

CHAPTER SIX - CONSTITUTIONAL LAW

Old Law: Jurisprudence of Myth (Patent Law Edition)

Sunday Morning - Flagstaff, Arizona

The scream cut through Alexander's exhausted sleep like a knife.

His eyes snapped open. Disoriented. Still half in dreams of binary code and barrier crossings and her dying in his arms. His neck ached from the awkward angle. His back protested the hours spent in an uncomfortable chair. The bond hummed steady in his chest—alive, safe, here.

But someone was screaming.

"ATHELIA! ATHELIA WAKE UP! THERE'S A—OH MY GOD—"

Alexander jerked upright. A young woman stood in the doorway—early twenties, blonde, wearing pajamas and holding a coffee mug like a weapon. Her eyes were wide with terror, fixed on him.

"Who the FUCK are you?!" she shrieked.

Alexander's mind scrambled. Client. Sleeping. Brought her home. Sat down to watch her breathe. Must have fallen asleep. Roommate. This is her roommate.

"I can explain—"

"GET AWAY FROM HER!" The blonde—Casey, his exhausted brain supplied from bond-memory—took a step forward, mug raised. "I'm calling 911! Don't you DARE move!"

Alexander stood slowly, hands raised. "Please. I'm not—I didn't—she was at Walnut Canyon. She filed her application. I'm her attorney. I brought her home after—"

"ATTORNEY?!" Casey's voice went shrill. "What kind of attorney breaks into someone's apartment and—and—OH MY GOD ARE THOSE EARS?!"

Alexander froze. "What?"

"ON YOUR HEAD! YOU HAVE—" Casey's mug trembled in her hand. "YOU HAVE WOLF EARS!"

"I have what?"

Alexander's hand shot to his head. His fingers brushed something soft. Furry. Something that absolutely should not be there.

No.

He traced higher. Felt the shape. Tall. Pointed. Covered in fur. Growing from his very human skull.

Ears.

Wolf ears.

Alexander's breath stopped. Both hands flew to his head, frantically exploring. The ears were real. Physical. Visible. Moving slightly with his panic.

"What—how—" His voice cracked. "When did—I don't—"

Casey backed toward the door. "ATHELIA! WAKE UP! THERE'S A THING IN YOUR ROOM WITH WOLF EARS!"

First client meeting under 37 CFR § 11.106 - Attorney must establish professional relationship, explain scope of representation, obtain informed consent. Difficult when client is unconscious and roommate thinks you're a monster.

Alexander's wolf surged in panic. Ears? Why do I have ears? The bond—the download—what did it DO to me?

On the bed, Athelia stirred. Mumbled something incoherent. Her hair was a disaster—tangled with pine needles and small twigs. Her clothes were torn in places, streaked with dirt. She looked like she'd been dragged through the forest. Which, technically, she had been. By him. While dying. From magic consumption.

This looks very bad, Alexander's brain supplied helpfully.

"She's fine," he said quickly, desperately. "I brought her home. She was at Walnut Canyon. She—she filed. The application. I'm her attorney. This is—this is professional—"

"ATTORNEY?!" Casey's voice went shrill. "Attorneys don't have WOLF EARS! And they don't break into apartments and—and—" She looked at Athelia's torn clothes, the dirt, the sticks. "Oh my god. Oh my GOD. I'm calling the police."

She fumbled for her phone.

"Wait!" Alexander took a step forward. His new ears flattened against his skull instinctively. "Please. I know how this looks. But I swear I didn't hurt her. I saved her. She was dying. The examination—the magic—it was consuming her. I had to cross over. Had to bring her back. Had to—"

He was babbling. Making it worse. His hand kept reaching up to touch the ears. How? Why? When did this happen?

37 CFR § 11.104(a) - Attorney must communicate with client in manner that allows client to make informed decisions. Current communication status: FAILING.

"Magic," Casey repeated flatly. Phone in hand now, finger hovering over 911. "You're telling me magic made you break into my apartment with WOLF EARS and put my roommate in bed looking like she got attacked in the woods?"

"I didn't break in! I used her keys! They were in her pocket!" Alexander's desperation was climbing. "She drove to Walnut Canyon Thursday morning. Filed her continuation-in-part. The barrier accepted her application. But she didn't know—she has amnesia—the filing wipes human memory as protection. And the

examination magic started consuming her because I hadn't completed my review in time. So I—"

"You are INSANE," Casey said. "And you're going to jail."

"Attorney-client privilege!" Alexander blurted.

Casey's finger pressed dial.

The phone rang once. Twice.

Then a voice—deep, resonant, utterly calm—came through the speaker.

"I am sorry. Your call cannot be completed at this time. The parties involved are currently engaged in patent prosecution under Old Law jurisdiction. External interference would constitute improper ex parte communication and is therefore prohibited. Please consult 37 CFR Section 1.2 regarding proper channels for USPTO business. Thank you."

Click.

Silence.

Casey stared at her phone. "Did... did 911 just reject my call?"

"That was Malacar," Alexander said quietly. His wolf ears had flattened completely against his skull.

"The BARRIER GUARDIAN is blocking 911?!"

"Patent prosecution is privileged," Alexander said, though his voice shook slightly. "Once an application is filed and attorney is assigned, external parties can't interfere. It would be... improper communication with the Patent Office."

37 CFR § 1.2 - Conduct of business with USPTO. All business must be conducted through proper channels. Ex parte communications (one party contacting examiner without other party present) prohibited. Malacar extending this rule to block ALL external interference.

"So I can't call the police because you're her LAWYER?!"

"Because we're engaged in active patent examination," Alexander corrected weakly. "Under Old Law, that creates a jurisdictional bubble. No external interference permitted until prosecution concludes."

Casey tried dialing again.

Same voice. Same message. Same polite, terrifying finality.

"I am sorry. Your call cannot be completed at this time."

"We're trapped," Casey whispered.

"Not trapped," Alexander said, though he didn't sound convinced. "Just... jurisdictionally isolated. Until the examination process completes."

Jurisdictional isolation during prosecution. Once application filed and examination begins, only attorney and applicant can communicate with Patent Office. Third parties blocked to prevent improper influence. Malacar weaponizing this rule.

Casey stared at him. "You're using lawyer talk to justify A MAGIC DATABASE BLOCKING MY 911 CALL!"

"I don't think justify is the right word—"

"WHAT IS THE RIGHT WORD?!"

"...explain?" Alexander offered weakly. His ears twitched. "Maybe clarify?"

Casey stared at her phone. Then at Alexander. Then at her phone again. "Did 911 just cite the CFR at me?"

"Technically Malacar cited the CFR," Alexander said. "911 never connected."

"For the record," he added quietly, ears flattening in misery, "my ears are not consenting to this conversation either."

Casey opened her mouth. Closed it. Looked at her phone one more time like it had betrayed her. "Athelia doesn't have a lawyer."

She's a grad student researching mythology. She doesn't have any legal cases."

"Not legal cases. Patent application." Alexander's ears twitched. He tried to still them. Failed. "She filed Thursday morning at Walnut Canyon. Continuation-in-part claiming priority to a parent application that's been pending for millennia. Guardian Queen examination protocols. I'm the attorney assigned to her case. Royal Wolf bloodline. I've been—"

On the bed, Athelia groaned.

Both of them froze.

She shifted. Frowned. Her hand moved to her head, fingers tangling in pine-needle-crusting hair.

"Mmph. Casey? Why're you yelling..." Her eyes fluttered open. Unfocused. Confused.

Then her gaze found Alexander.

Standing in her bedroom. Rumpled. Exhausted. With visible wolf ears growing from his very human head.

Her eyes widened.

"You're real," she whispered.

First client-attorney meeting. Client recognizes attorney despite amnesia. Bond recognition overrides memory wipe. 37 CFR § 11.106 privilege now active with conscious client.

Alexander's heart stuttered. "You remember?"

"I—" Athelia sat up slowly. Winced. Looked down at her torn clothes, her dirty hands. "I remember... the chamber. You were there. You said you were my attorney. You said the examination was complete. You touched my hand and—" She pressed fingers to her chest. "I felt something. Like a thread. Connecting us."

The bond. She could feel the bond.

"The application is allowable," Alexander said softly. "You survived all challenges. But you were dying. The magic was consuming you. I had to cross over. Had to bring you home."

Athelia's gaze moved to his ears. Lingered there. "You have..."

"Ears. Yes. Apparently." Alexander reached up self-consciously. "I didn't—I don't know when—the bond must have—"

"OKAY," Casey interrupted loudly. "I need someone to explain what the HELL is happening. In normal words. Without legal jargon or magic or—" she gestured wildly at Alexander, "—WOLF ANATOMY."

Athelia looked at her roommate. Then at Alexander. Then down at her torn clothes and dirt-streaked skin.

"I think," she said slowly, "I need to call my thesis advisor. And possibly a doctor. And..." Her eyes found Alexander's again. "My attorney?"

Alexander's wolf ears perked forward at "my attorney."

He really needed to figure out how to control these things.

"Okay," Casey said, voice tight. "Nobody moves. Athelia, are you saying you KNOW this—this—"

"Person," Alexander supplied helpfully.

"—CREATURE," Casey continued, "with WOLF EARS who apparently—"

She glanced at her phone.

Her face went white.

"FUCK! IT'S 8:47! I HAVE CONLAW IN THIRTEEN MINUTES!"

Athelia blinked at her groggily. "But... it's Sunday..."

"It's SATURDAY!" Casey shrieked. "Didn't you read your email? Mendez had to cancel Thursday's class for that faculty conference! Rescheduled it to Saturday morning at 9 AM!"

"I was unconscious for 48 hours," Athelia said weakly.

"WELL YOU'RE CONSCIOUS NOW! GET UP!"

Alexander blinked. "Constitutional Law?"

"YES! Professor Mendez! Nine AM! I CANNOT MISS THIS CLASS!" Casey was already moving, grabbing her backpack. "Athelia, you're coming too, right? You said you'd—"

"I—yes, but—" Athelia gestured vaguely at herself. Torn clothes. Dirt. Pine needles still in her hair.

"NO TIME! Grab a hoodie! Cover the dirt! LET'S GO!"

Alexander stood uncertainly in the middle of the chaos. "Should I —"

"YOU'RE COMING TOO!" Casey grabbed his arm. "If 911 won't work and magic databases are blocking my phone and you're her ATTORNEY, then you're staying where I can SEE you until I understand what the hell is happening!"

Attorney-client relationship requires proximity during active examination.
Casey's instinct to keep them together = accidentally correct under Old Law prosecution protocols.

Three minutes later, they burst out of the apartment.

Athelia had thrown on an oversized hoodie over her torn shirt. Still had dirt on her jeans. Her hair was a disaster but at least the pine needles were gone.

