NATIONAL REVIEW

Sleeper SCOTUS Blockbuster may be the Next Kelo

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It took many people by surprise when the Supreme Court ignited a firestorm in the now-infamous Kelo case by giving cities the ability to seize personal property from a private owner and give it to a developer for the alleged "public purpose" of increasing tax revenues. The Court will have another chance to rule on key property rights in what may be this term's sleeper blockbuster: a patent case that has major implications for constitutional due process guarantees and protecting private property.

The Court will be considering the constitutionality of the Patent Trial and Appeal Board (PTAB), an administrative tribunal created in 2011 by the America Invents Act that was supposed to help address concerns that patents were being issued to people who didn't deserve them because their inventions weren't truly new or that were too broad.

Congress created the Patent Trial and Appeal Board to make it easier to challenge bad patents and crack down on abusive behavior by so-called "patent trolls." Unfortunately, the PTAB has become a roving "patent death squad"– a moniker that has amazingly been embraced by the board's own former chief administrative judge and is an apt description of a tribunal that invalidates upwards of 70% of the patents it considers. It now threatens to destroy the real bridgebuilders along with the trolls.

From a policy perspective, the PTAB has undermined its own goal. Instead of freeing up the innovation economy, it has created a new set of legal procedures that can be abused to extort money from patent owners and invalidate legitimate patents. The result is exactly the opposite of that intended by the America Invents Act: more litigation, less certainty for inventors, and higher costs of innovation.

But the deeper constitutional problem is that the patent tribunal is taking away people's property without adhering to our constitutional guarantees of due process, and that could have implications for other types of property rights as well. The PTAB is a constitution-free zone without jury trials, with strict limits on the evidence patent owners may present, and where virtually anyone can challenge a patent, opening the door to rampant abuse. Rather than making

the process more efficient, patent owners can now face challenges on two fronts – at both the PTAB and in the courts. In an amicus brief for the CATO Institute and the American Conservative Union Foundation, Ilya Shapiro and Greg Dolin write that "the PTAB draws power away from the judicial branch in favor of the executive" and makes all decisions by the courts subject to "revision and modification by the executive branch" – raising serious constitutional issues.

For example, President Obama's Director of the US Patent and Trademark Office has in some cases convened multiple PTAB panels until she got the result she wanted to invalidate a desired patent. The tribunal has also permitted hedge fund managers to use the administrative process to manipulate the market, short-selling stocks and then filing challenges to induce a drop in stock prices. Challengers can also file repetitive attacks on the same patent, ironically increasing costs to the innovation economy instead of decreasing litigation costs. It's a one-way ratchet: a win for a patentholder is still subject to repeated attacks, but a win for the challenger is final.

Imagine a world in which the ownership of your home faced the same risk – a disgruntled neighbor, ex-spouse, or frustrated would-be purchaser could attack your ownership rights repeatedly before a judge that views his job as "death-squadding" real estate titles and with procedures that favor the challenger. Such a system would dramatically increase the costs required to maintain one's home, while the uncertainty clouding any title would lower the value of housing overall. That would be just as damaging to the housing market as it has been for the innovation economy.

The government's chilling defense of the PTAB system is to claim that they don't even owe patent owners due process in the first place, because patents are simply grants from the government and not private property. But that argument ignores centuries of history and Supreme Court precedent, and creates the danger of eroding property rights just as surely Kelo did.

The goal of the America Invents Act was a good one, aimed at bolstering the legitimate property rights of patent owners. But in this case the cure is worse than the disease and has created an out of control administrative tribunal that undermines constitutionally protected property rights. If the Supreme Court allows the government to start exempting whole categories of property from constitutional protection, we will all be the poorer for it.