

ALSTON & BIRD



**DOJ Enforcement and ITC Investigations in
the Era of the Biden Administration**

July 13th, 2022

Today's Presenters



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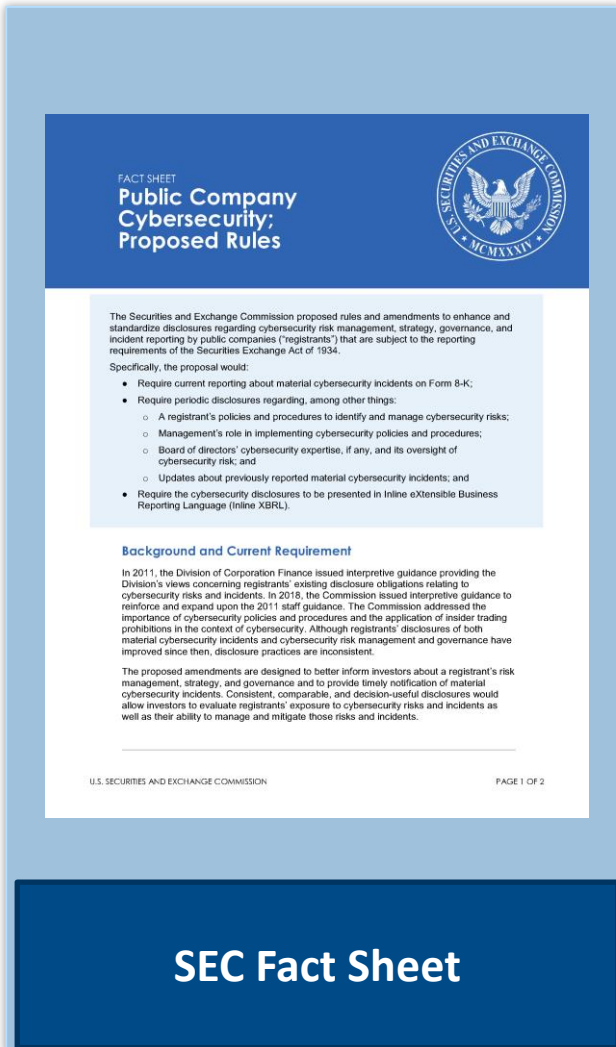


- **Crypto & Cybersecurity**
 - Resources
 - Regulation and Enforcement
- **Resurrecting the Yates Memo**
 - Individual Accountability
 - Compliance
 - Antitrust Initiatives
- **Foreign Corrupt Practices Act**
 - Enforcement Trends
- **Internal Investigations**
 - The Five P's



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- Requires reporting of “a material cybersecurity incident” within four business days
- Disclosure of “policies and procedures” and management and oversight related to cybersecurity compliance
- Seeks information about “board member cybersecurity expertise” in annual reports and certain filings




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- The October 2021 **Monaco Memo**
 - Resurrecting the Yates Memo
 - Cooperation is not limited to those “substantially involved”
- Increase in corporate **compliance** monitors
 - Corporate monitors are not “the exception”
 - Impact on investment in compliance programs
- **Past (mis)conduct** in resolution decisions
 - Review of a company’s “whole criminal, civil, and regulatory record”
 - DPA and NPA compliance



- **“Whole-of-government competition policy”**
 - Encouraged agencies to “enforce the antitrust laws vigorously” and challenge prior “bad mergers”
 - Focus on labor, healthcare, finance, and tech markets
- **Potential for criminal charges under Section 2**

 Administration Priorities COVID Plan

BRIEFING ROOM

Executive Order on Promoting Competition in the American Economy

JULY 09, 2021 • PRESIDENTIAL ACTIONS

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to promote the interests of American workers, businesses, and consumers, it is hereby ordered as follows:

Section 1. Policy.

A fair, open, and competitive marketplace has long been a cornerstone of the American economy, while excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers.

The American promise of a broad and sustained prosperity depends on an open and competitive economy. For workers, a competitive marketplace creates more high-quality jobs and the economic freedom to switch jobs or negotiate a higher wage. For small businesses and farmers, it creates more choices among suppliers and major buyers, leading to more take-home income, which they can reinvest in their enterprises. For entrepreneurs, it provides space to experiment, innovate, and pursue the new ideas that have for centuries powered the American economy and improved our quality of life. And for consumers, it means more choices, better service, and lower prices.

Robust competition is critical to preserving America’s role as the world’s leading economy.