Casey had her backpack, her coffee mug (now empty), and a look of grim determination.

Alexander had wolf ears.

Visible. Furry. Completely impossible to hide.

The moment they stepped outside, wind hit Alexander's ears.

He froze.

The sensation was—he didn't have words. Wind moving through fur. Air currents he could feel in ways his human ears never registered. Temperature differentials. Pressure changes. Every tiny shift in the breeze translated into information his brain didn't know how to process.

It was disorienting. Overwhelming. Completely weird.

"Move!" Casey grabbed his other arm and hauled him forward.

They ran.

Across the parking lot. Through the gap in the fence that was technically not allowed but everyone used anyway. Onto campus.

Alexander's ears swiveled with every sound. Car door slamming to the left—ears tracked it. Birds overhead—ears tilted up. Someone shouting in the distance—ears perked forward.

He couldn't control them. Couldn't stop them from moving. Every noise, every shift in air pressure, his ears responded like they had a mind of their own.

"People are staring," Athelia gasped as they sprinted past the library.

"LET THEM STARE!" Casey's voice was pure determination. "WE'RE NOT MISSING CONLAW!"

Public exposure of attorney-client relationship. Under normal USPTO practice, attorney identity is public record. Under Old Law, exposure of Royal Wolf attorney in human world = jurisdictional complication.

They were absolutely staring. Students stopped mid-conversation to watch three people sprint across campus—one with visible animal ears growing from his head.

Phones came out. Photos were taken.

Alexander's ears flattened against his skull in mortification.

"Almost there!" Casey panted.

The law building loomed ahead. Old brick. Ivy crawling up the walls. Carved words over the entrance: FIAT JUSTITIA.

Let justice be done.

They burst through the doors at 8:59.

Sprinted down the hallway.

Skidded to a stop outside Room 204.

Through the small window in the door, Alexander could see the classroom was already full. Thirty students. Laptops open. Professor at the front writing something on the board.

Casey grabbed the door handle.

"Wait," Alexander said. "My ears—"

"Are FINE," Casey said firmly. "You're her attorney. Attorneys go to class. This is happening."

She opened the door.

All thirty heads turned.

Professor Mendez—mid-forties, sharp suit, reputation for being brilliant and terrifying—stopped mid-sentence.

Silence crashed through the room.

Alexander's ears perked forward under the attention. Then flattened. Then perked again.

Stop it, he thought desperately at his ears. Please stop moving.

They twitched.

"Ms. Morgan," Professor Mendez said slowly. "You're late."

"Sorry, Professor. Emergency." Casey slid into her usual seat. Athelia followed, pulling her hoodie tighter.

Alexander stood in the doorway.

Every eye in the room was on him. On his ears specifically.

"And you are?" Professor Mendez asked.

But right now, standing in a human law school classroom with thirty students staring at his wolf ears, he felt like an idiot.

"I'm—" His voice cracked. "I'm Ms. Winters' attorney."

Silence.

Then someone in the back row laughed.

"Your attorney?" Another student. "Dude, what are you wearing on your head?"

"They're ears," Alexander said weakly. "Wolf ears. It's... complicated."

"Are those prosthetics?"

"Is this a prank?"

"Casey, is this for your Halloween thing?"

Alexander's ears swiveled toward each voice. Betraying exactly how sensitive they were. How real they were.

Athelia stood. "He's my patent attorney. I filed an application Thursday. He's assigned to my case. The ears are... a side effect of the examination process."

More laughter. Whispers. Someone took a photo.

Professor Mendez raised one hand. The room fell silent immediately.

"Ms. Winters," he said carefully. "Are you telling me you brought your patent attorney to my Constitutional Law class? With... ears?"

"Yes, Professor."

"And the ears are real?"

Alexander's ears flattened in embarrassment, answering the question more effectively than words ever could.

Mendez stared. Then he did something unexpected.

He smiled.

"Well. This is certainly the most interesting attendance I've taken in twenty years of teaching." He gestured to an empty seat. "Mr...?"

"Alexander." He didn't give his title. Didn't mention prince or bloodline or kingdom. Just. "Alexander."

"Mr. Alexander. Please sit. We're discussing federalism and the Commerce Clause. I'm sure as a patent attorney you have opinions on federal jurisdiction."

Constitutional Law governs federal power, including patent law (Article I, § 8, Clause 8 - Congress has power to "promote the Progress of Science").
Federal jurisdiction over patents = exclusive. Old Law operates in parallel jurisdiction.

Alexander moved to the empty seat next to Athelia. The bond hummed between them—closer now, stronger, impossible to ignore.

As he sat, his gaze swept across the classroom.

And froze.

Third row. Window seat.

A student with dark hair. Sharp features. And eyes the color of sapphires.

The student was staring at Alexander with an expression of barely controlled amusement.

Then he raised one hand in a small, mocking salute.

Alexander's ears perked forward in confusion.

Who is that?

The student smiled. Like he knew exactly what Alexander was thinking. Like this entire situation was hilarious.

Like he'd been waiting for this moment.

Professor Mendez cleared his throat and turned to face the class.

"Welcome to our..." He paused. His gaze landed on Alexander's ears. Lingered there for a long, uncomfortable moment. "...makeup class session."

Another pause. The ears twitched.

Mendez blinked, visibly resetting. "Right. Let's begin. The Commerce Clause. Can anyone explain why this is relevant to patent law?"

The sapphire-eyed student raised his hand.

"Mr. Cael'Sereith?" Mendez called.

"Article I, Section 8, Clause 8 gives Congress power to grant patents," Severen said smoothly. "But the Commerce Clause—Clause 3—gives federal courts exclusive jurisdiction over patent cases because intellectual property inherently affects interstate commerce. State courts can't hear patent infringement claims. It's exclusively federal."

His gaze slid to Alexander. To the wolf ears. To Athelia beside him.

"Unless," he added, voice carrying a hint of something dangerous, "you're operating under a completely different

jurisdictional system. In which case, federal exclusivity becomes... complicated."

Alexander's blood went cold.

He knows.

Professor Mendez nodded. "Excellent analysis, Severen. Though I'm not sure what 'different jurisdictional system' you're referring to."

"Just a hypothetical, Professor," Severen said lightly. "For discussion purposes."

His sapphire eyes never left Alexander's face.

Athelia's hand found Alexander's under the desk. Squeezed once.

That's him, she breathed through the bond. That's Severen. The one who told me about the barrier.

Alexander's ears flattened.

Severen's smile widened.

Sapphire eyes. Pre-filing counselor. Examiners who left the Office to teach balance. To help inventors understand the system before they file.

This was the person who'd told Athelia to go to Walnut Canyon.

Who'd explained about the barrier. About Guardian Queens. About filing.

Who'd set this entire thing in motion.

And now he was sitting in a Constitutional Law class, watching Alexander with wolf ears try to explain federal jurisdiction, looking like Christmas had come early.

Professor Mendez continued lecturing about the Commerce Clause.

Alexander's ears twitched with every word.

Athelia's hand stayed in his.

And Severen sat three rows away, sapphire eyes gleaming with knowledge and secrets and the satisfaction of a plan unfolding exactly as designed.

Professor Mendez cleared his throat. "Thank you, Mr. Cael'Sereith. That was... thorough. Now, can someone explain how the Commerce Clause intersects with the Necessary and Proper Clause when Congress establishes administrative agencies like the USPTO?"

A hand went up in the back row.

Different hand. Different student.

"Mr. Wavelander?" Mendez called again.

Alexander's ears pricked forward. Wavelander. That name...

The student who stood was nothing like Severen. Tall, yes. But where Severen was blonde with sapphire eyes and a pre-filing counselor's easy charm, this man had brown hair pulled back in a low ponytail, silver eyes that caught the fluorescent light like mirrors, and the kind of presence that made the room go quiet without him saying a word.

Article I, § 8, Clause 18 - Necessary and Proper Clause. Congress may make laws "necessary and proper" for executing enumerated powers. Allows creation of USPTO to administer patent system under Clause 8.

"The Necessary and Proper Clause—Article I, Section 8, Clause 18—gives Congress implied powers to execute its enumerated authorities," the silver-eyed Wavelander said. His voice was smooth, controlled, nothing like Severen's playful lilt. "When combined with the Patent Clause, it allows Congress to establish the USPTO as an administrative body. The Commerce Clause provides the jurisdictional hook—patents inherently affect interstate commerce, so federal courts have exclusive subject matter jurisdiction."

He paused. His silver eyes slid to Alexander. To the wolf ears.

"But the interesting question," he continued, "is what happens when an invention exists in multiple jurisdictions. When the patent office of record isn't the USPTO. When Old Law predates federal administrative authority by millennia."

Mendez blinked. "I'm... not sure I follow."

"Just a theoretical," the silver-eyed man said. But his gaze never left Alexander. "For academic discussion."

He sat down.

Across the room, Severen Cael'Sereith raised his hand.

Mendez sighed. "Mr. Cael'Sereith, I'm sensing a theme here. Do you and Mr. Wavelander want to elaborate on this 'multi-jurisdictional' theory?"

Severen's sapphire eyes gleamed. "Just exploring the Commerce Clause implications, Professor. For instance—Article I, Section 8, Clause 3 gives Congress power to regulate commerce 'among the several states.' But what about commerce that predates state formation? Commerce that exists in jurisdictions the federal government doesn't acknowledge?"

"You're talking about interstate commerce," Mendez said carefully. "Which falls under federal authority."

"Unless," Wavelander interjected, "the commerce isn't inter-state. It's inter-jurisdictional. Between recognized legal systems and... older ones. Systems that never ceded authority to federal administrative bodies."

Commerce Clause debate - What counts as "commerce among the states"? Can federal power extend to transactions outside recognized state boundaries?

Mendez blinked. "I'm not sure I follow. All commerce in the United States—"

"Assumes the United States has exclusive territorial jurisdiction," Severen finished. "But the Patent Clause—Article I, Section 8, Clause 8—predates many territorial acquisitions. What about patent systems that existed BEFORE the Constitution was ratified? Before federal patent law superseded earlier examination protocols?"

"You're describing historical patents," Mendez said. "Which would have expired centuries ago."

"Unless," silver-eyes said quietly, "the examination isn't finished. Unless the application is still pending. Under a different Office's protocols."

The classroom had gone completely silent.

Alexander's ears were flat against his skull.

Athelia's hand squeezed his tighter.

And Alexander realized with cold certainty: They're not just working together. They're building a legal argument. In front of witnesses. In a Constitutional Law class. They're establishing that multi-jurisdictional patent prosecution is THEORETICALLY POSSIBLE under federal law.

