Practical Concerns Surrounding the Neutrality of Administrative Patent Judge Decisions

Note

Introduction 754
I. The America Invents Act and the Advent of Inter Partes Review 755
  A. *The America Invents Act* 755
  B. *The Patent Trial and Appeal Board and Inter Partes Review* 756
    1. *The Patent Trial and Appeal Board* 756
    2. *The PTAB's Interaction with Article III Courts* 757
    3. *Inter Partes Review* 758
  C. *The Challenge to Inter Partes Review—Oil States* 760
II. APJs Compared to Article III Judges 762
  A. *Appointment Process and Reviewability of Decisions* 763
  B. *Tenure and Salary Concerns* 765
  C. *External Threats to Decisional Independence* 767
    1. *Removal of ALJs from the Competitive Service* 767
    2. *Industry Lobbying* 769
Conclusion 770

PRACTICAL CONCERNS SURROUNDING THE NEUTRALITY OF ADMINISTRATIVE PATENT JUDGE DECISIONS

Note

INTRODUCTION

The proper role of the so-called "administrative state" has become a hot-button issue in politics, especially in conservative circles. President Trump, for example, promised before his first term to deconstruct the administrative state,[1] and, after winning the Presidency in 2024, again mounted his attack with vows to "dismantle government bureaucracy"[2] via the Musk-led "Department of Governmental Efficiency," which made sweeping cuts across the federal bureaucracy before its sudden sunset in November 2025.[3] The animosity towards the amorphous "administrative state" is apparent, but what specifically is objectionable about the American administrative government system is not. In fact, many federal government programs, for example, Social Security, are overwhelmingly popular.[4] One aspect of the administrative state that is frequently the object of criticism is the use of non-Article III judges in adjudications.[5] Indeed, an increasingly popular method of attacking the

1. Eric Katz, *Trump Vows to 'Dismantle Federal Bureaucracy' and 'Restructure' Agencies with New, Musk-led Commission*, GOV'T EXEC. (Nov. 12, 2024), https://www.govexec.com/management/2024/11/trump-vows-dismantle-federal-bureaucracy-and-restructure-agencies-new-musk-led-commission/400998/ [https://perma.cc/LA7H-UKUW].

2. Elena Moore, Camila Domonoske & Jeongyoon Han, *Trump Taps Musk to Lead a 'Department of Government Efficiency with Ramaswamy*, NPR (Nov. 12, 2024, at 21:03 ET), https://www.npr.org/2024/11/12/g-s1-33972/trump-elon-musk-vivek-ramaswamy-doge-government-efficiency-deep-state [https://perma.cc/P746-2S9G]; *see also* Elon Musk (@elonmusk), X (Nov. 12, 2024, 19:13), https://x.com/elonmusk/status/1856505561501561307?lang=en [https://perma.cc/3EB2-MUAJ] ("Threat to democracy? Nope, threat to BUREAUCRACY!!!" referring to President Trump's proposed "Department of Governmental Efficiency," a non-governmental organization he hoped would slash government spending).

3. *See, e.g.*, Ashley Wu et al., *Where Trump, Musk, and DOGE Have Cut Federal Workers So Far*, N.Y. TIMES (Mar. 12, 2025), https://www.nytimes.com/interactive/2025/02/11/us/politics/trump-musk-doge-federal-workers.html [https://perma.cc/47M8-YGEX].

4. Amanda Seitz & Hannah Fingerhut, *Most Oppose Social Security, Medicare Cuts: AP-NORC Poll*, AP (Apr. 6, 2023, at 23:42 CST), https://apnews.com/article/social-security-medicare-cuts-ap-poll-biden-9e7395e8efeab68063d741beac6ef24b [https://perma.cc/DL9D-4TT7] (explaining a March 2023 poll that indicated 79% of Americans oppose reducing Social Security benefits and 67% of Americans oppose raising monthly Medicare premiums).

5. As used here, "adjudication" has the meaning aptly given to it by Professors Golden and Lee, who defined adjudication as "the making of a final determination of obligations under the applicable law to pay damages or other monetary relief, act, or refrain from acting." John M. Golden & Thomas H. Lee, *Federalism, Private Rights, and Article III Adjudication*, 108 VA. L. REV. 1547, 1566 n.72 (2022); *see also* John M. Golden & Thomas H. Lee, *Congressional Power, Public Rights, and Non-Article III Adjudications*, 98 NOTRE DAME L. REV. 1114, 1115 n.2 (2023) (same definition).

"administrative state" is mounting legal challenges of various forms against non-Article III adjudicators.[6]

Considering the animosity of late towards the administrative state, the decision in *Oil States Energy Services v. Greene's Energy Group* appears as an outlier. In *Oil States*, the Supreme Court decided that inter partes review, a process for post-grant reconsideration of a patent's validity, does not violate Article III of the Constitution.[7] The *Oil States* case is yet another in a long list of cases that seek to define exactly when an Article III court must hear a particular dispute.[8]

While debates surrounding the administrative state and particularly the constitutionality of non-Article III adjudications remain vigorous, one pressing question remains: "Does it even matter?" The formalistic answer to this question is "Yes," since the Constitution guarantees all worthy parties the right to have their day in court, as detailed by Justice Gorsuch in his *Oil States* dissent.[9] But from a practical perspective, are there marked differences in fairness-of-decision safeguards that protect Article III judges and non-Article III judges, such that potential litigants should prefer to have their case heard in an Article III court rather than by a non-Article III adjudicator? This note seeks to answer that question, using the *Oil States* case as an example, by comparing safeguards on administrative patent judges ("APJs"), with constitutional and statutory safeguards that ensure neutrality for judges sitting in Article III courts.

This note develops in two main parts. Part I provides some necessary background on the America Invents Act, the system of inter partes review ("IPR"), and the challenge to the constitutionality of IPR that occurred before the Supreme Court in the *Oil States* case. Part II provides the main contribution of this note and examines the differences in safeguards promoting neutrality of decision-making imposed on APJs as compared with Article III judges. A brief conclusion follows.