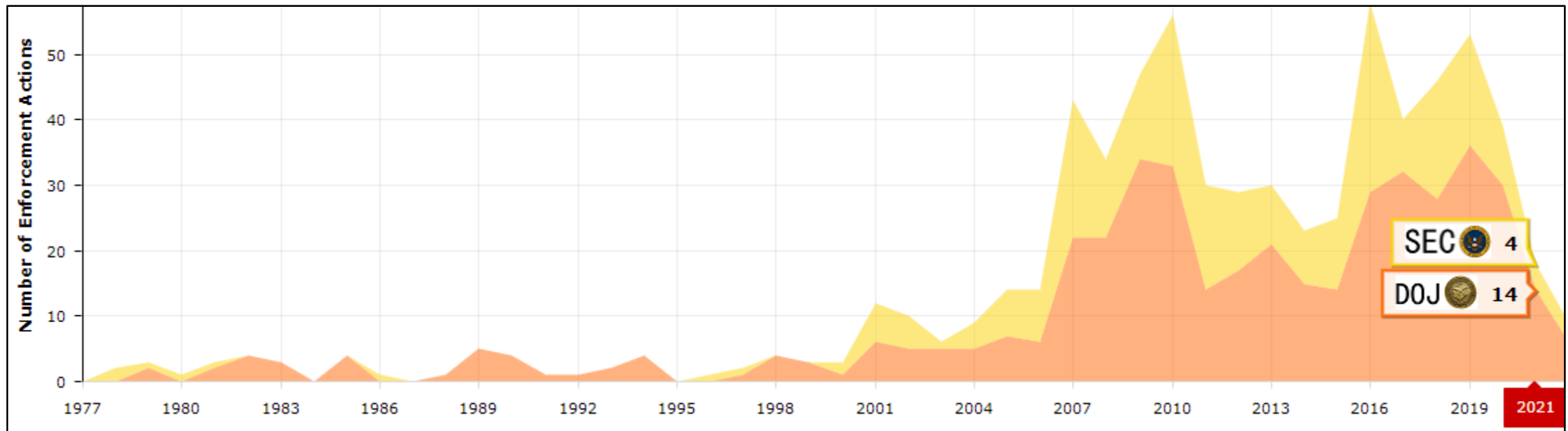


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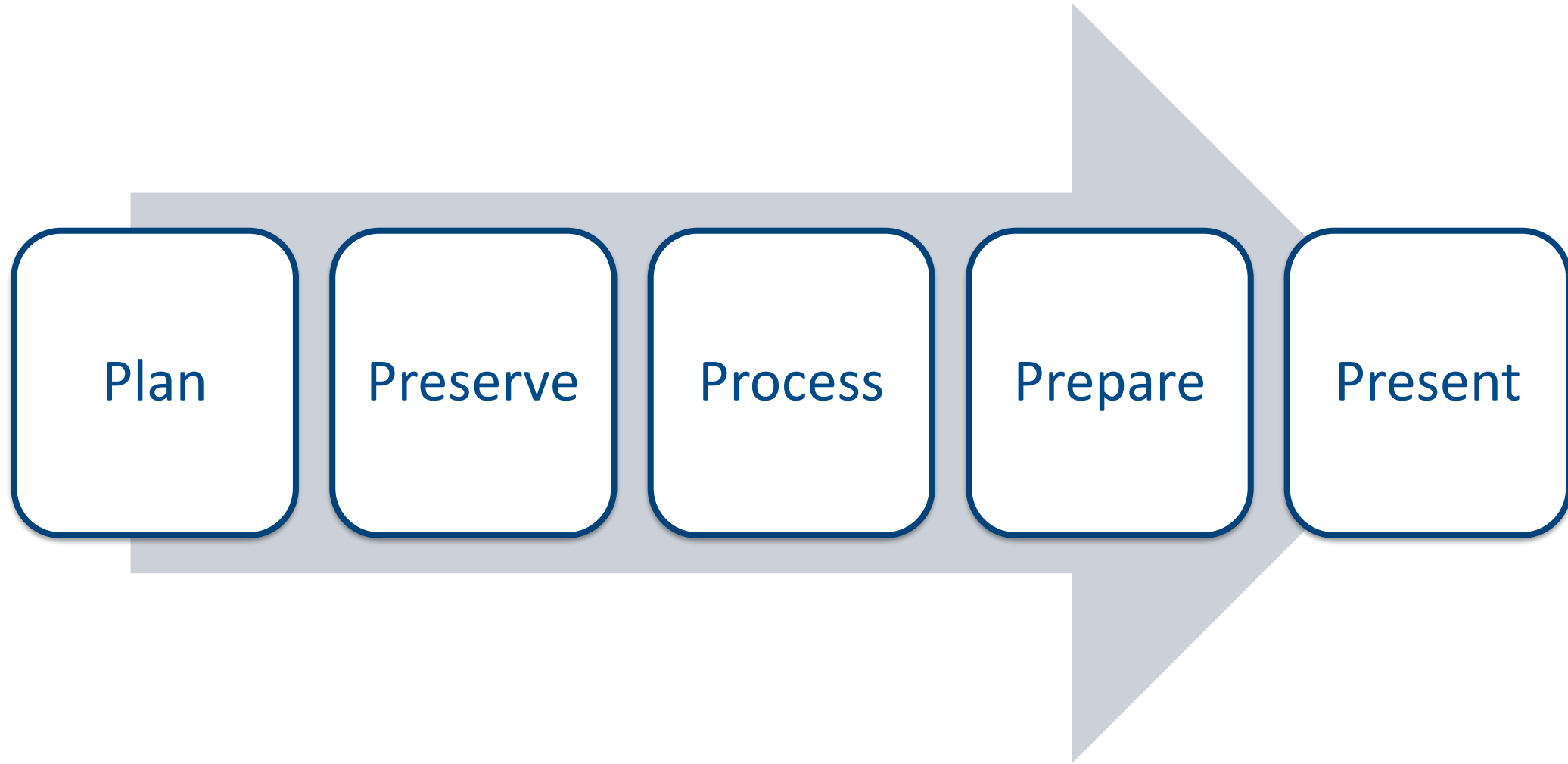
■ Enforcement Trends