Mendez cleared his throat. "Gentlemen, while I appreciate the... creative constitutional theory, I think we should return to established case law. The Commerce Clause as it's actually applied—"

"Gibbons v. Ogden," Severen said immediately. "1824. Commerce Clause grants Congress broad power to regulate interstate commerce. Chief Justice Marshall's interpretation."

"Yes. Thank you. So federal authority—"

"But Marshall also noted," Wavelander continued, "that commerce regulation presumes the entities engaged in commerce fall under federal jurisdiction. What about entities that predate federal authority? That never consented to federal governance?"

"Like Native American tribes," Severen added. "Who retain quasi-sovereign status. Whose treaties predate the Constitution. Who maintain their own legal systems parallel to federal courts."

Cherokee Nation v. Georgia (1831) - Tribes as "domestic dependent nations" with sovereignty predating U.S. formation

"Yes, but tribal sovereignty is a recognized exception—"

"What if there are OTHER exceptions?" Silver-eyes leaned forward. "Other sovereignties federal law doesn't acknowledge? Patent offices that operated for millennia before the USPTO was established in 1836?"

Severen's sapphire eyes caught the light. "The Constitution grants Congress power to issue patents. But it doesn't grant exclusive jurisdiction over ALL patent systems. Just the ones Congress chooses to recognize. Even modern law admits federal exclusivity has limits—Gunn v. Minton held that patent malpractice claims can be heard in state court despite their patent flavor. Jurisdiction isn't as absolute as we teach undergrads."

Gunn v. Minton (2013) - Patent malpractice claims (legal malpractice involving patents) can be heard in STATE court. Federal exclusivity under 28 U.S.C. § 1338(a) doesn't extend to all patent-related claims. Limits on "exclusive" jurisdiction.

"This is wildly theoretical—" Mendez started.

"Is it?" Wavelander's voice was soft. Dangerous. "Or is it the logical conclusion of federalism? States retain powers not explicitly granted to federal government. What about sovereignties that predate BOTH federal and state formation?"

Tenth Amendment - Powers not delegated to federal govt reserved to states or the people. But what about powers predating the Constitution itself?

The classroom was riveted now. Students leaning forward. Someone had started taking notes.

Alexander wanted to disappear through the floor.

Casey leaned over and whispered, "So. Your attorney has wolf ears. Your pre-filing consultant is in this class. And some guy named Wavelander who apparently knows about magic patent systems. And they're BOTH building a constitutional argument for why ancient patent offices might still have legal authority. This is either the best coincidence ever or we're in a simulation."

"I don't think it's a coincidence," Athelia whispered back.

"Yeah. Me neither."

Alexander sat rigidly in his seat, trying to ignore the stares, the whispers, the way his ears kept swiveling toward every sound. Trying to focus on Mendez's lecture about federal exclusive jurisdiction and administrative law.

But all he could think was: Severen and Wavelander. Sapphire eyes—pre-filing counselor. Silver eyes with brown hair—what kind of examiner has silver eyes? What branch?

The downloaded knowledge stirred. Silver. Balance. Obviousness examination. Section 103. Weighing prior art against innovation. Finding the line between obvious combinations and inventive step.

This was planned, he realized. All of it. Severen guided her to file. Silver-eyes knows about multi-jurisdictional prosecution. They're both here. Both watching. Both waiting to see what happens next.

But why?

Ex parte communication = one party contacting Patent Office without other party's knowledge. Prohibited in USPTO prosecution. Raises questions of fairness, due process. What about pre-filing communication between applicant and third parties?

The bond pulsed. Athelia was thinking the same thing. He could feel her uncertainty, her suspicion, her growing realization that they'd both been maneuvered into this situation.

Across the room, Wavelander pulled out a tablet. Started typing.

Three rows forward, Severen smiled.

Not a friendly smile.

A satisfied one.

And Alexander's wolf ears caught the faint sound of a message being sent.

Mendez was still lecturing. Something about federal preemption and the Supremacy Clause. But Wavelander raised his hand again.

"Professor, one more question about jurisdictional boundaries."

Mendez sighed. "Yes, Mr. Wavelander?"

"In Old Law prosecution—" He paused. "I mean, in patent systems that predate modern administrative procedure, examination was conducted through direct interface. Examiner and applicant met at the barrier. No written Office Actions. No response periods. Just immediate evaluation."

Alexander's ears swiveled toward him involuntarily.

That's exactly how it works, he thought. Athelia filed. I examined at the barrier. Immediate download. Immediate response.

Someone in the third row giggled. "Dude, his ears just moved."

More laughter.

Alexander's ears flattened in embarrassment, which only made it worse.

"They're like a DOG," someone whispered loudly.

Alexander froze.

His ears swiveled toward Severen.

The classroom erupted in laughter.

"OH MY GOD THEY MOVE WHEN HE THINKS!"

"Someone make a loud noise, I wanna see them twitch!"

Alexander scooted closer to Athelia. Instinctive. Protective. The bond humming safe, mine, protect through his chest.

Athelia's hand found his under the desk again. Squeezed.

"Class," Mendez said sharply. "Please settle down."

But someone in the back row pulled out their phone. Started filming.

"Dude, TikTok is gonna lose its MIND over wolf ear guy—"

Alexander's ears pinned back. He pressed closer to Athelia, angling his body between her and the rest of the class.

The laughter got louder.

Flight response triggering protective instinct. Attorney-client privilege extends to physical protection during examination?

Mendez set down his marker. "Alright. That's enough. Mr.—" He paused. "I'm sorry, I don't actually know your name. The gentleman with the... ears. I'm going to have to ask you to leave. You're becoming a distraction."

Alexander's ears snapped forward. "No."

Silence.

"Excuse me?" Mendez said.

"I'm staying." Alexander stood, still positioned protectively in front of Athelia. "This lecture is discussing jurisdictional issues that bear directly on Ms. Winters' pending patent prosecution. Under 28 U.S.C. Section 1338(a), federal courts have exclusive jurisdiction over patent cases—meaning the legal theories being discussed here could establish framework for her case. Excluding me would constitute an ex parte proceeding—a one-sided examination of legal issues affecting my client without her attorney present."

28 U.S.C. § 1338(a) - Federal courts have EXCLUSIVE original jurisdiction over patent cases. No state court can hear patent infringement claims. This is THE key jurisdictional statute for patents.

Mendez blinked. "This is a Constitutional Law class, not a legal proceeding—"

"You're teaching about federal exclusive jurisdiction over patents," Alexander continued. His voice was steady despite his ears betraying his nervousness with constant micro-movements. "Article I, Section 8, Clause 8. Commerce Clause implications. These are the exact legal frameworks that will determine whether Ms. Winters' patent application is examined under federal USPTO rules or under... alternative jurisdictional protocols."

"Alternative—what are you even talking about?"

"Mr. Cael'Sereith and Mr. Wavelander have been discussing multi-jurisdictional patent systems," Alexander said. "Patent offices that predate federal authority. Examination protocols that fall outside USPTO jurisdiction. My client has filed such an application. These legal theories being discussed in this classroom could establish precedent for how her prosecution proceeds."

Ex parte proceeding = one party absent. Prohibited in most legal contexts. Attorney has duty to monitor proceedings affecting client interests.

"This is an ACADEMIC lecture—"

"Being recorded," Alexander gestured to the student with the phone. "And discussed in a public university classroom. Under the First Amendment, this constitutes public discourse on matters of legal significance. Under the Fourteenth Amendment Due Process Clause, my client has a right to attorney representation during public discussions of law that directly impacts her case."

The classroom was dead silent now.

Mendez opened his mouth. Closed it. Opened it again.

"You're citing the Fourteenth Amendment to justify staying in my Constitutional Law class?"

"Yes." Alexander's ears were flat against his skull but his voice never wavered. "I'm citing the Due Process Clause. And the First Amendment's protection of attorney-client privilege during public legal discourse. And Article I's grant of patent authority which establishes my standing as a patent attorney to monitor discussions of patent law. You can ask me to leave. But if you do, I'll file an immediate motion with the university administration arguing that my exclusion violates my client's due process rights during a proceeding that directly affects her ongoing patent prosecution."

Due Process Clause (14th Amendment) - No state shall deprive any person of life, liberty, or property without due process of law. Does "property" include pending patent applications? **Oil States v. Greene's Energy (2018)** - Patents are public-rights franchise, but still "property" for many purposes. **Board of Regents v. Roth** - Property interests require legitimate expectancy.

Silence.

Then someone in the back row whispered, "Holy shit, wolf guy knows constitutional law."

Mendez rubbed his temples. "Fine. FINE. You can stay. But if anyone else films those ears, I'm confiscating phones. This is a classroom, not a circus."

Alexander sat down.

His ears perked forward in victory.

More giggles rippled through the class, but quieter now. Respectful.

Athelia looked at him with something like awe.

And across the room, both Severen and Wavelander were smiling.

Athelia pulled out her notebook. Started to write notes about the Commerce Clause lecture.

But her hand moved on its own.

She blinked. Looked down.

She'd drawn a wolf.

Not a sketch. Not a doodle.

A PERFECT anatomical rendering. Every detail precise. Ears alert. Eyes watching. Protective stance.

She'd never drawn a wolf before in her life.

Didn't remember deciding to draw this one.

Her hand kept moving. Below the wolf, she started writing notes. Mendez was still talking about McCulloch v. Maryland and implied powers. She tried to write what he was saying.

But what came out was:

```
01000011 01101100 01100001 01101001 01101101 00100000 00110010 00100000
01110010 01100101 01100100 01110101 01100011 01110100 01101001 01101111
01101110 00100000 01110100 01101111 00100000 01110000 01110010 01100001
01100011 01110100 01101001 01100011 01100101 00100000 01100011 01101111
01101101 01110000 01101100 01100101 01110100 01100101
```

Binary.

She was writing in binary.

Without thinking about it.

Without translating.

Her hand just... knew.

She stared at the numbers. Tried to read them. Couldn't.

But somehow she KNEW what they said:

Claim 2 reduction to practice complete.

Her hand kept writing. More binary. Faster now.

```
01000010 01101111 01101110 01100100 00100000 01100110 01101111 01110010
01101101 01101001 01101110 01100111 00101110 00100000 01001110 01100101
01110101 01110010 01100001 01101100 00100000 01110000 01100001 01110100
01101000 01110111 01100001 01111001 01110011 00100000 01100001 01100011
01110100 01101001 01101110 01100101 00101110 00100000 01000011 01101100
01100001 01101001 01101101 00100000 00110011 00100000 01100101 01101110
01100001 01100010 01101100 01100101 01101101 01100101 01101110 01110100
00100000 01110110 01100101 01110010 01101001 01100110 01101001 01100101
01100100 00101110
```

Bond forming. Neural pathways active. Claim 3 enablement verified.

She looked at Alexander.

His ears swiveled toward her like he'd heard her thoughts.

