspective is "really, really missing the boat," and inventors would be better helped with changes like giving them more chances to amend challenged claims in a patent.

"If there was a way that someone could invent a search engine that was truly superior to Google, and there was real robust patent protection for it, then consumers would have a real choice there between Google and the competitor," Moore said. "But at this point, that almost certainly can't happen because, without robust patent protection, any real innovation will likely be emulated by Google."

## **Drawing Lines**

During the Trump administration, control of patent policy in the Senate shifted to Tillis and Coons, who, despite being in opposing parties, tend to stand together. They generally supported the policies of Andrei Iancu, former USPTO director under President Donald Trump who wanted to make invalidating patents harder to restore balance to the system.

The most significant of these changes was increasing when PTAB judges can use their discretion to turn away patent challenges that seem to have merit, which Coons supports and which Leahy is aiming to overturn. In September, the Vermont senator introduced the Restoring the America Invents Act, which would narrow when patent challenges can be rejected, expand what type of challenges can be filed, and allow the government to file them.

Up until January, Tillis had been chair of the IP subcommittee, while Coons was its ranking member. When Joe Biden took over as president, Tillis became ranking member and Coons was expected to become chair, but was moved aside by the appointment of Leahy to the role. In recent years, Tillis and Coons' support of reining in the PTAB wasn't challenged by their peers, and now it is.

"Even in this short period of time, I think you've already been able to see his impact — the conversation has changed," Matich said.

That's not to say the sides never worked together. In September, Leahy and Tillis introduced a pair of bills — the Pride in Patent Ownership Act and the Unleashing American Innovators Act — which aim to increase diversity in who gets patents and require transparency about who owns patents.

They also penned a letter to Chief Justice John Roberts in November, asking the Judicial Conference of the United States to look at the alleged case-hoarding of U.S. District Judge Alan Albright in the Western District of Texas.

Coons laid out his appreciation for the retiring senator on Monday.

"Whether on the Judiciary or Appropriations committees, whether traveling with family or on Senate business, Senator Leahy was always available to offer advice and encouragement, and he will be sorely missed in the Senate," Coons said in a statement.

Likewise, Iancu said in a separate statement that, "When he retires next year, Sen. Leahy will have left an indelible mark throughout a career filled with landmark accomplishments."

"He has been a true leader and will be missed," the former director and current Irell & Manella LLP partner said.

## **The Future of Patent Leadership**

With Leahy out of the picture for 2023, attorneys say they expect the subcommittee's leadership to head back to Coons or Tillis, depending on which party controls the Senate. Matich said this change will likely feel simultaneously like a big switch and barely one at all.

"In more recent years, up until the current Congress, Leahy wasn't as big of a voice because Coons was

the ranker on the IP subcommittee," Matich said. "During the last Congress, you had Coons and Tillis taking the lead in Congress on those issues. I think this means the next Congress will look more like the past Congress, than this Congress under Leahy."

Pagano agreed that Coons and Tillis are the most likely candidates to lead the subcommittee, saying they've both shown interest.

What's not especially clear is whether any senator will step in to fight for the PTAB like Leahy. The Restoring the American Invents Act bill was co-sponsored by Sen. John Cornyn, R-Texas, but was clearly spearheaded by Leahy. Attorneys said it's unlikely Leahy will be able to get such a big bill passed in his remaining time, and it's unclear whether anyone else will continue to push for it.

But lobbyists will do their best to make sure someone stands up for the PTAB in Congress, with Big Tech in particular wanting the board to handle more patent challenges.

"[Lobbyists are] very sophisticated and very effective, so I'm sure they'll find other strong allies to support the PTAB," Mazour said.

Leahy's retirement may leave room for Sen. Mazie Hirono, D-Hawaii, to step up in the party and be a voice for patent policy. While she hasn't been as vocal about patents as Coons or Tillis, her signature regularly joins theirs in letters about patent policy, including one asking for clarification about patent eligibility, and she co-sponsored legislation addressing inventor diversity.

"Maybe this will be an opportunity," Matich said. "Maybe we'll start hearing more from her."

--Editing by Adam LoBelia.