I. THE AMERICA INVENTS ACT AND THE ADVENT OF INTER PARTES REVIEW

A. The America Invents Act

In 2011, Congress passed the America Invents Act.[10] This "comprehensive patent law reform" was enacted to quell concerns "that questionable patents are too easily obtained and are too difficult to challenge."[11] Specifically,

6. *See* Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 17–30 (2017).

7. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 584 U.S. 325, 328 (2018).

8. *Id.*; *see, e.g.*, U.S. v. Arthrex, Inc., 594 U.S. 1, 1 (2021).

9. *See Oil States*, 584 U.S. at 346–52 (Gorsuch, J., dissenting).

10. Leahy-Smith America Invents Act of 2011, Pub. L. No. 122-29, 125 Stat. 284 (2011).

11. H.R. REP. NO. 112-98, pt. 1, at 38–39 (2011).

Congress was concerned with so-called patent "trolls," noting that "[a] number of patent observers believe the issuance of poor business-method patents during the late 1990's through the early 2000's led to the patent 'troll' lawsuits."[12]

The AIA brought several changes to the U.S. patent system, including switching from a first-to-invent system to a first-to-file system, thereby harmonizing the U.S. with most other countries,[13] replacing the Board of Patent Appeals and Interferences ("BPAI") with a new Patent Trial and Appeal Board ("PTAB"),[14] and creating two new proceedings for challenging the validity of a patent after it is issued—IPR and post-grant review ("PGR").[15] For purposes of this note, the latter two of these changes (the creation of the PTAB and IPR) are important and warrant a closer examination.

B. *The Patent Trial and Appeal Board and Inter Partes Review*

1. *The Patent Trial and Appeal Board*

One of the most influential changes implemented by the AIA was the creation of the PTAB, a "tribunal" within the United States Patent and Trademark Office ("USPTO") specifically designed to adjudicate patent disputes.[16] The PTAB was created in furtherance of the AIA's mission of "'improv[ing] patent quality and provid[ing] a more efficient system for challenging patents that should not have issued,'" while also reducing exorbitantly high litigation costs.[17] The PTAB functions both as an appellate body, hearing appeals of denied patents,[18] and also as a "trial court" of sorts, presiding over IPR and PGR cases.[19]

As far as technical structure, the PTAB consists of a "Director, the Deputy Director, the Commissioner for Patents, the Commissioner for Trademarks, and the administrative patent judges . . . ."[20] When inter partes review is

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12. *Id.* at 54. A "patent troll" is a disapproving term used to refer to plaintiffs in patent litigation "'who opportunistically assert weak patents against the firms that actually develop the technology covered in the patent' or 'small, nonproducing inventors who do not develop or commercialize new technology, who do not manufacture anything, but who do hope to snare other firms in their patent traps.'" *See* FED. TRADE COMM'N, PATENT ASSERTION ENTITY ACTIVITY: AN FTC STUDY 21 (2016) (quoting JAMES E. BESSEN & MICHAEL J. MEURER, PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK 159 (2008)).

13. CHRISTOPHER T. ZIRPOLI & KEVIN J. HICKLEY, CONG. RSCH. SERV., R48016, THE PATENT TRIAL AND APPEAL BOARD AND INTER PARTES REVIEW 9–10 (2024).

14. *Id.* at 9.

15. *Id.*

16. *Id.* at 1.

17. *Id.* (quoting H.R. REP. NO. 112-98, pt. 1, at 39–40 (2011), *as reprinted in* 2011 U.S.C.C.A.N. 67, 69).

18. *Id.* at 9.

19. *Id.*

20. 35 U.S.C. § 6. *See also* U.S. PAT. AND TRADEMARK OFF., ORGANIZATIONAL STRUCTURE AND ADMINISTRATION OF THE PATENT TRIAL AND APPEAL BOARD (May 12, 2015),

initiated, it is heard "by at least 3 members of the Patent Trial and Appeal Board, who shall be designated by the Director."[21] Although the Director has primary authority to appoint panels of APJs, a chain of bureaucratic delegations vests the authority in such a way that it is most commonly administrative employees called "designees" tasked with assigning the panels.[22]

2. The PTAB's Interaction with Article III Courts

The PTAB has an interesting and often confusing relationship with the Article III court system. The Constitution gives Congress the authority "[t]o promote the progress of Science and useful Arts"[23] by granting patents.[24] Obviously, however, any grant, (re)examination, litigation, or appeal regarding a patent requires a technical and scientific background. It is for this reason that taking the patent bar to become a registered patent attorney most typically requires that the examinee have a bachelor's degree in a "hard science" field of study.[25] It is also partly for this reason that, in 1982, Congress created the United States Court of Appeals for the Federal Circuit, an appellate court created specifically to have a "specialized expertise in patent law."[26] With this context in mind, the PTAB makes sense: just as there is a specialized court for hearing substantive issues of patent law, so too is there a specialized court to hear IPR and PGR claims.

However, the PTAB is not an Article III court; it is a tribunal housed within the USPTO. This phenomenon begs the question: how does the PTAB interact with the Article III court system?

One obvious answer to this question is that the Federal Circuit has appellate jurisdiction over any PTAB decision.[27] However, the relationship between the PTAB and the Article III system is a bit more complicated than

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https://www.uspto.gov/sites/default/files/documents/Organizational%20Structure%20of%20the%20Board%20May%2012%202015.pdf [https://perma.cc/J6GJ-L84B] (explaining the structure of the Patent Trial and Appeal Board).

21. 35 U.S.C. § 6.

22. *See* PAT. TRIAL & APPEAL BD., STANDARD OPERATING PROCEDURE 1 (Rev. 15), https://www.uspto.gov/sites/default/files/documents/SOP%201%20R15%20FINAL.pdf [https://perma.cc/F56A-XK9F].

23. U.S. CONST. art. I, § 8 cl. 8.

24. *Id.*

25. U.S. PAT. & TRADEMARK OFF. OF ENROLLMENT & DISCIPLINE (OED), GENERAL REQUIREMENTS BULLETIN FOR ADMISSION TO THE EXAMINATION FOR REGISTRATION TO PRACTICE IN PATENT CASES BEFORE THE UNITED STATES PATENT AND TRADEMARK OFFICE 3–5 (2025), https://www.uspto.gov/sites/default/files/documents/OED_GRB.pdf [https://perma.cc/M3EF-B4PB].