Which, she realized with cold certainty, he probably had.

Her hand moved again. Not binary this time. Just words appearing on the page in her own handwriting:

```
§ 112(a) ENABLEMENT SATISFIED
PHOSITA = PERSON HAVING ORDINARY SKILL IN THE ART
Unexpected results = secondary consideration proving non-
obviousness
```

Athelia stared at what she'd written.

She didn't know what PHOSITA meant. Had never heard the term. Couldn't explain what "secondary consideration" referenced.

She flipped the page. Started fresh. Tried to focus on Mendez's lecture.

But the words kept coming.

The bell rang.

Students gathered their things. Mendez looked exhausted, like he'd just taught a class that had spiraled completely out of his control. Which, Alexander reflected, he had.

"We'll continue with *McCulloch v. Maryland* next week," Mendez said weakly. "And please—stick to established case law. Not theoretical multi-jurisdictional patent systems that may or may not predate the Constitution."

Wavelander stood. Gathered his things. Started toward the exit.

But Severen Cael'Sereith moved faster.

He crossed the classroom in three strides and stopped directly in front of Athelia.

"Ms. Winters," he said pleasantly. "How nice to see you again. I trust your weekend trip to Walnut Canyon was... productive?"

Athelia's breath caught.

Alexander's ears snapped forward.

Casey muttered, "Oh fuck, here we go."

"You told me to file there," Athelia said. Her voice was steady despite the bond humming panic through Alexander's chest. "You said the barrier would recognize me. That I'd complete the First Woman's application."

"And did you?" Severen's sapphire eyes gleamed.

"You know I did."

"Good." He glanced at Alexander. At the wolf ears. "And I see your assigned attorney completed his examination. Timely response. Well done, Your Highness."

The classroom went dead silent.

Everyone still packing up froze.

Alexander's ears flattened. "Don't call me that."

"Why not?" Severen's smile was sharp. "It's what you are. Prince of the Wolf Kingdom. Guardian of the barrier. Assigned to examine continuation-in-part applications from Guardian Queen bloodlines. You completed your forty-eight-hour examination. Submitted your response. The bond formed. Claim 2 is reducing to practice." He gestured at Alexander's ears. "Quite visibly."

Reduction to practice = physical embodiment proving claims work.
Alexander's dual-form manifestation = actual reduction, not just constructive.

Someone in the back row whispered, "What the fuck is happening?"

"Pre-filing consultation," Severen said, not taking his eyes off Alexander. "I help inventors understand the system before they file. Make sure they know what they're claiming. What bonds will form. What examination protocols apply."

"You didn't tell me my claims would be altered," Athelia said. Her voice was ice. "You didn't tell me Malacar would add Claim 2 and Claim 3 without my consent."

"No," Severen agreed. "I didn't. Because you needed to FILE. And if you'd known your application would be modified to include a Royal Wolf Attorney as part of your claimed invention, you would have hesitated. Questioned. Maybe not filed at all. And then you'd be dead."

"So you lied by omission," Alexander growled.

"I provided pre-filing counseling," Severen corrected. "Which doesn't include disclosing what the examination office will do AFTER filing. That's Malacar's domain, not mine."

37 CFR § 11.18(b) - Patent practitioner duties. Must provide competent representation but not required to disclose Patent Office's internal procedures.

Wavelander appeared at Severen's shoulder. "You've made your point, Severen. They know we're watching."

"Have I?" Severen's gaze slid to Athelia. "Because I'm not sure she understands what's at stake. The First Woman's application has been pending for millennia. Twenty-three women died trying to file continuation applications. Athelia is the FIRST to survive. The first to complete prosecution. The first to form the bond."

He leaned closer.

"And now the real examination begins."

"Excuse me."

All three of them turned.

Professor Mendez stood in the doorway, briefcase in hand, looking profoundly uncomfortable.

"Ms. Winters," he said carefully. "Mr. Cael'Sereith. Mr. Wavelander." He paused, looking at Alexander. "And... whoever you actually are. I need to speak with Ms. Winters. Privately."

Severen gave Athelia one last meaningful look, then walked out. Wavelander followed silently.

Alexander didn't move.

"That includes you," Mendez said.

"I'm her attorney." Alexander's ears were flat but his voice was firm. "Anything you need to discuss with her regarding today's class falls under matters affecting her legal interests. Attorney-client privilege means I stay."

Mendez stared at him for a long moment. Then sighed. "Fine. But if those ears move one more time, I'm calling campus security. I don't care how good your constitutional arguments are."

He walked to the front of the classroom. Set down his briefcase. Turned to face them both.

"Ms. Winters, I need to know what exactly is going on in my classroom."

"I don't know what you—"

"Don't." His voice was sharp. "Two students just spent forty-five minutes building a constitutional argument for multi-jurisdictional legal systems that predate federal authority. Your... attorney... cited the Sixth, First, and Fourteenth Amendments to justify staying in an academic lecture. You've been writing in binary code." He gestured to her notebook, still open on the desk. "And I've been teaching constitutional law for fifteen years. I know when something is very, very wrong."

Academic freedom vs institutional duty. When does a professor have obligation to report concerning classroom activity?

Athelia's mouth went dry.

Mendez continued, "I don't know if this is some kind of elaborate academic project, or if you're involved in something genuinely dangerous. But what I DO know is that the arguments raised in my class today weren't theoretical. They were targeted. Specific. Like you're building a legal framework to support something that's about to happen."

He looked at Alexander. At the wolf ears that Alexander couldn't hide even if he wanted to.

"And I know those aren't a costume."

Silence.

"Professor—" Athelia started.

"I'm not asking you to explain," Mendez interrupted. "I'm giving you an assignment. Both of you." He pulled out a notepad. Started writing. "You're going to research and write a twenty-page paper on jurisdictional conflicts between federal authority and pre-constitutional sovereignties. You'll examine tribal sovereignty as established in *Cherokee Nation v. Georgia*, territorial disputes under the Treaty of Guadalupe Hidalgo, and Louisiana Purchase integration challenges. You'll analyze how federal courts have handled claims from legal systems that predate U.S. governance."

Assignment Purpose: Force them to think through legal implications of their situation using established case law.

He tore off the page. Handed it to Athelia.

"And you'll include," he said quietly, "a section on what happens when a legal system everyone THOUGHT was extinct suddenly reasserts authority. How federal law handles that. What constitutional frameworks apply. Whether there's ANY legal precedent for acknowledging jurisdiction over U.S. territory by an entity the government doesn't recognize exists."

Athelia stared at the assignment paper.

"Due date?" she whispered.

"Next Monday." Mendez picked up his briefcase. "Which gives you one week to figure out how to articulate whatever this is in legal terms that won't get you arrested, committed, or disappeared by whichever government agency handles... wolf people with constitutional law arguments."

He walked to the door. Stopped.

"Ms. Winters, whatever you're involved in—it's bigger than a Constitutional Law grade. I know that. But if you're going to survive it, you're going to need to understand how federal law actually works. Not theoretical multi-jurisdictional systems. Real, current, enforceable law."

His gaze shifted to Alexander.

"And you—whoever you are, whatever you are—you called yourself her attorney. That means you have a duty to keep her alive. Not just protect her from external threats. But protect her from making legal arguments that will get her labeled a domestic terrorist or a national security threat. The theories discussed in class today? If presented to the wrong people, in the wrong way, they could be interpreted as challenging federal sovereignty. That's sedition territory."

18 U.S.C. § 2384 - Seditious conspiracy. Conspiring to overthrow or oppose U.S. government authority by force. Does legal argument constitute "force"?

Alexander's ears flattened. "I understand."

"Good." Mendez opened the door. "Because Mr. Cael'Sereith and the other Mr. Wavelander just built you a beautiful legal trap. If you're not careful, that constitutional framework they established will be used against you in federal court. They gave you the rope. Don't hang yourselves with it."

He left.

The door closed.

Athelia and Alexander sat in the empty classroom. Her notebook full of binary. His ears betraying every emotion he couldn't hide. The bond humming between them.

"He's right," Alexander said quietly. "Severen and Issac weren't helping us. They were documenting. Building a record. Making sure there are witnesses who can testify that you're claiming jurisdiction outside federal authority."

"Why?"

"Because when this goes to trial—and it WILL go to trial—they want to make sure the federal courts can't pretend we don't exist. They're forcing recognition. Even if that recognition comes in the form of prosecution."

Strategic litigation. Sometimes acknowledgment through prosecution is better than continued invisibility. Forces courts to address existence of alternative jurisdiction.

Athelia looked at the homework assignment. At the list of cases and legal frameworks.

"Then we'd better start researching," she said.

Casey's phone buzzed. She glanced at it. Her eyes went wide.

"Uh. Guys?"

She turned the screen toward them.

A Twitter notification. Trending in United States:

#WolfCounselor

"Someone posted video from class," Casey said weakly. "It's already at 2 million views."

Alexander's ears flattened completely.

Public documentation of supernatural entities. Social media as evidence. Once information enters public domain, it cannot be retracted. The barrier between worlds just became very, very thin.

*

They walked back to the apartment in silence.

Well. Not complete silence. Alexander's ears tracked every sound. Car engines. Birds. Wind through trees. Someone's phone ringing half a block away. His ears swiveled, twitched, perked, flattened—all completely beyond his control.

Athelia walked beside him, hood pulled up, hands shoved in pockets. Still covered in dirt. Still exhausted. The bond hummed between them with every step.

Casey trailed behind, phone out, doom-scrolling through #WolfCounselor videos. "Three million now," she muttered. "Someone made a TikTok. You're a meme."

Alexander's ears drooped.

They climbed the stairs to the apartment. Casey unlocked the door. They filed inside.

The door closed.

Silence.

"Okay," Casey said, dropping her backpack. "I'm ordering pizza. Does the wolf attorney eat normal food or do I need to google 'what do lawyers eat'?"

"Pizza is fine," Alexander said quietly. His ears were still tracking sounds through the walls. Neighbors arguing two doors down. Someone vacuuming upstairs. Water running in pipes.

"Great. Cool. Normal pizza for the abnormal attorney." Casey pulled out her phone. "Athelia, you want your usual?"

"Yeah." Athelia sank onto the couch. Closed her eyes. "And coffee. Lots of coffee."

"It's 2 PM."

"I was unconscious for 48 hours and just watched two patent examiners build a constitutional law trap using my life as the test case. I need coffee."

Exhaustion during patent prosecution. Examination process is mentally demanding. Guardian Queen protocols even more so. Requires sustained focus, legal analysis, jurisdictional awareness.

Casey ordered. Alexander stood uncertainly in the middle of the living room, ears swiveling, clearly not knowing what to do with himself.

"So," Casey said, setting her phone down. "What happens now?"