- Lowest number of combined DOJ and SEC enforcement actions in **20 years**
- Drop in **individual prosecutions**
- Continued reliance on conspiracy/**money laundering charges**





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- **Intellectual Property and Recent Developments**
 - New PTO Director
 - New ALJ at the ITC
 - Proposed Revisions to the America Invents Act
 - Litigation Funding



- Former Managing partner at Winston & Strawn, Silicon Valley
- Began her engineering career with General Electric Aerospace where she designed one of the first artificial intelligence systems for aircraft
- Represented both patent holders and defendants in US district courts, the International Trade Commission (ITC), and the Patent Trial and Appeal Board (PTAB)
- Inductee of the Litigation Counsel of America
- Plans to focus on broadening pro-bono work at the USPTO



Kathi Vidal



Vidal in Action on IPRs:

1. ***Fintiv***. New guidance issued by Director Vidal on *Fintiv*:
 - a. “[T]he PTAB will not deny institution of an IPR or PGR under *Fintiv*”:
 - i. when a “petition presents compelling evidence of unpatentability;”
 - ii. “based on a parallel ITC proceeding; or
 - iii. if a petitioner stipulates not to pursue in district court “any grounds that could have reasonably been raised in the petition.”
2. ***Amicus briefing***. Director Vidal ordered Director Review in two cases in view of widespread speculation that the challenges to the patents were filed in an attempt to hold patent owner hostage in view of the large verdict it had won against Intel. On July 7, Director Vidal authorized *amicus curiae* regarding evidence of an abuse of process.
3. ***In person hearings are back***. Starting on July 15, the PTAB will allow parties to argue in person so long as both parties request an in-person hearing.

