THE NEW WORLD OF AGENCY ADJUDICATION

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In 1946, the Administrative Procedure Act (APA) set forth the basics for "formal" adjudication, with the classic account requiring an administrative law judge to make the initial determination and the agency head to have the final word. Today, however, the vast majority of agency adjudications are not paradigmatic "formal" adjudications as set forth in the APA. That is the lost world. It turns out there is great diversity in the procedures by which federal agencies adjudicate. This new world involves a variety of less-independent administrative judges, hearing officers, and other agency personnel adjudicating disputes. Like in the lost world, however, the agency head retains final decision-making authority.

In 2011, Congress created yet another novel agency tribunal—the Patent Trial and Appeal Board (PTAB)—to adjudicate disputes between private parties as to the validity of issued patents. Questions abound concerning the PTAB's proper place in the modern administrative state, as its features depart from the textbook accounts of APA-governed "formal" adjudication. Many of these questions are working their way through the Federal Circuit and to the Supreme Court. Indeed, the Court will decide this Term whether PTAB adjudication unconstitutionally strips parties of their property rights in issued patents.

This Article situates PTAB adjudication within administrative law's larger landscape of agency adjudication. By surveying this new world of agency adjudication, it becomes clear that PTAB adjudication is not that unusual. But we also identify one core feature of modern agency adjudication that is absent at the PTAB: the Director of the Patent and Trademark Office lacks final decision-making authority. To be sure, the Director has some power to influence outcomes, in her ability to order rehearing and stack the board with those who share her substantive vision. But these second-best means of agency-head control raise problems of their own, including constitutional questions. This Article concludes by exploring alternative mechanisms to remedy the lack of agency-head review at the PTAB.

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INTRODUCTION

Every administrative law student learns the basics of "formal" adjudication under the Administrative Procedure Act (APA). The paradigmatic APA-governed formal adjudication involves an evidentiary hearing held before an administrative law judge (ALJ) wherein parties are entitled to oral arguments, rebuttal, and cross-examination of witnesses.[1] ALJs presiding over this formal adjudicatory hearing are functionally equivalent to a trial judge in a bench trial.[2] The critical difference from the judicial model is that the agency head reviews ALJ decisions de novo and has final decision-making authority.[3]

The vast majority of agency adjudications today, however, do not take the form of APA-governed formal adjudication. Instead, agencies regulate using adjudicatory means that still require evidentiary hearings but do not embrace all of the features set forth in the APA. To borrow from Dan Farber and Anne O'Connell, the predominance of formal-like agency adjudication outside of the APA is yet another departure from the "lost world of administrative law"—further revealing "an increasing mismatch between the suppositions of modern administrative law and the realities of modern regulation."[4] This new world of formal adjudication outside of

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[1] *See* 1 RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE 703 (2010) (discussing formal adjudication procedures set forth in 5 U.S.C. §§ 554–557).

[2] *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011).

[3] 5 U.S.C. § 557(b) (2012); *accord* FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 364–65 (1955).

[4] Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140 (2014).

the APA is extremely diverse in substance and procedure.[5] It covers a broad range of subject matters such as public benefits, disputes between federal agencies and private parties, and even disputes between private parties. Some new-world adjudicatory systems handle hundreds of thousands of cases a year, while others handle just a handful of cases annually. Many are essentially just as formal as APA-governed formal adjudication; others are quite informal. As the Administrative Conference of the United States has documented, "Some proceedings are highly adversarial; others are inquisitorial. Caseloads vary. Some have huge backlogs and long delays; others seem relatively current. The structures for internal appeal also vary."[6]

Despite this great diversity in adjudication across the modern administrative state, the "standard federal model" continues to vest final decision-making authority in the agency head.[7] This feature has deep roots in the theory of federal courts. *Hart & Weschler's*, for instance, distinguishes Article III federal courts and Article I legislative courts from agency tribunals in part because the agency head has final policymaking authority.[8] Administrative law scholars, moreover, have long recognized and often criticized, how federal agencies have the authority to make policy through either rulemaking or adjudication.[9] That is, agency heads have almost unfettered authority to review and reverse their adjudicatory boards, through which they set binding policies for the agency. Beyond enabling agency heads to exercise policy control, agency-head review also empowers agency leadership to bring greater consistency to adjudicatory outcomes while concomitantly providing agency heads with a better understanding of how the regulatory system is functioning. Given these benefits, it is not too surprising that even though the new world is more diverse than the lost world, agency-head final decision-making remains a touchstone of agency adjudication.