Alexander's gaze moved to Athelia. "I... need to stay."

"Stay?" Athelia opened one eye.

"The examination isn't complete. The bond—" His hand moved to his chest. "The attorney-client relationship requires proximity during active prosecution. I can't leave until—"

"Until what?" Casey demanded. "Until the magic says you can? Until 911 starts working again? Until your EARS fall off?"

"Until the application issues," Alexander said. "Or is abandoned. Or prosecution concludes." His ears flattened. "I don't make the rules. I'm just—they're Old Law. They're absolute."

37 CFR § 11.106 - Attorney-client privilege requires confidentiality, loyalty, proximity. Under Old Law, bond enforces these requirements literally. Attorney cannot physically separate from client during active examination.

Athelia sat up slowly. "You're saying you can't leave. Like. At all."

"Not until prosecution concludes."

"How long does that take?"

Alexander's ears twitched. "Depends on the complexity of the application. Your case involves Guardian Queen protocols, jurisdictional conflicts, constitutional challenges, potential fraud allegations..." He hesitated. "Could be weeks. Could be months."

"MONTHS?!" Casey's voice went shrill.

"You are NOT staying here for MONTHS!" Athelia stood. "This is a two-bedroom apartment! We barely have space for—"

"I don't need much space." Alexander's desperation was showing. His ears flat against his skull. "A corner. A blanket. I'll stay out of the way. I just—I can't leave. The bond won't let me leave."

He looked miserable. Exhausted. His wolf ears betraying every emotion he couldn't hide.

Athelia stared at him. "Fine. FINE. You can stay. But you're sleeping on the floor."

"Agreed."

"In my room. Because apparently the bond requires 'proximity' and I'm not dealing with you passing out in the hallway if you get too far away."

"Understood."

"You are NOT sharing my bed."

Alexander's ears perked up slightly—hope—then flattened completely when her expression didn't change. "Of course not. Floor. I'll take the floor."

His wolf was probably screaming. Alexander looked like he was dying inside.

Mate bond vs. professional boundaries. Wolf wants proximity, contact, acknowledgment. Attorney knows this is WILDLY inappropriate. Conflict between instinct and ethics = visible in ear position.

"I'll get blankets," Casey said flatly. She disappeared into the hallway closet.

Athelia pointed at her bedroom. "Come on. Let's figure out where you're sleeping that won't result in me tripping over you at 3 AM."

Alexander followed her into the small bedroom. Single bed. Desk covered in books and papers. Posters on the walls—mythology, ancient civilizations, patent law diagrams she'd printed and pinned up during research.

Athelia pointed to the corner by the window. "There. You get approximately four square feet of floor space. Don't touch my stuff. Don't snore. Don't—" She noticed his ears tracking her every word. "—don't make this weird."

"I'll do my best," Alexander said quietly.

Casey appeared with an armful of blankets and two pillows. Dumped them in the corner. "Here. Try not to die of floor-sleeping. I need at least one of you functional for when the federal government shows up to arrest us all."

"That's not—" Alexander started.

"Don't. I've seen the Twitter videos. Someone tagged the FBI. Multiple someones. #WolfCounselor is trending next to #NationalSecurity." Casey's expression was dead serious. "So yeah. Federal government. Probably Monday."

Social media documentation of supernatural events. Public interest + national security implications = federal investigation likely. 18 U.S.C. § 2384 seditious conspiracy concerns real.

Alexander's ears flattened.

Pizza arrived. They ate in uncomfortable silence. Alexander sat on the floor of Athelia's room, pizza slice in hand, ears swiveling to track sounds from three apartments away. Athelia sat at her desk, trying to focus on Mendez's homework assignment.

She opened her laptop. Pulled up the assignment: 20-page analysis of jurisdictional conflicts between federal and pre-constitutional authority. Due Wednesday.

She started typing.

Constitutional law. Article I. Commerce Clause. Cherokee Nation v. Georgia as precedent for pre-constitutional sovereignty. Federal exclusivity under 28 U.S.C. § 1338(a) for patent cases.

Her hands moved across the keyboard.

Words appeared on screen.

And then—between one sentence and the next—binary code.

```
01000111 01110010 01100001 01101000 01100001 01101101
00100000 01100110 01100001 01100011 01110100 01101111
01110010 01110011 00100000 01100001 01110000 01110000
01101100 01111001
```

Athelia stared at the screen. She didn't remember typing that. Didn't know what it said. But her fingers had moved. The code was there.

She kept typing.

More constitutional analysis. Then more binary. Then her hand grabbed a pen and started writing in the margins of her notes:

§102(b)(1) grace period - one year from inventor's own disclosure
Prior art exception if disclosure by inventor
Graham factors: (1) scope/content of prior art (2) differences (3)
level of ordinary skill (4) secondary considerations
Secondary considerations = objective indicia of non-obviousness
Commercial success, long-felt need, failure of others

Athelia stared at what she'd written. She didn't know what "Graham factors" meant. Had never heard of "§102(b)(1) grace period." Couldn't explain "objective indicia."

But her hand had written it anyway.

"Are you okay?" he asked quietly.

"I'm writing things I don't understand," Athelia said. Her voice shook slightly. "Patent law terms. Binary code. Like someone else is using my hands."

"For what?"

"For when you remember."

Athelia looked at her notes. At the binary code on her screen. At the constitutional law analysis mixing with patent law concepts she'd never studied.

"I don't want to remember," she whispered.

Alexander's ears drooped. "I know."

The bond hummed between them. Four feet of space. An entire world of complications.

By midnight, Athelia had written twelve pages. Half constitutional law. Half patent examination analysis. All of it somehow coherent despite being two completely different papers woven together.

She saved the file. Closed her laptop. Looked at Alexander in the corner, wrapped in blankets, sitting upright against the wall.

"You should sleep," she said.

"I will."

"You're not going to, are you."

His ears twitched. "Probably not."

"The bond?"

"The bond. And the fact that my wolf is extremely aware that you're four feet away and I'm on the floor like a guilty puppy." His smile was strained. "It's fine. I've had worse sleeping arrangements."

Athelia turned off the light. Climbed into bed. Pulled the covers up.

Darkness.

The bond hummed.

Alexander's breathing was too controlled. Too careful. Like he was hyper-aware of every sound he made.

"Thank you," Athelia said quietly into the dark. "For saving my life. At Walnut Canyon."

Silence. Then:

"You're welcome." His voice was soft. Tired. "It's my job. Attorney-client relationship. Professional responsibility."

His ears, invisible in the darkness, probably just flattened in misery at the lie.

Because they both knew it wasn't professional responsibility.

It was the bond.

37 CFR § 11.106 attorney-client privilege creates confidential relationship. But Old Law bond creates something deeper - obligation beyond professional duty. Attorney would die for client not because of ethics rules, but because bond demands it.

Forty miles away, in a palace hidden behind its own jurisdictional barrier, the council convened in emergency session.

A projection shimmered in the center of the chamber. Twitter feed. TikTok videos. News articles forming in real-time: Viral Video: Law Student Brings "Wolf Attorney" to Class.

#WolfCounselor. 5 million views. Rising.

The council watched in silence.

"He's protecting her," Marcus said from his position against the wall. "As her attorney. As the bond requires."

"He's endangering the entire realm," another council member said. "If humans discover the barrier. If they investigate the wolf king attorney. If they trace him back here—"

"They'll find us," Karenth finished. "And three hundred years of careful isolation ends."

Silence.

"All in favor of recall," Karenth said. "Ordering the prince to return immediately and sever the bond."

Three hands raised.

The motion carried.

Marcus's jaw tightened. But he said nothing.

Because they both knew Alexander wouldn't obey.

The bond wouldn't let him.

— END CHAPTER SIX —

STATUTORY REFERENCE INDEX - Chapter 6

Key Federal Statutes:

- 28 U.S.C. § 1338(a) - Federal courts have EXCLUSIVE jurisdiction over patent cases (THE key statute for patent jurisdiction)
- 37 CFR § 1.2 - Conduct of USPTO business (Malacar blocks 911 citing proper channels)
- 37 CFR § 11.106 - Attorney-client privilege and confidentiality
- 18 U.S.C. § 2384 - Seditious conspiracy (Mendez's warning about challenging federal authority)

Constitutional Provisions:

- Article I, § 8, Clause 8 - Patent & Copyright Clause (Congressional power to grant patents)
- Article I, § 8, Clause 3 - Commerce Clause (regulates interstate commerce, affects patent jurisdiction)
- Article I, § 8, Clause 18 - Necessary and Proper Clause (allows USPTO creation)
- Tenth Amendment - Powers not delegated to federal govt reserved to states (but what about pre-constitutional powers?)
- Fourteenth Amendment Due Process - Property rights require process (are pending patents "property"?)

Key Cases:

- Gunn v. Minton (2013) - Patent malpractice claims can be in STATE court (limits on federal exclusivity)
- Oil States v. Greene's Energy (2018) - Patents are public-rights franchise but still "property" for many purposes
- Board of Regents v. Roth - Property interests require legitimate expectancy

- **Cherokee Nation v. Georgia (1831)** - Tribes as "domestic dependent nations" with pre-constitutional sovereignty
- **Gibbons v. Ogden (1824)** - Commerce Clause grants Congress broad power over interstate commerce
- **McCulloch v. Maryland (1819)** - Necessary & Proper Clause allows implied federal powers

Key Patent Concepts:

- **§ 112(a) Enablement** - Specification must teach PHOSITA how to make/use invention
- **PHOSITA** - Person Having Ordinary Skill In The Art (legal fiction for enablement analysis)
- **Reduction to Practice** - Alexander's body conforming to claim specifications = actual reduction
- **Secondary Considerations** - Unexpected results prove non-obviousness under § 103
- **Ex Parte Proceeding** - One party absent during proceedings affecting their interests (prohibited)

FULL STATUTORY TEXT

Referenced Statutes - For Patent Bar Study

28 U.S.C. § 1338(a) - Exclusive Jurisdiction Over Patents

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety

protection, copyrights and trademarks. **No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents**, plant variety protection, or copyrights. For purposes of this subsection, the term "State" includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands.

37 CFR § 1.2 - Business to be Conducted with Decorum and Courtesy

(a) Parties and their attorneys or agents are required to conduct business with the United States Patent and Trademark Office with decorum and courtesy. Papers presented in violation of this requirement will be submitted to the Director and will not be entered. A notice of the non-entry of the paper will be provided.

(b) Complaints regarding USPTO employees should be submitted to the immediate supervisor of that employee. Such complaints will be appropriately investigated and responded to promptly.

Note: In Chapter 6, Malacar cites § 1.2 when blocking Casey's 911 call, extending "proper channels" rule to prevent all external interference during prosecution.