26. MoloLamken LLP, *What is the "Federal Circuit?"* (2021), https://www.mololamken.com/knowledge-what-is-the-federal-circuit [https://perma.cc/7GNG-Y2MF].

27. U.S. Ct. Appeals for Fed. Cir., *Types of Cases the Federal Circuit Handles* (Jan. 8, 2026, at 14:32 UTC), https://www.cafc.uscourts.gov/home/the-court/about-the-court/federal-circuit-case-types/ [https://perma.cc/LYN7-394Q] ("The Federal Circuit also reviews certain [administrative agency] decisions from the . . . U.S. Trademark Trial and Appeal Board [and] U.S. Patent Trial and Appeal Board . . . .").

that, especially when proceedings in a district court occur in tandem with procedures before the PTAB.[28] Oftentimes, IPR petitions will be filed after litigation in an Article III court is initiated.[29] As a result, the district court will often stay proceedings until the IPR is resolved.[30] The AIA provides for limited circumstances in which a stay is automatically granted.[31] Beyond the mandatory stay provisions, the AIA provides four factors for district courts to use in determining to grant a stay.[32] The provisions regarding a stay will be examined in further detail in Part II, but it is worth noting for now the interplay between PTAB proceedings and litigations in Article III courts, especially insofar as such parallel proceedings provide the opportunity for abuse.

3. Inter Partes Review

As mentioned above, to combat the perceived deficiencies in the American patent system, the America Invents Act established a new procedure for the post-grant review of a patent called Inter Partes Review.[33] IPR proceedings can be initiated by "a person who is not the owner of a patent" to challenge "1 or more claims of a patent only on a ground that could be raised under section 102 or 103 and only on the basis of prior art consisting of patents or printed publications."[34] IPR must be commenced the later date of either nine months after the patent's grant or the issuance of a reissue patent, or the termination of a post grant review.[35] Upon a successful petition to initiate IPR, a final determination must be made by the PTAB within one year from the commencement of IPR proceedings.[36]

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28. *See generally* Eric W. Schweibenz, Robert C. Mattson & Lisa M. Mandrusiak, *Automatic Stay of Litigation Pending Inter Partes Review: A Simple Proposal for Solving the Patent Troll Riddle*, 7 LANDSLIDE 40 (2014) (discussing how parallel PTAB and district court proceedings often proceed concurrently).

29. *Id.* at 41.

30. *Id.*

31. 35 U.S.C. § 315(a)(2) ("If the petitioner or real party in interest files a civil action challenging the validity of a claim of the patent on or after the date on which the petitioner files a petition for inter partes review of the patent, that civil action shall be automatically stayed until either— (A) the patent owner moves the court to lift the stay; (B) the patent owner files a civil action or counterclaim alleging that the petitioner or real party in interest has infringed the patent; or (C) the petitioner or real party in interest moves the court to dismiss the civil action.").

32. *See* Leahy-Smith America Invents Act of 2011, Pub. L. No. 112-29, 125 Stat. 284, 331 (2011) ("[T]he court shall decide whether to enter a stay based on— (A) whether a stay, or the denial thereof, will simplify the issues in question and streamline the trial; (B) whether discovery is complete and whether a trial date has been set; (C) whether a stay, or the denial thereof, would unduly prejudice the nonmoving party or present a clear tactical advantage for the moving party; and (D) whether a stay, or the denial thereof, will reduce the burden of litigation on the parties and on the court.").

33. U.S. Pat. and Trademark Off., *Inter Partes Disputes*, https://www.uspto.gov/patents/laws/america-invents-act-aia/inter-partes-disputes [https://perma.cc/ERE5-NJVT] (last visited Jan. 8, 2026).

34. *See* 35 U.S.C. § 311.

35. U.S. Pat. and Trademark Off., *supra* note 33.

36. *Id.*

Inter partes review has several advantages as opposed to challenging the validity of a patent in federal district court. For one, IPR proceedings appear to produce better results, if reversal rate can be considered a metric by which to judge the correctness of a decision. Inter partes can be thought of as a "trial court" analog to the Federal Circuit's specialized jurisdiction over substantive questions of patent law; due to the scientific nature of patents, just as it makes sense for a specialized court to hear patent-related appeals, it makes sense for a specialized tribunal to hear challenges to the validity of patents. To this end, IPR appears to produce more "correct" decisions—whereas federal district courts are overturned by the Federal Circuit 12.1% of the time on patent validity issues, PTAB decisions are only reversed 4.8% of the time.[37] Additionally, IPR proceedings save costs when compared to conventional validity challenge litigation: IPR before the PTAB typically comes with a total cost in the hundreds of thousands of dollars, compared to the several millions of dollars that challenging the validity of a patent in district court usually costs.[38]

However, IPR does not come without its share of suspicions. For example, in cases where IPR is initiated, at least one claim is found to be invalid in over 80% of cases; all claims are found to be unpatentable in 67.5% of cases.[39] Of course, considering that Congress created IPR in response to concerns of high numbers of phony patents, this figure could be explainable, or even expected. However, concern still exists among some in the IP community that IPR is biased against patent holders.[40]

Furthermore, the availability of IPR combined with district court invalidity proceedings has led to a sizeable "efficient infringement" issue.[41] Efficient infringement, much like the law and economics theory of efficient breach, describes a situation where large companies decide that it is less costly to simply infringe a poorly capitalized patentee's patent than to seek a license or purchase of the intellectual property.[42] Although IPR proceedings on their own are cheaper than invalidity litigation in federal district court, many large corporations will choose to first infringe a patent, then file an invalidity claim in federal court, and then institute IPR proceedings.[43] This works since, as described earlier, many district courts will stay litigation pending IPR.[44] The

37. *See* ZIRPOLI & HICKLEY, *supra* note 13, at 19.