In 2011, Congress introduced yet another form of federal agency adjudication: certain proceedings before the Patent Trial and Appeal Board (PTAB) at the Patent and Trademark Office (Patent Office).[10] At the time of its enactment, the Patent Office Director proclaimed that the

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[5] *See infra* Part I.B.

[6] Adoption of Recommendations, 81 Fed. Reg. 94,312, 94,315 (Dec. 23, 2016).

[7] Ronald M. Levin, *Administrative Judges and Agency Policy Development: The Koch Way*, 22 WM. & MARY BILL RTS. J. 407, 412 (2013).

[8] RICHARD H. FALLON, JR., ET AL., HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 379–80 (7th ed. 2015); *accord* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 923–24 (1988).

[9] *See, e.g.*, M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1396–97 (2004); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 922 (1965).

[10] Leahy-Smith America Invents Act, Pub. L. No. 112–29, 125 Stat. 284 (2011) (codified in scattered sections of 35 U.S.C.).

Leahy-Smith America Invents Act (AIA) constituted "the most significant overhaul to our patent system, since the founding fathers first conceived of codifying a grand bargain between society and invention."[11] As part of this comprehensive reform, the AIA created PTAB and established three new, fast-track administrative procedures for private parties to challenge issued patents before the PTAB.

These PTAB proceedings are immensely popular. As of October 2017, the PTAB had received over 7,000 petitions that challenged issued patents under these three AIA procedures.[12] To adjudicate these claims, the Patent Office tripled its adjudicatory workforce of administrative patent judges, who generally adjudicate on three-judge panels.[13] In 2016, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), which has near-exclusive jurisdiction over patent appeals, docketed more patent appeals arising from the PTAB than from the federal district courts.[14] PTAB has transformed the relationship between Article III patent litigation and the administrative state.

These new agency adjudications have raised numerous questions concerning administrative law and regulatory practice, which are working their way through the Federal Circuit and making their way to the Supreme Court. For instance, in *Oil States Energy Services v. Greene's Energy Group*, the Court this Term considers whether PTAB adjudication unconstitutionally extinguishes property rights through a non-Article III forum and without a jury trial.[15] At oral argument last November, the Court expressed concerns about a number of features of this new agency adjudication. For instance, Chief Justice Roberts questioned whether the Patent Office Director's authority to change the agency adjudicators in the middle of the proceedings offends due process.[16]

Some patent scholars have questioned the PTAB's legitimacy in the modern administrative state, suggesting perhaps that it is a new platypus

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[11] David Kappos, *Re-Inventing the US Patent System*, USPTO: DIRECTOR'S FORUM (Sept. 16, 2011), http://www.uspto.gov/blog/director/entry/re_inventing_the_us_patent.

[12] U.S. Patent & Trademark Office, Patent Trial and Appeal Board Statistics (Oct. 31, 2017), https://www.uspto.gov/sites/default/files/documents/aia_statistics_october2017.pdf.

[13] KENT BARNETT ET AL., NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS, SELECTION, OVERSIGHT, AND REMOVAL 18 (Admin. Conf. of U.S. ed., draft report Feb. 2018) (reporting there were 275 administrative patent judges as of 2017), https://www.acus.gov/report/non-alj-adjudicators-federal-agencies-status-selection-oversight-and-removal (reporting there were 275 administrative patent judges as of 2017).

[14] Jason Rantanen, *The Federal Circuit and Appeals from the Patent Office*, PATENTLYO (Dec. 4, 2016), https://patentlyo.com/patent/2016/12/federal-circuit-appeals.html.