37 CFR § 11.106 - Confidentiality of Information

(a) GENERAL RULE.—A practitioner shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, paragraph (b) of this section permits such disclosure, or paragraph (c) of this section requires such disclosure.

(b) PERMITTED DISCLOSURE.—A practitioner may reveal information relating to the representation of a client to the extent the practitioner reasonably believes necessary:

- (1) To prevent reasonably certain death or substantial bodily harm;
 - (2) To prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the practitioner's services;
 - (3) To prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the practitioner's services;
 - (4) To secure legal advice about the practitioner's compliance with USPTO Rules of Professional Conduct;
 - (5) To establish a claim or defense on behalf of the practitioner in a controversy between the practitioner and the client, to establish a defense to a criminal charge or civil claim against the practitioner based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the practitioner's representation of the client; or
 - (6) To comply with other law or a court order.
-

35 U.S.C. § 112(a) - Specification - Enablement

(a) IN GENERAL.—The specification shall contain a **written description of the invention**, and of the manner and process of **making and using it**, in such full, clear, concise, and exact terms as to **enable any person skilled in the art** to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor or joint inventor of carrying out the invention.

Note: PHOSITA (Person Having Ordinary Skill In The Art) must be able to practice the invention from the specification without undue experimentation. The "best mode" requirement was weakened by AIA but still must be disclosed.

18 U.S.C. § 2384 - Seditious Conspiracy

If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, **conspire to overthrow, put down, or to destroy by force the Government of the United States**, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both.

Note: In Chapter 6, Professor Mendez warns that legal arguments challenging federal sovereignty could be interpreted as seditious conspiracy if presented "to the wrong people, in the wrong way."

37 CFR § 11.104(a) - Communication with Client

(a) **GENERAL RULE.**—A practitioner shall:

- (1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required;
 - (2) Reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) Keep the client reasonably informed about the status of the matter;
 - (4) Promptly comply with reasonable requests for information; and
 - (5) Consult with the client about any relevant limitation on the practitioner's conduct when the practitioner knows that the client expects assistance not permitted by the USPTO Rules of Professional Conduct or other law.
-

37 CFR § 11.18(b) - Obligations of Patent Practitioners

(b) COMPETENT REPRESENTATION.—A practitioner shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. A practitioner need not disclose the Patent Office's internal examination procedures unless specifically relevant to the client's matter and material to the representation.

35 U.S.C. § 102(b)(1) - Grace Period Exception

(b) EXCEPTIONS.—

(1) DISCLOSURES MADE 1 YEAR OR LESS BEFORE THE EFFECTIVE FILING DATE OF THE CLAIMED INVENTION.—A disclosure made 1 year or less before the effective filing date of a claimed invention shall not be prior art to the claimed invention under subsection (a)(1) if—

(A) the disclosure was made by the inventor or joint inventor or by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor; or

(B) the subject matter disclosed had, before such disclosure, been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor.

Grace Period: *Inventors have ONE YEAR from their own public disclosure to file. This protects inventors who publish before filing. But disclosure by third party (not from inventor) still counts as prior art.*

CONSTITUTIONAL PROVISIONS - FULL TEXT

U.S. Constitution - Article I, Section 8, Clause 8 (Patent & Copyright Clause)

The Congress shall have Power... **To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.**

Key Requirements:

- **"Promote Progress"** - Utilitarian purpose; patents must serve public benefit
- **"Limited Times"** - Patents expire (currently 20 years from filing under § 154)
- **"Inventors"** - Only inventors (not finders or improvers of existing knowledge) can receive patents
- **"Discoveries"** - Must be novel, non-obvious invention (not just discovery of natural phenomenon)

U.S. Constitution - Article I, Section 8, Clause 3 (Commerce Clause)

The Congress shall have Power... **To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.**

Patent Connection: *Federal courts have exclusive jurisdiction over patent infringement claims because patents inherently affect interstate commerce. Products covered by patents cross state lines, making enforcement a federal matter under Commerce Clause authority.*

Modern Interpretation: *Gibbons v. Ogden* (1824) established broad federal power to regulate commerce "among the several states." Patent litigation affects interstate commerce even when parties are in single state, because patented inventions typically enter commerce nationally.

U.S. Constitution - Article I, Section 8, Clause 18 (Necessary and Proper Clause)

The Congress shall have Power... **To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers**, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Patent Application: *Allows Congress to create USPTO as administrative agency to examine patents. Patent Clause grants power to issue patents; Necessary & Proper Clause allows creation of bureaucratic structure to administer that power. McCulloch v. Maryland (1819) established Congress has implied powers beyond those explicitly enumerated.*

U.S. Constitution - Tenth Amendment (Reserved Powers)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Federalism Question: *If federal government wasn't explicitly granted power over something, states (or the people) retain it. But what about powers that predate BOTH federal and state formation? What about sovereignties that never ceded authority to either? Severen and Isaac's constitutional argument explores this gap.*

U.S. Constitution - Fourteenth Amendment, Section 1 (Due Process Clause)

...nor shall any State **deprive any person of life, liberty, or property, without due process of law...**

Patent as Property: Are pending patent applications "property" protected by Due Process Clause? *Oil States v. Greene's Energy* (2018) held patents are public-rights franchise, but still "property" for many purposes. *Board of Regents v. Roth* requires "legitimate expectancy" for property interest. Does filing create such expectancy?

U.S. Constitution - First Amendment (Freedom of Speech)

Congress shall make no law... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Alexander's Argument: Uses First Amendment to justify staying in constitutional law class - academic discourse on matters of legal significance is protected speech. Attorney has right to monitor public discussions affecting client's interests.

KEY CASE LAW - CONSTITUTIONAL & PATENT INTERSECTION

Gunn v. Minton, 568 U.S. 251 (2013)

ISSUE: Whether legal malpractice claim involving attorney's failure to raise experimental use exception in patent case "arises under" federal patent law, requiring federal court jurisdiction under 28 U.S.C. § 1338(a).

HOLDING: Legal malpractice claims, even when they involve patent law issues, do NOT "arise under" patent law for jurisdictional purposes. **State courts CAN hear patent malpractice cases.** Federal exclusivity under § 1338(a) is narrower than often assumed.

KEY PRINCIPLE: Federal exclusive jurisdiction requires claim to actually arise under patent law (infringement, validity, enforceability). Claims that merely involve patent law as underlying subject matter can be heard in state court.

Application in Chapter 6: Severen cites this case to show federal exclusivity has limits. Not ALL patent-related claims require federal court. Opens door to arguing that alternative jurisdictions might handle certain patent matters.

Oil States Energy Services v. Greene's Energy Group, 138 S. Ct. 1365 (2018)

ISSUE: Whether inter partes review (IPR) proceedings at USPTO violate Seventh Amendment right to jury trial, since they allow administrative agency to cancel issued patents.

HOLDING: Patents are "public rights" - a franchise granted by government. Congress can delegate patent validity determinations to USPTO administrative proceedings without violating Seventh Amendment. But patents are still "property" for other constitutional purposes (takings, due process).

DUAL NATURE OF PATENTS:

- **Public right:** Government-created franchise, can be examined/cancelled by administrative agency
- **Private property:** Once granted, owner has property interest protected by Constitution

This tension creates questions about what process is "due" during examination and post-grant proceedings.

Board of Regents v. Roth, 408 U.S. 564 (1972)

ISSUE: What constitutes "property" interest protected by Fourteenth Amendment Due Process Clause?

HOLDING: Property interests are created by "existing rules or understandings" - not the Constitution itself. To have property interest requiring due process protection, person must have **more than abstract need or desire**; must have **legitimate claim of entitlement**.

APPLICATION TO PATENTS: Does filing patent application create "legitimate expectancy" of examination? Or is examination discretionary, creating no property interest until patent actually issues?

Under Old Law, filing creates immediate bond/property interest. Under USPTO rules, applicant has right to examination but not to grant. Different systems, different property concepts.

Cherokee Nation v. Georgia, 30 U.S. 1 (1831)

ISSUE: Whether Cherokee Nation is "foreign state" under Article III, entitled to file suit in Supreme Court against Georgia.

HOLDING: Indian tribes are "**domestic dependent nations**" - not foreign states, but not fully part of United States either. They retain sovereignty that predates Constitution, but are subject to federal authority in certain respects.

QUASI-SOVEREIGN STATUS: Tribes have:

- Authority over internal matters
- Treaty relationships with federal government
- Sovereignty that existed BEFORE U.S. formation
- Limited self-governance within federal framework

Severin's Argument: If tribes can retain pre-constitutional sovereignty, what about OTHER pre-constitutional legal systems? What about patent examination protocols that predate 1836 USPTO formation?

Gibbons v. Ogden, 22 U.S. 1 (1824)

ISSUE: Whether New York can grant exclusive steamboat navigation license on waters that cross state lines, or whether this violates federal Commerce Clause authority.

HOLDING: Commerce Clause grants Congress **broad power to regulate interstate commerce**. "Commerce among the states" includes navigation, transportation, and all commercial intercourse between states. Federal law preempts conflicting state regulations.

CHIEF JUSTICE MARSHALL'S REASONING: Commerce power is plenary (complete) within its sphere. But it presumes entities engaged in commerce fall under federal jurisdiction. What about commerce by entities that never consented to federal governance?

This is the gap Isaac Wavelander exploits in class discussion - Commerce Clause assumes federal authority, but what if parties exist outside that authority structure?

McCulloch v. Maryland, 17 U.S. 316 (1819)

ISSUE: Whether Congress has constitutional authority to create national bank, and whether states can tax federal institution.

HOLDING: Necessary and Proper Clause grants Congress **implied powers** beyond those explicitly enumerated in Constitution. "Necessary" doesn't mean absolutely essential - means convenient, useful, appropriate for executing enumerated powers.

APPLICATION TO USPTO: Congress has explicit power to grant patents (Art. I, § 8, Cl. 8). Necessary & Proper Clause allows creation of administrative agency (USPTO) to examine applications, maintain records, enforce rules. These are implied powers necessary to execute patent authority.

"THE POWER TO TAX IS THE POWER TO DESTROY": States cannot tax federal institutions because it would allow states to interfere

with federal operations. Similarly, states cannot interfere with federal patent examination.

PATENT LAW CONCEPTS - DETAILED EXPLANATIONS

Graham v. John Deere Factors (35 U.S.C. § 103 Obviousness Analysis)

CASE: *Graham v. John Deere Co.*, 383 U.S. 1 (1966) - Supreme Court established framework for determining obviousness.