38. *Id.* at 17. One source suggests that the average cost for litigating the validity of a patent in district court is around $6,000,000. Brief for Am. Intell. Prop. L. Ass'n as Amici Curiae Supporting Neither Party, Octane Fitness, LLC v. Icon Health & Fitness, Inc., 572 U.S. 545 (2014) (No. 12-1184) (citing AM. INTELL. PROP. L. ASS'N, 2013 REPORT OF THE ECONOMIC SURVEY 34 (2013)).

39. *See* ZIRPOLI & HICKLEY, *supra* note 13, at 17.

40. *Id.* at 18.

41. *See* Gene Quinn, *The U.S. Patent System, the Coase Theorem, and the Era of Efficient Infringement*, IP WATCHDOG (May 9, 2023, at 17:45), https://ipwatchdog.com/2023/05/09/us-patent-system-coase-theorem-era-efficient-infringement/id=160724/ [https://perma.cc/M6NX-8NRR].

42. *Id.*

43. *Id.*

44. *See id.*

result is that a mom-and-pop patent owner whose patent is infringed faces the threat of both IPR and invalidity litigation, with the appurtenant costs of several years of time and millions of dollars in legal fees.[45]

Taken as a whole, inter partes review presents an attractive alternative to conventional invalidity litigation, when used as intended. However, there are concerns regarding abuse of the IPR system, especially by larger corporations.

C. The Challenge to Inter Partes Review—Oil States

Inter partes review was attacked as violating Article III of the Constitution in *Oil States Energy Services v. Greene's Energy Group*.[46] Oil States sued Greene's Energy for violating one of "its patent[s] relating to an apparatus and method for protecting wellhead equipment used in hydraulic fracturing."[47] Greene's Energy, in addition to challenging the patent's validity in the district court, also petitioned the PTAB for inter partes review of the patent in question.[48] The district court and the PTAB diverged in their decisions. The district court rejected Greene's Energy's arguments in a claim-construction order, while the PTAB accepted Greene's Energy's position that the claims challenged were unpatentable.[49]

When the case came before the Supreme Court, the main issue was whether inter partes review violates Article III of the Constitution.[50] Justice Thomas began the majority opinion by stating that the Government's judicial power cannot be conferred on non-Article III entities.[51] However, as he articulated, this rule only applies when a "proceeding involves an exercise of Article III judicial power."[52] To determine whether inter partes review exercises Article III judicial power, Justice Thomas called on the familiar public–private right distinction, recognizing that Supreme Court precedents "have given Congress significant latitude to assign adjudication of public rights to entities other than Article III courts."[53] While admitting that the Supreme Court "has not 'definitively explained' the distinction between public and private rights," Justice Thomas made little of the vigorous scholarly debate surrounding the

45. *Id.*

46. 584 U.S. 325, 328 (2018).

47. *Id.* at 332–33.

48. *Id.* at 333.

49. *Id.*

50. *Id.* at 334. Oil States also challenged inter partes review as repugnant to the Seventh Amendment, but Justice Thomas rejected this argument in one short paragraph. *Id.* at 344–45 ("This Court's precedents establish that, when Congress properly assigns a matter to adjudication in a non-Article III tribunal, 'the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.' No party challenges or attempts to distinguish those precedents. Thus, our rejection of Oil States' Article III challenge also resolves its Seventh Amendment challenge.") (citations omitted).

51. *Id.* at 334 (quoting Stern v. Marshall, 564 U.S. 462, 484 (2011)).

52. *Oil States*, 584 U.S. at 334.

53. *Id.*

proper classification of patents as either public or private rights, ultimately concluding that "[i]nter partes review falls squarely within the public-rights doctrine."[54]

In determining that inter partes review falls within the public-rights doctrine, Justice Thomas's argument followed a basic syllogism: granting a patent is a "matter involving public rights," inter partes review "involves the same basic matter as the grant of a patent," therefore, inter partes review is a matter involving public rights.[55] Justice Thomas made little of the temporal distinction between the initial grant of a patent and inter partes review,[56] noting that "inter partes review involves the same interests as the determination to grant a patent in the first instance."[57] The majority opinion then rejected three arguments raised by Oil States and the dissenting Justices. First, Oil States cited three Supreme Court decisions that "recognize[d] patent rights as the 'private property of the patentee.'"[58] However, the majority opinion distinguished patents from traditional forms of property, noting that because patents are "public franchise[s],"[59] they can confer only "rights that the statute prescribes"[60] Significantly, Justice Thomas noted the Patent Act's language that "*[s]ubject to the provisions of this title*, patents shall have the attributes of personal property."[61] Therefore, inter partes review was simply one of the "provisions" of the Patent Act.[62] Second, through an extensive review of how patents were challenged in eighteenth-century England, Justice Thomas "disagree[d] with the dissent's assumption that, because courts have traditionally adjudicated patent validity in this country, courts must forever continue to do so."[63] Finally, Justice Thomas rejected Oil States's argument that IPR violated Article III because it shares "every salient characteristic associated with the exercise of the judicial power,"[64] explaining that "[the Supreme] Court has never adopted a 'looks like' test to determine if an adjudication has improperly occurred outside of an

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54. *Id.* at 325, 334 (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 (1982) (plurality opinion). *See also* John Golden, *Patents and the Private-Versus-Public Rights Distinction*, NEW PRIV. L. BLOG, (May 30, 2017), https://nplblog.law.harvard.edu/2017/05/30/patents-and-the-private-versus-public-rights-distinction/ [https://perma.cc/8SGP-FV6Z] ("Controversy rages over the extent to which patent rights—or, at least, challenges to patent rights' validity—fall within the 'public rights' exception to Article III adjudication.").

55. *Oil States*, 584 U.S. at 334–35.

56. *Id.* at 337 ("The primary distinction between inter partes review and the initial grant of a patent is that inter partes review occurs *after* the patent has issued. But that distinction does not make a difference here.").

57. *Id.*

58. *Id.* at 337–38.

59. *Id.* at 338 (quoting Pfaff v. Wells Elecs., Inc. 525 U.S. 55, 63–64 (1998)).

60. *Oil States*, 584 U.S. at 338.