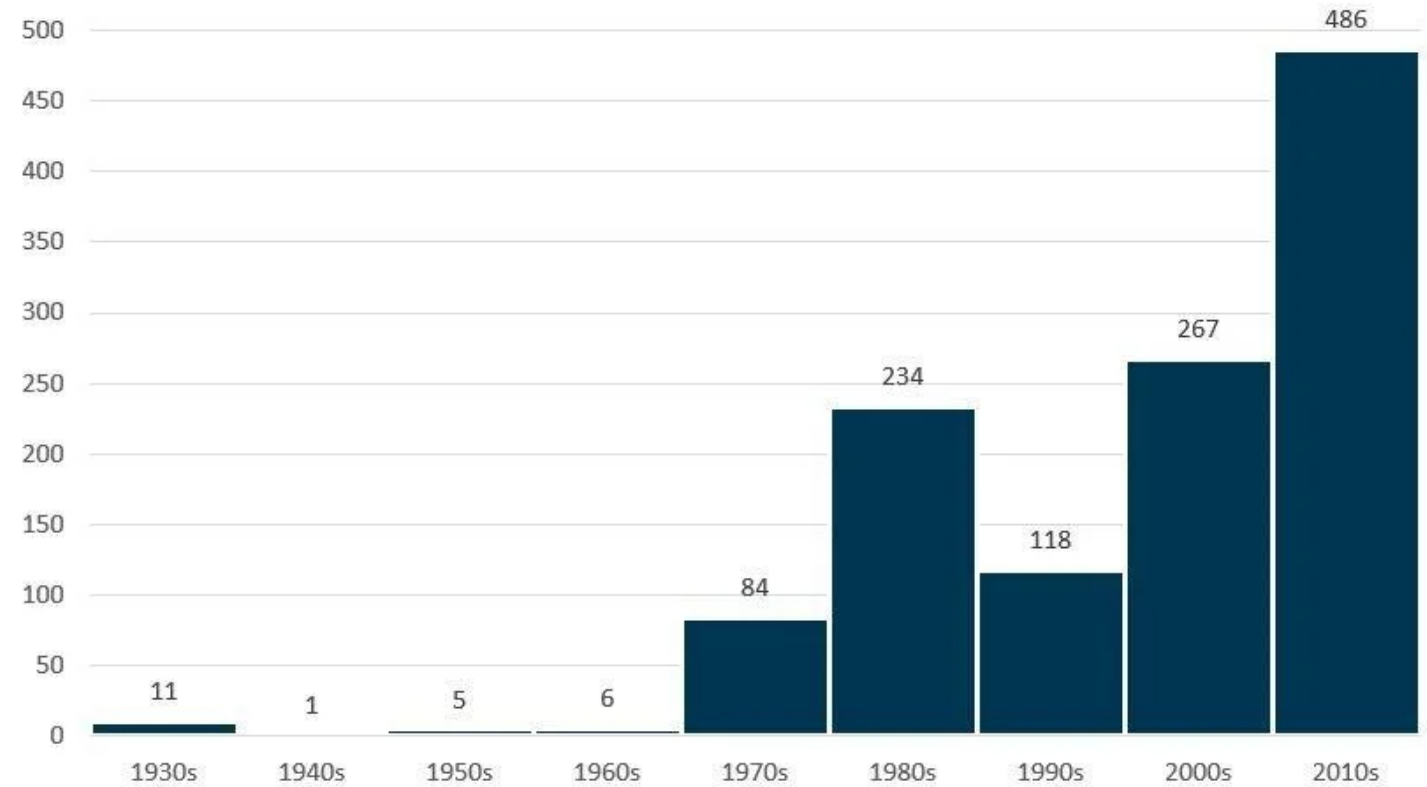


Kathi Vidal



- Fast venue to adjudicate patent infringement actions by defendants that manufacture outside of the US [read – *everybody*].
- The complainant must practice the patent and spend money on practicing patents in the US.
- Relief is an exclusion of the defendant's products at the border.

Section 337 Investigations By Decade





- Administrative Law Judge David P. Shaw Retires from the ITC
 - Started at the ITC on October 24, 2011
 - Chief Judge of the Library of Congress (Copyright Issues, among other things)
- Administrative Law Judge Bryan F. Moore appointed on May 9, 2022
 - First African American Administrative Law Judge at the ITC
 - PTAB Administrative Patent Trial and Appeal Judge since 2012
 - ITC Investigative Attorney from 2005 to 2012



ALJ Bryan F. Moore



- Brief Background of the Leahy-Smith America Invents Act
 - Enacted 9/16/2011
- Revision of First-to-Invent to First-to-File
- Created Patent Trial and Appeal Board
- Creation of Inter Partes Review and Post Grant Review

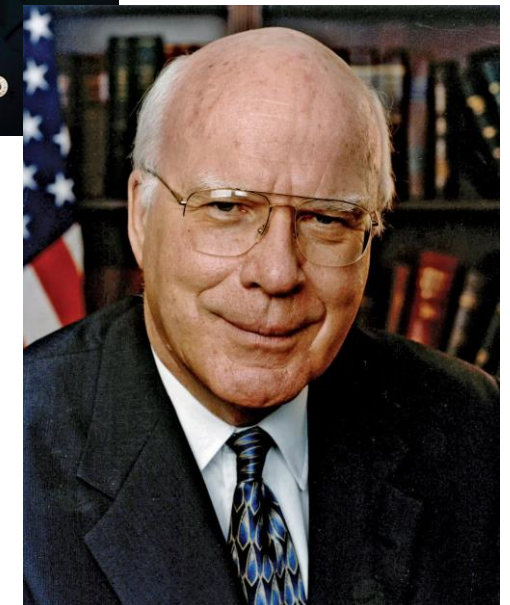
AMERICA INVENTS ACT



Proposed Revisions to the AIA



- PTAB Reform Act
- Sen. Leahy (D-VT) and Sen. Tillis (R-NC) Proposed Revisions
 - Limit to Patents Reviewed by the PTAB
 - Ban Serial Petitions by Challengers
 - Cover Some Expenses to Patent Owners
 - May Limit Discretionary Denials of Institution Under 35 U.S.C. § 314(a)
 - Tillis: Aimed at stopping misuse of PTAB challenges while “preserving the vital role of the PTAB in furthering innovation.”
 - Leahy: "proud to continue the work of ensuring that our patent system reinforces high-quality patents while protecting startups, small businesses and American manufacturers from patents that do not represent true innovation."
- Status
 - Introduced on June 16, 2022, so in early stages.





- Trends in Litigation Funding
 - Traditional Model is Pure Contingency
 - New Models Include Partial Funding by Investors With “Waterfall” on Resolution
 - Important to have Thorough Infringement Analysis
 - Important to have Damages Analysis
 - District of Delaware’s New Standing Order





Questions?