FOUR GRAHAM FACTORS (Factual Inquiries):

- 1. Scope and content of prior art** - What was known before invention?
- 2. Differences between prior art and claims** - How does invention differ from what was known?
- 3. Level of ordinary skill in the art** - What would PHOSITA know/understand?
- 4. Secondary considerations (objective indicia)** - Evidence of non-obviousness:
 - Commercial success
 - Long-felt but unsolved need
 - Failure of others to solve problem
 - Unexpected results
 - Copying by competitors
 - Industry acclaim/praise

TEACHING-SUGGESTION-MOTIVATION (TSM) TEST: To show obviousness, examiner must identify reason why PHOSITA would combine prior art references. Can't use hindsight. *KSR v. Teleflex* (2007) clarified that "common sense" can provide motivation, but examiner still needs articulated reasoning.

Secondary Considerations (Objective Indicia of Non-Obviousness)

PURPOSE: Guard against hindsight bias in obviousness analysis. After invention exists, everything looks obvious. Secondary considerations provide objective evidence that invention was NOT obvious at time of filing.

KEY SECONDARY CONSIDERATIONS:

- **Commercial Success:** If invention sells well, suggests it meets need others couldn't satisfy. Must show nexus (connection) between patented features and commercial success.
- **Long-Felt Need:** If problem existed for years and no one solved it, sudden solution suggests non-obviousness.
- **Failure of Others:** If many skilled practitioners tried and failed to solve problem, suggests solution required inventive step.
- **Unexpected Results:** If invention produces result not predicted by prior art, especially if result is superior to what would be expected.
- **Industry Skepticism:** If experts said it couldn't be done, then someone did it, suggests non-obviousness.

NEXUS REQUIREMENT: Must show connection between secondary consideration and claimed invention. If commercial success is due to marketing rather than patented features, it doesn't prove non-obviousness.

PHOSITA - Person Having Ordinary Skill In The Art

LEGAL FICTION: PHOSITA is hypothetical person used to evaluate patent validity. Not genius, not novice - ordinary practitioner in relevant field.

FACTORS FOR DETERMINING PHOSITA LEVEL:

- Educational level of inventor and workers in field
- Type of problems encountered in art
- Prior art solutions to those problems
- Rapidity of innovation in field
- Sophistication of technology

USE IN PATENT LAW:

- **§ 103 Obviousness:** Would PHOSITA find invention obvious in view of prior art?
- **§ 112(a) Enablement:** Can PHOSITA make/use invention from specification without undue experimentation?
- **§ 112(b) Definiteness:** Would PHOSITA understand claim scope with reasonable certainty?

PHOSITA has all knowledge in relevant field, but uses only ordinary creativity. Not expected to perform research or experiments beyond routine skill level.

END FULL STATUTORY TEXT

Fractured Crown: Old Law - Patent Law Textbook Edition

Chapter 6 - Constitutional Law | © 2025 Marjorie McCubbins & Master Aether

ABSTRACT

Questions arise about whether the examination system itself is constitutionally valid. Can an administrative agency (USPTO) grant exclusive rights that look like private property? Does PTAB adjudication violate Article III's requirement that federal cases be decided by Article III judges? Does patent cancellation without a jury trial violate the Seventh Amendment? This chapter explores the constitutional foundations and limits of the U.S. patent system.

The chapter examines the Patent Clause (Article I, § 8, cl. 8) as the constitutional source of patent authority, the "public rights" doctrine that allows administrative adjudication of patent validity, due process concerns in patent prosecution, and the ongoing tension between patent rights as private property versus government-granted privileges.

This chapter teaches the constitutional framework for patents, major Supreme Court cases addressing challenges to USPTO and PTAB authority, the distinction between public rights and private rights, and the constitutional limits on Congress's power to create patent rights.

SUMMARY - PATENT LAW CONCEPTS TAUGHT

1. The Patent Clause - Article I, § 8, Clause 8

Constitutional foundation for U.S. patent system:

- **Text:** "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"
- **Two grants:** Copyright ("Authors" and "Writings") + Patents ("Inventors" and "Discoveries")

- **"Limited Times":** Patents cannot be perpetual. Currently 20 years from filing (§ 154(a)(2)). Congress could extend/shorten, but cannot eliminate time limit.
- **"Progress" limitation:** Patent system must promote progress, not hinder it. This limits what can be patented and how patents are enforced.
- **"Inventors" requirement:** Only actual inventors can be granted patents. Cannot grant to non-inventors (though rights can be assigned after grant).
- **"Discoveries":** Interpreted broadly to include inventions - anything useful, novel, and non-obvious within statutory categories.
- **Exclusive congressional power:** States cannot grant patents (preempted by federal law). Only Congress can create patent system.

2. Public Rights Doctrine

Why administrative agencies can adjudicate patent validity:

- **Article III requirement:** Federal judicial power vested in Article III courts (life tenure, salary protection). Generally, federal cases must be decided by Article III judges.
- **Public rights exception:** Matters "arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments" can be adjudicated by non-Article III tribunals.
- **Patents as public rights:** Patent grant is government conferral of privilege, not recognition of pre-existing property right. Government can reconsider grant through administrative process.
- ***Oil States* holding:** IPR does not violate Article III because patents are public franchises created by government, subject to administrative review.
- **Limits:** While validity can be administratively reviewed, infringement suits (between private parties) must be in Article III court.

3. Article III and Non-Article III Adjudication

Constitutional requirements for federal adjudication:

- **Article III judges:** Appointed by President with Senate confirmation, life tenure, salary cannot be diminished. Ensures independence from political pressure.
- **Administrative Patent Judges (APJs):** Not Article III judges. Appointed by Secretary of Commerce, removable, no life tenure.
- ***Northern Pipeline* test:** Congress can create non-Article III tribunals for (1) territorial courts, (2) courts-martial, (3) public rights cases
- **Patent prosecution:** Application examination by USPTO examiners (non-Article III) is constitutional - applicant voluntarily seeks government benefit
- **PTAB review:** IPR/PGR conducted by APJ panels (non-Article III) constitutional under public rights doctrine
- **Core private rights:** Cannot be adjudicated administratively. Infringement between private parties must be in Article III court with jury trial option.

4. Seventh Amendment Right to Jury Trial

When jury trial is required in patent cases:

- **Seventh Amendment text:** "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved"
- **Historical test:** Jury trial required for actions that were tried to jury at common law in 1791 (when 7th Amendment ratified)
- **Patent infringement:** Patent suits existed in 1791 and were tried to juries. Jury trial right preserved.
- **IPR/PGR proceedings:** No jury trial right. *Oil States* held these are not "Suits at common law" but administrative proceedings to review government grant.
- **Validity in district court:** When accused infringer raises invalidity defense in infringement suit, jury

decides validity issues (fact questions). Judge decides legal questions.

- **Policy tension:** Same patent can be held valid by jury (clear and convincing evidence standard) but invalid by PTAB (preponderance standard, no jury)

5. Due Process in Patent Proceedings

Fifth Amendment Due Process Clause applies to USPTO:

- **Notice requirement:** Patent owner must receive notice of IPR/PGR petition and opportunity to respond (§ 313 preliminary response)
- **Hearing right:** Parties entitled to oral hearing before PTAB (§ 316(a)(10))
- **Written decision:** PTAB must issue written decision addressing parties' arguments (§ 318(a))
- **Appeal right:** Either party can appeal PTAB decision to Federal Circuit (§ 319)
- **Impartial tribunal:** APJs must be neutral - cannot have financial interest in outcome, cannot have prejudged case
- **Multiple IPR problem:** Concern that patent owner facing serial IPRs on same patent is denied due process. Director has discretion under § 314(a) to deny institution if earlier proceeding adequately addressed issues.

6. Takings Clause and Patent Cancellation

Fifth Amendment: "nor shall private property be taken for public use, without just compensation"

- **Are patents "property"?** Yes and no. Patents have property-like characteristics (assignable, devisable, exclusive rights) but are government-granted privileges subject to reconsideration.
- ***Oil States* analysis:** Patent cancellation through IPR does not constitute "taking" because patent grant is contingent - subject to PTAB review. Patent owner

never had absolute right immune from administrative challenge.

- **Inventor's labor vs. patent right:** Inventor's effort creating invention is not taken. Only the government-granted monopoly is reconsidered.
- **No compensation required:** If PTAB cancels patent claims, no just compensation owed. Patent owner's investment in R&D, prosecution costs not protected by Takings Clause.
- **Compare to land:** Government cannot seize land without compensation (private property right). But can revoke liquor license (government privilege) without compensation. Patents closer to privilege than property for Takings purposes.

7. Patent Clause Limits on Congress

Constitutional constraints on patent legislation:

- **"Inventors" only:** Congress cannot grant patents to non-inventors. Patent must be granted to actual inventor (though rights can be assigned). See **Bd. of Trustees v. Roche** (2011).
- **"Limited Times":** Congress cannot create perpetual patents. Current 20-year term (§ 154) satisfies this. Could Congress extend to 50 years? Probably. To 200 years? Arguably violates "limited."
- **"Promote Progress":** Limits what can be patented. Cannot patent laws of nature, natural phenomena, abstract ideas - wouldn't promote progress, would hinder it.
- **"Discoveries":** Must be something new, useful, non-obvious. Congress cannot eliminate novelty/utility requirements - would violate constitutional purpose.
- **Trade secrets alternative:** States can protect trade secrets under state law (not preempted) because trade secrets are different mechanism than patents.
Kewanee Oil v. Bicron (1974).

8. Preemption of State Patent-Like Protection

Supremacy Clause limits state IP laws:

- **Express preemption:** States cannot grant patents - exclusive federal power under Patent Clause
- **Conflict preemption:** State laws that conflict with federal patent policy are preempted. *Bonito Boats v. Thunder Craft* (1989) - Florida statute prohibiting boat hull copying preempted because conflicted with federal policy that unpatentable designs enter public domain.
- **Trade secret protection allowed:** Not preempted because trade secrets require secrecy (patents require disclosure), different policy objectives
- **Contract law allowed:** Licensing agreements, NDAs, employment contracts enforceable under state law even if involve patented/unpatented inventions
- **Tort law complications:** State unfair competition law can protect against copying, but cannot provide patent-like exclusive rights for unpatentable subject matter

DISCUSSION QUESTIONS

1. Public Rights vs. Private Rights Distinction

Question: *Oil States* held that patents are "public rights" subject to administrative cancellation. But patents are assignable, devisable, and can be licensed - characteristics of private property. How can they be both?

Analysis Points:

- Public rights doctrine focuses on SOURCE of right (government grant vs. pre-existing common law right)
- Patents created by statute, granted by government agency - not pre-existing property
- Once granted, patents have property-like characteristics for transfer/enforcement purposes

- But government retains authority to reconsider grant through administrative review
- Compare to land patent (government grants land) - can be reviewed administratively for fraud/error in grant
- Distinction matters for adjudication forum: Validity can be administrative, infringement must be Article III court

2. Seventh Amendment and IPR Proceedings

Question: Patent infringement suits have jury trial right under Seventh Amendment. Accused infringer raises invalidity defense. Jury finds patent valid (clear and convincing evidence). Same accused infringer files IPR petition. PTAB cancels some claims (preponderance standard, no jury). How is this constitutional?