[15] Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 137 S. Ct. 2239 (2017) (granting certiorari and limiting to the first question presented).

[16] Transcript of Oral Argument at 45, Oil States Energy Servs., LLC v. Greene's Energy Grp., No. 16–712 (2017).

of administrative law. After all, these procedures differ in significant ways from the formal adjudication procedures in the APA. For instance, the proceedings are not presided over by ALJs, but agency officials called "administrative patent judges" and the Patent Office Director does not have final decision-making authority over PTAB decisions.

In this Article, we situate the PTAB adjudicatory process within administrative law's larger movement away from the lost world of APA-governed formal adjudication and toward the new world of formal-like adjudication that falls outside of the APA. As we demonstrate by detailing similar agency adjudications outside of the APA-governed formal proceedings in a number of regulatory contexts, the PTAB adjudicatory proceedings are not that unusual. Indeed, as we detail in Part III.B, PTAB adjudication embraces most of the best practices that administrative law experts have identified to ensure these formal-like adjudications are procedurally fair and substantively effective.

But PTAB adjudication also departs from both the lost world and the new world of agency adjudication in one critical respect: in the AIA, Congress did not grant the Patent Office Director final decision-making authority over PTAB adjudications. To be sure, the Director does have some authority to have the final word: the Director may order rehearing and stack the PTAB with administrative patent judges who are known will rule in the Director's favor. But these second-best means of agency-head control arguably raise problems of their own, most notably deep questions of procedural fairness and due process that may well rise to a constitutional level. In light of these concerns, we explore in Part IV a number of alternative mechanisms—internal agency practices, agency rulemaking, or even statutory amendment—that would help remedy the Director's lack of final decision-making authority.

Situating the PTAB in the modern administrative state is critical for a number of reasons. First, administrative law dictates that the category of adjudication influences the judicial deference afforded the agency's legal and factual determinations as well as the procedural safeguards required.[17] The Federal Circuit has repeatedly suggested that the PTAB proceedings are APA-governed formal adjudication and hence has imposed the APA's formal adjudication procedures on the Patent Office.[18] However, as we argue in Part III.A, the better understanding is that the PTAB proceedings are not governed by the APA's formal adjudication

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[17] *See infra* Part I. *See also* Melissa F. Wasserman, *The Changing Guard of Patent Law:* Chevron *Deference for the PTO*, 54 WM. & MARY L. REV. 1959, 1969-1970 (2013).

[18] *See, e.g.,* Norvartis AG v. Torrent Pharms. Ltd., 853 F.3d 1316, 1324 (Fed. Cir. 2017) ("In a formal adjudication . . . the APA imposes certain procedural requirements on the agency."); Dell Inc. v. Acceleron, LLC, 818 F.3d 1293, 1301 (Fed. Cir. 2016) (same); In re NuVasive, Inc., 841 F.3d 966, 971 (Fed. Cir. 2016) (same). Notably, the Federal Circuit has not afforded PTAB legal interpretations of ambiguous terms in the Patent Act any deference, which is highly unusual from an administrative law perspective. *See* Wasserman, *supra* note 17, at 1975.

requirements, even though they share many hallmarks of formal adjudication. Regardless of the merits of requiring the PTAB to implement the same procedural safeguards afforded formal adjudication, it appears that the APA, contrary to the suggestion of the Federal Circuit, does not mandate these protections.

Second, understanding the extent to which PTAB features exist in other agency adjudications informs the debate regarding whether, and if, certain facets of the Patent Office's new adjudicatory powers violate the APA or the Constitution. Because the field of patent law has historically lacked a robust engagement with administrative law theory and doctrine, a sustained comparison of PTAB adjudications with other agency adjudications can help focus challenges to those features that are in fact unique and hence may be more likely to be illegal.[19] At a minimum, courts should better understand how invalidating a feature of PTAB adjudication will affect the broader administrative state.

