

INITIAL SURVEY OF LAW REVIEW ARTICLES ADDRESSING CONSTITUTIONALITY OF FIRST-TO-FILE PATENT SYSTEM IN LAST 10 YEARS

FIRST-TO-FILE UNCONSTITUTIONAL (7 total, 6 non-student notes)

Rebecca C.E. McFadyen, *The "First-To-File" Patent System: Why Adoption Is NOT An Option!*, 14 Rich. J.L. & Tech. 3 (2007)

However, an analysis of the framers' intent as well as statutory language of the early patent acts demonstrate that the Constitution authorizes the patent to be awarded only to the "first and true inventor." To hold otherwise poses a direct challenge to the Constitution.

John J. Okuley, *Resolution of Inventorship Disputes: Avoiding Litigation Through Early Evaluation*, 18 Ohio St. J. on Disp. Resol. 915 (2003)

Though many commentators argue that the United States should adopt a first-to-file system, the current interpretation of the United States Constitution and the patent statutes is that patents are to be awarded to the first inventor.

Max Stul Oppenheimer, *Harmonization Through Condemnation: Is New London The Key To World Patent Harmony?* 40 Vand. J. Transnat'l L. 445 (2007)

granting the patent to the first filer deprives the inventor of "the exclusive right" guaranteed by the Constitution and is therefore unconstitutional.

Paul M. Schoenhard, *Reconceptualizing Inventive Conception: Strengthening, Not Abandoning the First-To-Invent System*, 17 Fed. Cir. B.J. 567 (2008–2009)

By these terms, it is readily apparent that the IP Clause is not aimed at the securing of rights to "disclosers" or "filers," but to inventors.

Adam Sedia, Legislative Update: *Storming The Last Bastion: The Patent Reform Act Of 2007 And Its Assault On The Superior First-To-Invent Rule*, 18 DePaul J. Art Tech. & Intell. Prop. L. 79 (2007-2008)

Based on historical understanding, outlined in Section II above, those who view the first-to-file system as unconstitutional appear to have the better argument.

Karen E. Simon, Comment, *The Patent Reform Act's First-to-File Standard: Needed Reform or Constitutional Blunder?*, 6 J. Marshall Rev. Intell. Prop. L. 129 (2006)

the first-to-file standard as proposed in H.R. 2795 is unconstitutional

Edwin Suominen, *Re-Discovering Article I, Section 8 -- The Formula for First-to-Invent*, 83 J. Pat. Off. Soc'y 641 (2001)

The plain language of the terms would thus seem to settle the issue, clearly prohibiting any first-to-file system as unconstitutionally denying actual inventors the exclusive right to their discoveries.

FIRST-TO-FILE MIGHT BE UNCONSTITUTIONAL **(2 total, 2 non-student notes)**

Susanna Chenette, Note, *Maintaining the Constitutionality of the Patent System*, 35 Hastings Const. L.Q. 221 (2008)

Therefore, because of the Supreme Court's broad interpretation of Congress' power under the Act, a first-to-file system that grants patents to those other than the actual "inventor" as stated by the Clause will likely survive a direct constitutionality attack. However, it is nevertheless possible that a first-to-file system would not "promote the progress of science and the useful arts" and therefore be unconstitutional.

Timothy R. Holbrook, *The Treaty Power and the Patent Clause: Are There Limits on the United States' Ability to Harmonize?*, 22 Cardozo Arts & Ent. L.J. 1 (2004)

Given that historically the inventor has been viewed as first to create, then such tradition may suggest a constitutionally rooted requirement that would preclude a first to file system

FIRST-TO-FILE CONSTITUTIONAL **(None)**