61. *Id.* (quoting 35 U.S.C. § 261) (emphasis added).

62. *Id.*

63. *Id.* at 340–42.

64. *Id.* at 343 (quoting Brief for Petitioner at 20, *Oil States*, 584 U.S. 325 (No. 16-712)).

Article III court."[65] Interestingly, despite seeming to fully embrace a public-rights view of patents early in his opinion, at the end of the majority opinion, Justice Thomas limited the holding of *Oil States* in several significant ways. First, Justice Thomas made clear that the Court was not deciding whether "other patent matters . . . can be heard in a non-Article III forum."[66] Additionally, the decision was limited as expressing no opinion on the retroactivity of IPR, or whether IPR would meet muster under a due process challenge.[67] Finally, and most confusingly, Justice Thomas stated that the decision "should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause," leaving the door open for future scholarly and judicial debates about the public-versus-private nature of patents.[68]

With the decision in *Oil States*, inter partes review survived a direct constitutional attack; non-Article III adjudicators could constitutionally hear and decide post-grant patent review cases. But the question remains: "does it even matter?" On the surface, the *Oil States* case might appear as just another case laying siege on the administrative state. However, a close look at inter partes review adjudicators, the APJs, reveals that the desire to hear patentability challenges in an Article III forum is not simply a matter of upholding legal formalisms, but rather grounded in a well-founded fear for the neutrality of decisions issued by the PTAB.

II. APJS COMPARED TO ARTICLE III JUDGES

As for the APJs, most are former patent attorneys who have diverse backgrounds in areas such as "private practice at both large and small firms, government practice from within the USPTO itself and from other federal agencies, and in-house counsel at large and small corporations."[69] Holding the position of APJ "typically requires approximately 10-15 years or more of patent experience," including "prosecuting patent cases and/or litigating patent cases" or patent work at the USPTO.[70] The APJs describe their job as "fun," "hard," and "challenging," but one that "allows [them] to put aside the work, exciting as it may be, and spend quality, undivided time with [their] famil[ies]."[71] The

65. *Id.*

66. *Id.* at 344.

67. *Id.*

68. *Id.*

69. Michael Wagner, *An Introduction to the Administrative Patent Judges at the Patent Trial and Appeal Board*, THE FED. LAW., May 2015, at 36.

70. *Administrative Patent Judge*, USAJOBS, https://www.usajobs.gov/job/690925500 [https://perma.cc/3N64-G77S] (last visited Jan. 12, 2025).

71. *See* Michael Astorino et al., *Day in the Life of An Administrative Patent Judge,* U.S. PAT. AND TRADEMARK OFF.,

USPTO describes the position of APJ as "ideal" for a person who "enjoy[s] reviewing arguments and evidence provided in motions, briefs, and oral hearings," is "committed to preparing and issuing timely, high-quality decisions, that are consistent with statutes, regulations, case law, and agency policies," and who "reflect[s] professionalism and judicial decorum."[72] Although this job description shares many qualities with those of an Article III judge, the safeguards surrounding APJs are far less stringent than those for Article III judges.[73] Thus, parties who premise entire lawsuits on the argument that their controversy must be heard in an Article III court might do so not just to vindicate their Constitutional right, or to lay siege upon the administrative state, but on a well-founded fear that denial of an Article III forum leaves their case more vulnerable to an unfair or biased decision.[74]

A. Appointment Process and Reviewability of Decisions

The first, and one of the most obvious discrepancies between APJs and Article III judges is the process by which they are appointed and the reviewability of their decisions by the Director of the PTAB. Article III judges must be nominated by the President and confirmed by the Senate.[75] The appointment of an Article III judge is a slow and laborious process, beginning with compiling names of potential nominees by Congresspeople, selection of a nominee by the President, and, perhaps most importantly, the issuance of an opinion by the Senate Judiciary Committee.[76] The Senate Judiciary Committee hearing serves two functions. First, it provides an extensive vetting of the nominee's professional prowess, personal life, and qualifications to sit on the bench.[77] Second, the hearings that accompany the Judiciary Committee's opinion thrust into the limelight any deficiencies in qualification or past personal conduct that lacks the decorum required of the bench.[78]

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https://www.uspto.gov/sites/default/files/documents/a_day_in_the_life_of_an_apj.pdf [https://perma.cc/9GJ2-4MGX] (last visited Jan. 12, 2025).

72. *Administrative Patent Judge*, *supra* note 70.

73. *See, e.g.*, Lyle Therese A. Hilotin-Lee, *How Are Judges Selected?*, FINDLAW (June 20, 2024), https://www.findlaw.com/litigation/legal-system/how-are-judges-selected.html [https://perma.cc/MZ4V-UC7Q].

74. This is not to say, of course, that suing to attack non-Article III adjudications is not a common and effective practice. *See generally* Metzger, *supra* note 6 (describing various attacks on the administrative state via the Supreme Court).

75. U.S. CONST. art. II, § 2, cl. 2.

76. Hilotin-Lee, *supra* note 73.

77. BARRY J. MCMILLION, CONG. RSCH. SERV., R44236, SUPREME COURT APPOINTMENT PROCESS: CONSIDERATION BY THE SENATE JUDICIARY COMMITTEE 1 (2021).

78. The Senate Judiciary Committee's hearing regarding the nomination of Justice Kavanaugh provides an example of how the Committee's nature can have a considerable impact on the public perception of judges. *See Summary of Actions by Chairman Grassley and the Senate Judiciary Committee Related to Allegations Made and Disputed Regarding Judge Brett Kavanaugh*, U.S. S. COMM. ON THE JUDICIARY (Sep. 26, 2018), https://www.judiciary.senate.gov/press/rep/releases/summary-of-actions-by-chairman-grassley-and-the-

By contrast, APJs are "persons of competent legal knowledge and scientific ability who are appointed by the Secretary [of Commerce], in consultation with the Director [of the PTAB]."[79] And, although the statutory text suggests a formal process tantamount to the appointment of federal judges, the presence of job listings on the USPTO website suggests that "appointment" by the Director may be more akin to an employer selecting from a pool of candidates.[80] It is worth noting that a hiring process akin to traditional selection from a pool of candidates may be dictated by necessity. Since the PTAB is not an Article III court, practitioners seeking to switch to a career in the judiciary may be less likely to seek employment there, since a job as an APJ does not carry the same appurtenant prestige, tenure protection, and salary guarantees as an Article III judge. However, for purposes of this note, causation of the phenomenon is immaterial. What is important is that the current process for selecting APJs not only skips the extensive vetting process conducted for Article III judges by the Senate Judiciary Committee, but the entire process happens out of the limelight.