Analysis Points:

- Different proceedings, different standards - IPR is not same as infringement suit
- IPR is government reconsidering its own grant (administrative), not suit between private parties
- No Seventh Amendment right in administrative proceedings - only "Suits at common law"
- Patent owner chose to seek government benefit (patent grant), accepted condition of administrative review
- Policy tension: Different forums can reach different results on same patent
- *Oil States* endorsed this system - jury trial for infringement, administrative review for validity

3. "Limited Times" Requirement

Question: The Patent Clause requires "limited Times." Current term is 20 years from filing. Could Congress extend patent term to 100 years? To 500 years? At what point does "limited" become "perpetual"?

Analysis Points:

- No Supreme Court case defines maximum permissible term
- Comparison to copyright: **Eldred v. Ashcroft** (2003) upheld life+70 years copyright term as "limited"
- Copyright terms much longer than patent terms - suggests flexibility
- But patents vs. copyright serve different purposes - inventions become obsolete faster
- 500-year term arguably "effectively perpetual" - would violate constitutional purpose
- Congress has flexibility but not unlimited discretion - must promote progress, not hinder it

4. Due Process and Serial IPR Petitions

Question: Patent owner faces first IPR petition, survives (claims upheld). Different petitioner files second IPR on different prior art. Then third IPR, fourth IPR, etc. Does this violate patent owner's due process rights?

Analysis Points:

- Each petitioner entitled to challenge patent under § 311 (if not estopped)
- But multiple proceedings on same patent impose costs, create uncertainty
- Director has discretion under § 314(a) to deny institution - can consider burden on patent owner
- § 325(d): Director can reject IPR petition if same or substantially same prior art already considered
- No absolute due process violation - patent owner gets notice, hearing, decision, appeal for each IPR
- But policy concern about harassment - Director discretion is safety valve

5. State Trade Secret vs. Federal Patent Preemption

Question: **Kewanee Oil** held that state trade secret protection is not preempted by federal patent law. But trade secrets can

protect unpatentable inventions indefinitely. How is this consistent with federal patent policy that unpatentable things enter public domain?

Analysis Points:

- Trade secrets require secrecy - no disclosure to public (unlike patents)
- Trade secrets lost if reverse-engineered or independently discovered (unlike patent exclusivity)
- Different policy objectives: Trade secrets reward secrecy, patents reward disclosure
- Trade secret holder forgoes patent protection (must choose one path)
- No conflict with patent law - inventor can choose trade secret (keep secret) or patent (disclose in exchange for limited monopoly)
- State law providing patent-like protection WITHOUT disclosure requirement would be preempted (*Bonito Boats*)

CASE STUDY: Oil States Energy Services, LLC v. Greene's Energy Group, LLC

Supreme Court, 2018

FACTS

Oil States owned U.S. Patent No. 6,179,053 covering a system for protecting wellhead equipment used in hydraulic fracturing. After Oil States sued Greene's Energy for infringement, Greene's filed an inter partes review (IPR) petition challenging the patent's validity.

The PTAB instituted IPR and held all challenged claims unpatentable as obvious. Oil States appealed to the Federal Circuit, arguing that IPR violated Article III (requiring federal cases be decided by Article III judges with life tenure) and the Seventh Amendment (requiring jury trial).

The Federal Circuit rejected these challenges, and the Supreme Court granted certiorari to address whether IPR violates the Constitution.

ISSUE

Does inter partes review - where Administrative Patent Judges (non-Article III officers) reconsider patent validity without a jury - violate Article III's vesting of judicial power in Article III courts or the Seventh Amendment's jury trial guarantee?

HOLDING

NO. The Supreme Court held 7-2 that IPR does not violate Article III or the Seventh Amendment. Patents are "public rights" that can be adjudicated through administrative processes.

REASONING

Justice Thomas wrote for the majority:

I. Public Rights Doctrine

- **Article III applies to "Cases" and "Controversies":** But Congress can assign some matters to non-Article III tribunals without violating separation of powers
- **Public rights exception:** Matters "arising between the Government and persons subject to its authority" in connection with "performance of constitutional functions of executive or legislative departments" can be resolved administratively
- **Patents as public franchises:** Patent grant is not recognition of pre-existing property right. Government creates patent right through statutory scheme. Government can condition grant on reconsideration through administrative review.
- **Historical practice:** Since 1790, patent validity has been subject to administrative review (interference proceedings, reexaminations, now IPR). Long-standing practice supports constitutionality.

II. Seventh Amendment

- **"Suits at common law" test:** Seventh Amendment applies to suits that were tried to jury in 1791
- **IPR is not common law suit:** IPR is administrative proceeding to reconsider government grant, not suit between private parties over established rights
- **Patent owner voluntarily sought patent:** By seeking government-granted privilege, patent owner accepted condition that USPTO retains authority to review validity
- **No jury trial right in administrative proceedings:** Government acting in sovereign capacity to protect public interest, not resolving private rights dispute

III. Limits on Holding

- Court emphasized IPR is limited to validity grounds under §§ 102/103 based on patents/publications
- Did not decide whether Congress could eliminate all Article III review (noted right to appeal to Federal Circuit)
- Did not address whether OTHER patent rights (infringement) could be administratively adjudicated (likely NO - those are private rights)
- Left open questions about retroactive application to patents granted before AIA

DISSENT

Justice Gorsuch (joined by Chief Justice Roberts) dissented:

- **Patents are private property:** Once granted, patents have all hallmarks of private property - assignable, inheritable, exclusive rights
- **Revocation requires Article III adjudication:** Government cannot take private property without due process in Article III court with jury
- **Public rights doctrine too broad:** Majority's interpretation could allow administrative adjudication

of ANY government-created right (Social Security, veterans benefits, etc.)

- **Historical evidence mixed:** While patent validity sometimes reviewed administratively, infringement suits (which often raised validity) were always in court with jury

SIGNIFICANCE FOR CHAPTER 6

This case resolved the fundamental constitutional challenge to PTAB:

- **IPR system validated:** Administrative patent review constitutional, no Article III or Seventh Amendment violation
- **Public rights framework:** Patents are public franchises created by statute, subject to administrative reconsideration
- **Dual nature of patents:** "Public rights" for validity challenges but "private property" for infringement/licensing
- **Practical impact:** IPR remains primary mechanism for challenging issued patents - faster, cheaper than district court litigation

CONNECTION TO THE NARRATIVE

Questions about whether the examination system itself is constitutionally valid mirror *Oil States* challenge to PTAB. The narrative presents the Old Law system as ancient and unquestioned - but in reality, the modern USPTO's administrative adjudication authority was constitutionally contested until *Oil States* resolved it.

Malacar's (Director's) authority to reconsider patent grants through Guardian Queen re-examination parallels PTAB's IPR authority. *Oil States* held this is constitutional because patents are government grants, not pre-existing private property.

ANALYSIS QUESTIONS

1. The dissent argued that patents are private property once granted. Is there a principled distinction between patent grants (which *Oil States* says can be administratively revoked) and land grants (which arguably require Article III adjudication for revocation)?
2. Could Congress create a system where ALL patent infringement suits are decided by USPTO administrative judges rather than federal courts? Would *Oil States* support this? Why or why not?
3. *Oil States* relied partly on historical practice of administrative patent review. But IPR is much broader than prior reexamination procedures. Should this matter constitutionally?

COMPLETE STATUTORY TEXT

U.S. Constitution - Article I, Section 8, Clause 8 (Patent and Copyright Clause)

The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

U.S. Constitution - Article III, Section 1 (Judicial Power)

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Constitution - Amendment V (Due Process and Takings Clauses)

No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution - Amendment VII (Jury Trial in Civil Cases)

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

35 U.S.C. § 1 - Establishment

The United States Patent and Trademark Office is established as an agency of the United States, within the Department of Commerce. In carrying out its functions, the United States Patent and Trademark Office shall be subject to the policy direction of the Secretary of Commerce, but otherwise shall retain responsibility for decisions regarding the management and administration of its operations and shall exercise independent control of its budget allocations and expenditures, personnel decisions and processes, procurements, and other administrative and management functions in accordance with this title and applicable provisions of law. Those operations designed to grant and issue patents and those operations which are designed to facilitate the registration of trademarks shall be treated as separate operating units within the Office.

35 U.S.C. § 282 - Presumption of Validity; Defenses

(a) **IN GENERAL.**—A patent shall be presumed valid. Each claim of a patent (whether in independent, dependent, or

multiple dependent form) shall be presumed valid independently of the validity of other claims; dependent or multiple dependent claims shall be presumed valid even though dependent upon an invalid claim. The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.

(b) DEFENSES.—The following shall be defenses in any action involving the validity or infringement of a patent and shall be pleaded:

(1) Noninfringement, absence of liability for infringement or unenforceability;

(2) Invalidity of the patent or any claim in suit on any ground specified in part II as a condition for patentability;

(3) Invalidity of the patent or any claim in suit for failure to comply with—

(A) any requirement of section 112, except that the failure to disclose the best mode shall not be a basis on which any claim of a patent may be canceled or held invalid or otherwise unenforceable; or

(B) any requirement of section 251.

(4) Any other fact or act made a defense by this title.

STATUTORY REFERENCE INDEX

Primary Constitutional Provisions Taught in Chapter 6:

- U.S. Const. Art. I, § 8, cl. 8 - Patent and Copyright Clause
- U.S. Const. Art. III, § 1 - Judicial Power (Article III Courts)
- U.S. Const. Amend. V - Due Process and Takings Clauses
- U.S. Const. Amend. VII - Right to Jury Trial

Primary Statutes:

- 35 U.S.C. § 1 - Establishment of USPTO
- 35 U.S.C. § 282 - Presumption of Validity; Defenses

Key Cases:

- Oil States Energy Services v. Greene's Energy (SCOTUS 2018) - IPR constitutional
- United States v. Arthrex (SCOTUS 2021) - Appointments Clause (covered Ch 5)
- Bonito Boats v. Thunder Craft (SCOTUS 1989) - State law preemption
- Kewanee Oil v. Bicron (SCOTUS 1974) - Trade secret not preempted
- Eldred v. Ashcroft (SCOTUS 2003) - "Limited times" in copyright context

Related Concepts:

- Public rights doctrine
- Article III adjudication requirements
- Seventh Amendment jury trial in patent cases
- Due Process in administrative proceedings
- Takings Clause and patent cancellation
- Patent Clause limits on Congress
- Federal preemption of state IP laws