Furthermore, constitutional issues pertaining to removal restrictions on APJs have led to a structure that affords APJs far less decisional independence than originally contemplated by Congress. This issue took center stage in the case *United States v. Arthrex*.[81] Arthrex, a developer and manufacturer of implants used during orthopedic surgeries, brought suit against Smith & Nephew, Inc., claiming that the latter infringed upon one of its patents.[82] IPR was initiated, and ultimately, it was determined that the Arthrex patent was invalid.[83] Obviously dissatisfied with this result, Arthrex appealed to the Federal Circuit, where for the first time it raised the argument that APJs were principal officers, such that their appointment by the Secretary of Commerce was unconstitutional.[84] The Federal Circuit was persuaded by this argument and found that APJs were in fact principal officers.[85] However, rather than shut the entire operation down, the Federal Circuit came up with a workaround: it removed the APJs' tenure protections, effectively making them removable at will by the Secretary; thus, the APJs would be converted from principal to inferior officers.[86] On appeal to the Supreme Court, Arthrex's main argument was that a mere severance of tenure protections was inappropriate.[87] Instead,

senate-judiciary-committee-related-to-allegations-made-and-disputed-regarding-judge-brett-kavanaugh [https://perma.cc/2LQG-AJYP].

79. 35 U.S.C. § 6.

80. *See Administrative Patent Judge*, *supra* note 70.

81. 594 U.S. 1 (2021).

82. *Id.* at 9–10.

83. *Id.* at 10.

84. *Id.*

85. Arthrex, Inc. v. Smith & Nephew, Inc., 941 F.3d 1320, 1335 (Fed. Cir. 2019).

86. *Id.* at 1338–40.

87. *See* Brief for Arthrex, Inc. at 59, *Arthrex*, 594 U.S. 1 (Nos. 19-1434, 19-1452, and 19-1458).

Arthrex urged the Court to find the entire regime of inter partes review unconstitutional and "defer to Congress to fix the problem."[88] The Supreme Court ultimately embraced the remedy of granting the Director authority to review each and every decision made by an APJ.[89] Parties to PTAB proceedings have taken full advantage of the Chief Justice's workaround. There are currently over 500 active requests for Director Review pending before the PTAB, and currently 59 proceedings in which Director Review has been granted.[90]

By not being appointed by the President, "by and with the Advice and Consent of the Senate,"[91] APJs with insufficient credentials or troubling personal pasts will be allowed to hear IPR cases. Furthermore, the *Arthrex* workaround, which made all decisions reviewable by the PTAB Director and the subsequent inundation of requests for Director Review, has led to decreased decisional independence for APJs as compared to Article III judges.

B. *Tenure and Salary Concerns*

The Framers regarded tenure protections for judges as of paramount importance for fair adjudications.[92] APJs' tenure protection survived a scare in *Arthrex* when the Supreme Court elected not to remove APJs' tenure protection as the Federal Circuit initially did, but rather to make all decisions reviewable by the PTAB Director.[93] For now, therefore, APJ tenure protections appear secure as an effective safeguard against impartial decisions.

However, the way that APJs are compensated provides a serious risk to the neutrality of decisions before the PTAB. First, consider Article III judges. As mentioned above, one of the Framers' chief grievances with King George at the time of writing the Declaration of Independence was that the King exercised undue control over the decisions of judges on account of his control over their salaries.[94] As such, the Framers took care to ensure that Article III

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88. *Id.* at 57–59. Arthrex articulated three remedies. First, "Congress could select from a range of historically grounded remedies. Congress could provide for APJs to be appointed by the President and confirmed by the Senate, consistent with their important functions." Second, "Congress could grant the Director authority to review APJ decisions." Third, Arthrex offered that "Congress could reject inter partes review," which was likely Arthrex's preferred remedy, as in that case, the decision by the PTAB, which invalidated Arthrex's patent in question, would be nullified.

89. *See Arthrex*, 594 U.S. at 24.

90. *See Status of Director Review Requests*, U.S. PAT. AND TRADEMARK OFF., https://*www.uspto.gov/patents/patent-trial-and-appeal-board/status-director-review-requests* [https://perma.cc/Q85Y-9XHN] (last visited Jan. 12, 2025).

91. U.S. CONST. art. II, § 2, cl. 2.

92. *See* THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) ("He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.").

93. *See Arthrex*, 594 U.S. at 24.

94. *See* THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776); *see also* Ron D. Katznelson, *The Pecuniary Interests of PTAB Judges - Empirical Analysis Relating Bonus Awards to Decisions in AIA Trials*, at 3, (July 2021) https://docs.house.gov/meetings/JU/JU03/20220721/115027/HHRG-117-JU03-20220721-SD004.pdf [https://perma.cc/L4AL-UECG] ("The experience of Massachusetts was still fresh in our

judges would enjoy a Constitutionally protected salary, which may not be decreased during their tenure.[95] APJs are not subject to the same salary protections as Article III judges.[96] But, it is more than insulation from pay decreases that is concerning about APJs' compensation structure with respect to neutrality of decision-making. APJs are awarded a base salary that is set by the PTAB Director.[97] Furthermore, 35 U.S.C. § 5 provides that "[o]fficers and employees of the Office shall be subject to the provisions of title 5."[98] Under 5 U.S.C. § 4505(a), employees may be paid performance-based cash bonuses if their "performance rating was at the fully successful level or higher."[99] This means that APJs can be, and in fact are, paid cash bonuses in addition to their base salaries.[100] At first blush, the receipt of cash bonuses by employees presiding over adjudications affecting substantial rights of parties raises alarm bells, since Article III judges must be disqualified "in any proceeding in which the judge has a financial interest, however small."[101] In an extensive empirical analysis performed by Dr. Don Katznelson, it was determined that in fiscal year 2016, eighty-nine percent of APJs earned a bonus, with eighty percent of APJs surveyed earning more than $10,000 in bonus awards.[102] Additionally, sixty-four percent of APJs earned a bonus award of ten percent or more of their base salary, and sixteen percent of APJs earned a bonus equivalent to nineteen point nine percent of their base pay.[103] This is presumably because the maximum allowable cash bonus under 5 U.S.C. § 4505 is twenty percent.[104] While no express prohibition exists on awarding bonuses to Article III judges, in light of the Framers' abhorrence of judicial salary control by King George and Article III's language, it can hardly be a coincidence that federal judges are not awarded cash bonuses.[105] The very notion that APJs receive cash bonuses therefore fails

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Founders' minds—an act of Parliament in 1773 had decreed that the salaries of judges would be paid by the King at his discretion, and forbade them from receiving salaries from the colony's legislature.").

95. U.S. CONST. art. III, § 1, cl. 2.

96. *See* 35 U.S.C. § 3.

97. *See id.* ("The Director may fix the rate of basic pay for the administrative patent judges appointed pursuant to section 6 and the administrative trademark judges appointed pursuant to section 17 of the Trademark Act of 1946 (15 U.S.C. 1067) at not greater than the rate of basic pay payable for level III of the Executive Schedule under section 5314 of title 5.").

98. *Id.*

99. 5 U.S.C. § 4505a.

100. *See* Katznelson, *supra* note 94, at 5–8.

101. CODE OF CONDUCT FOR UNITED STATES JUDGES CANON 3 (U.S. Cts. 2019), https://www.uscourts.gov/administration-policies/judiciary-policies/ethics-policies/code-conduct-united-states-judges [https://perma.cc/R9J5-TZJA].

102. *See* Katznelson, *supra* note 94, at 24.

103. *Id.*

104. 5 U.S.C. § 4505a ("[T]he agency head may authorize a cash award equal to an amount exceeding 10 percent of the employee's annual rate of basic pay if the agency head determines that exceptional performance by the employee justifies such an award, but in no case may an award under this section exceed 20 percent of the employee's annual rate of basic pay.").

105. *See* Katznelson, *supra* note 94, at 3.

a fairness litmus test, and, as Dr. Katznelson observes, may implicate a due process issue in its own right.[106]

Additionally, it has been suggested that APJs' bonuses might be correlated to the outcomes of the decisions they make.[107] Dr. Katznelson suggests that "*PTAB judges appear to gain more financial rewards when deciding to institute an AIA trial than when deciding to deny institution.*"[108] While admitting that the data is not as strongly correlative as would be accepted in the scientific community,[109] this analysis shows that the general feeling of unease surrounding adjudicatory employees receiving cash bonuses may be vindicated by the "manifest appearance of pecuniary bias."[110]

The Congressional history of the America Invents Act shows a manifest intent to "insulate [APJs] from outside pressures and preserve integrity within the application examination system."[111] However, the system of appointing APJs, and the receipt of cash awards by APJs depending on job performance seriously undermines these goals.

C. External Threats to Decisional Independence

As previously shown, there are several threats to the neutrality of decisions by APJs that are incident to the structure of the PTAB and APJs' compensation structure. However, beyond these "internal" concerns, there are several threats to the neutrality of decisions of APJs that originate from external sources.

1. Removal of ALJs from the Competitive Service

As discussed above, President Trump has not been bashful about his disdain towards the perceived shortcomings of the "administrative state."[112] This assault shows no signs of slowing during the President's second term.[113] During President Trump's first term, he issued an Executive Order which moved administrative law judges (ALJs) from the competitive service and

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106. Katznelson, *supra* note 94, at 27–28; *see also* THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) ("He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.").

107. Katznelson, *supra* note 94, at 31–34.

108. *Id.* at 31.

109. *Id.* Dr. Katznelson explains that "the one-tail *p*-values for the difference coefficients . . . permit the rejection of a null hypothesis that they are zero (unbiased) in favor of the alternate hypothesis of bias . . . ." Dr. Katznelson's p-values are, respectively, 0.41 and 0.20. *Id.* at 30–31. Generally, p-values of less than 0.05 are accepted as significant. *Id.*

110. *Id.*

111. H.R. REP. NO. 104-784, at 32 (1996).

112. *See* Katz, *supra* note 1.

113. Rebecca Jacobs, *Trump Has Said He Wants to Destroy the "Deep State" 56 Times on Truth Social*, CREW (Aug. 1, 2024), https://www.citizensforethics.org/reports-investigations/crew-investigations/trump-has-said-he-wants-to-destroy-the-deep-state-56-times-on-truth-social/ [https://perma.cc/CFK2-M2AG].

instead moved ALJs into the excepted service.[114] Employees in the competitive service are "subject to the civil service laws passed by Congress to ensure that applicants and employees receive fair and equal treatment in the hiring process."[115] Furthermore, "[i]n the competitive service, individuals must go through a competitive hiring process," which "may consist of a written test, an evaluation of the individual's education and experience, and/or an evaluation of other attributes necessary for successful performance in the position to be filled."[116] By contrast, excepted service employees are subject only to the qualification requirements set by their respective agencies.[117]

Removing ALJs from competitive service was a move designed to give "the president and agency heads broader latitude in appointments [of ALJs]."[118] And indeed, by removing ALJs from the competitive service, agency heads have far more freedom to choose the criteria by which ALJs are appointed.[119] The Executive Order acknowledged that ALJs ideally are "impartial and committed to the rule of law."[120] However, as applied to the PTAB, the removal of APJs from the competitive service could lead to biased decisions by APJs. To understand this concern, first remember the purpose of the America Invents Act, which created the PTAB: "that questionable patents are too easily obtained and are too difficult to challenge."[121] Therefore, the PTAB was created not to issue patents, but clearly, to invalidate them.[122] Additionally, consider who hires APJs. The Secretary of Commerce appoints APJs "in consultation with the Director of the PTO."[123] The concern is therefore that (1) considering the PTAB was created specifically to invalidate patents; and (2) that the Secretary of Commerce and Director of the USPTO have broad latitude in the hiring of APJs, absent the Selective Service, a system exists where APJs who find against patent holders are more likely to get the job than those who are impartial.

While it is difficult to know what the effect of removing APJs from the Selective Service will be for patent holders, it is important to note that PTAB proceedings already appear to prejudice patent holders. Indeed, as mentioned

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114. Exec. Order No. 13843, 83 Fed. Reg. 32755 (July 10, 2018).

115. *Entering Federal Service*, USAJOBS https://help.usajobs.gov/working-in-government/service [https://perma.cc/QA3H-SF8Y] (last visited Jan. 12, 2025).

116. *Id.*

117. *Id.*

118. Erich Wagner, *Trump Moves Hiring of Administrative Law Judges Out of the Competitive Service,* GOV'T EXEC. (July 10, 2018), https://www.govexec.com/management/2018/07/trump-moves-administrative-law-judge-appointments-out-of-competitive-service/149602/ [https://perma.cc/4Y5A-JYJL].

119. Exec. Order No. 13843, 83 Fed. Reg. 32755 (July 10, 2018).

120. *Id.*

121. H.R. REP. NO. 112-98, pt. 1, at 38–39 (2011).

122. *See* Peter J. Pitts, *'Patent Death Squads' vs. Innovation*, WALL ST. J. (June 10, 2015, at 19:23 ET), https://www.wsj.com/articles/patent-death-squads-vs-innovation-1433978591 [https://perma.cc/9JXT-N8EW].

123. Rick Bisenius, Dan Smith & Ryan Petty, *What is the PTAB and Who are the Judges?*, FISH, (July 13, 2020), https://www.fr.com/insights/ip-law-essentials/what-is-the-ptab-and-who-are-the-judges/ [https://perma.cc/AW7G-65RA].

supra, "[t]he PTAB has invalidated at least one 'claim'—or part—in almost 80% of the patents it has ruled on."[124] Panels of APJs have been likened to "patent death squads," posing serious threats not only to owners of weak patents, but also to legitimate and deserving patent holders.[125] Removing APJs from the rigors of the Selective Service and giving more latitude to the Director, who is charged with operating a system designed to make it harder to keep a patent, only exacerbates the problem and poses a serious risk to the decisional independence of APJs.

2. *Industry Lobbying*

An additional "external" threat to the decisional independence of APJs is the looming threat of industry lobbying. Consider the players before the PTAB. Some may include inventors as natural people, with limited resources. But others are multi-billion, or trillion-dollar corporations.[126] In fact, by September 2020, only ten petitioners had instituted 2,659 petitions for IPR before the PTAB.[127] With more money comes more influence, which manifests in several ways.[128] First, big players have used the PTAB as a way to drown poorly-capitalized patent owners in expensive proceedings that they cannot afford.[129] Additionally, technology giants engage in "lobbying the executive branch and lobbying the USPTO, in particular now, to change rules and change positions."[130] The threat of lobbying before the PTAB, which is largely absent from Article III courts, poses the ultimate risk that APJs who are more corporation-friendly will see higher rates of appointment, even though it is exactly this type of abusive practice that the PTAB was designed to prevent.[131]

The link between industry lobbying and corporation-friendly APJs is apparent in two main ways. First, the fact that many APJs have experience doing work for the very corporations that lobby before the PTAB leads to lessened decisional integrity. As mentioned *supra,* many APJs have extensive previous

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124. Pitts, *supra* note 122.

125. *Id.*

126. PTAB STATISTICS: AIA TRIALS DATA, https://www.reginfo.gov/public/do/eoDownloadDocument?pubId=&eodoc=true&documentID=7164 [https://perma.cc/YY4P-5KBK] (last visited Jan. 12, 2025).

127. *Id.*

128. *See* John B. Pegram et al., Session 5: Patent Law at the Twenty-Ninth Annual International Intellectual Property Law & Policy Conference 1, 4 (Apr. 22, 2022), *in* FORDHAM INTELL. PROP. L. INST. at 1, 4 https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1015&context=ipli_conf_29th_2022 [https://perma.cc/ZU9E-3LHA] (noting that "[e]ven though the rhetoric and the narrative about the creation of the PTAB was for individual inventors, the mom and pops were being tormented by abusive patent trolls").

129. *Id.* at 4, 9 ("It's not direct lobbying of cases, it's the procedures, it's the serial petitioning, which plagues the PTAB from the beginning if 30 petitions, 40 petitions, 50 petitions filed against the same patent owner.").

130. *Id.* at 4.

131. *Id.*

experience before the PTAB.[132] This includes experience in private practice.[133] Practitioners who have extensive experience before the PTAB likely work for large companies who are well-capitalized and able to afford many IPR proceedings. Of course, the large companies who the practitioners work for are the same companies who abuse and weaponize PTAB proceedings. Therefore, the concern is that APJs are pulled from a pool of practitioners who have worked for the very same companies that abuse PTAB proceedings, leading to anti-patent holder decisions.

CONCLUSION

In contrast to the growing assault on the administrative state, the decision in *Oil States* shocked many as a defense of the constitutionality of inter partes review. However, beyond the mere Constitutional guarantee that all entitled parties should have disputes heard in an Article III forum, there are considerable discrepancies between APJs and Article III judges. Namely, as this note observes, there are concerns regarding the appointment structure of APJs, the receipt of cash bonuses by APJs, and "external factors" such as the removal of ALJs from the competitive service and industry lobbying.

*Antonio J. Petrucci**

132. *Patent Trial and Appeal Board*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/about-us/organizational-offices/patent-trial-and-appeal-board#:~:text=The%20Patent%20Trial%20and%20Appeal%20Board%20(PTAB)%20is%20a%20tribunal,clerks%20or%20USPTO%20patent%20examiners [https://perma.cc/K8LW-MNAD] (last visited Jan. 8, 2025).

133. *Id.*

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