Third, comparing PTAB adjudication with the diverse agency adjudications across the regulatory state can highlight deficiencies in the PTAB's decisional process while concomitantly providing ways for the agency to improve its decision making. That is, understanding which features most agency adjudications have that the PTAB lacks can help inform discussions as to why the Patent Office's adjudicatory powers lack this feature and what, if anything, should be done to rectify it. This process could lead to improvements in the decisional process of the PTAB and the Patent Office more generally. Conversely, the PTAB has embraced a number of best practices that are worth incorporating in other new-world adjudicatory processes. In other words, much can be learned from examining these diverse laboratories of agency adjudication.

Finally, by focusing on these new PTAB proceedings and situating them within the new world of agency adjudication, we hope to spark a more sustained and critical debate about the future of agency adjudication. At the very least, administrative law as taught in the classroom must look beyond formal adjudication governed by the APA to the vast array of formal-like adjudications that predominate agency adjudication today. Yet even in this new world of agency adjudication, vesting final policymaking authority in the agency head remains a critical feature—one that sets agency adjudication apart from disputes resolved by the Article III judiciary or Article I legislative courts and one that provides numerous benefits to the functioning of an agency. This feature certainly merits further theoretical development and empirical

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[19] *See, e.g.*, Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269, 270 (2007) ("In contrast to commentators and practitioners in other technically complex areas . . . the patent law community has tended to pay little attention to administrative law."); Adam Mossoff, *The Use and Abuse of IP at the Birth of the Administrative State*, 157 U. PA. L. REV. 2001, 2002 (2009) ("Throughout the twentieth century, administrative law and intellectual property law seemed as if they were hermetically sealed off from each other in both theory and practice.").

investigation. This Article starts that conversation by examining in detail one new agency adjudication—PTAB adjudication—that expressly lacks such agency-head final decision-making authority.

This Article proceeds as follows: Part I provides an overview of both the lost world and the new world of agency adjudication. Part II introduces the key features of PTAB adjudication as set forth in the AIA. Part III then situates the PTAB proceedings within the larger landscape of agency adjudications that take place across the regulatory state. Part IV then focuses on one critical difference in PTAB adjudication: the agency head's lack of final decision-making authority.

I. UNDERSTANDING MODERN AGENCY ADJUDICATION

Every administrative law student is introduced to the classic "formal" adjudication governed by the APA. This world of agency adjudication, however, is largely lost. The modern landscape of agency adjudication is much more diverse in substance and procedure and often involves a variety of less-independent agency personnel adjudicating disputes than APA-governed formal adjudication. This Part describes this modern landscape and contrasts it with APA-governed "formal" adjudication. Part I.A begins with the lost world. Part I.B then introduces the new world of adjudication. One important theme that emerges from this survey is that agency adjudication—whether part of the lost or new world—generally vests final decision-making authority in the agency head.

A. The Lost World: APA-Governed Adjudication

Enacted in 1946, the Administrative Procedure Act establishes the default rules, subject to congressional override in the agency's governing statute,[20] for federal agency action and judicial review thereof.[21] The APA divides the various types of agency actions into two broad categories: rulemaking, which is the agency process for promulgating rules that articulate "an agency statement of general or particular applicability and

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[20] *See, e.g.*, Dickinson v. Zurko, 527 U.S. 150, 154 (1999) (holding that to depart from the APA default rules, the agency's governing statute must suggest "more than a possibility of a [different] standard, and indeed more than even a bare preponderance of evidence"; the exception "must be clear"). *See generally* Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 243–45 (2014) (discussing the standards for departing from the APA's default rules).

[21] *See* 5 U.S.C. §§ 551–59, 701–06 (2012). For more on APA's enactment, see, for example, Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996). For an overview of the evolution of the APA since 1946, see, for example, Kathryn E. Kovacs, *Superstatute Theory and the Administrative Procedure Act*, 90 IND. L.J. 1207 (2015); Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 633–68 (2017).

future effect";[22] and adjudication, which constitutes agency action that does not qualify as rulemaking.[23]

The APA further distinguishes what has been coined "formal" adjudication from all other types of "informal" adjudication. The APA's formal adjudication procedures generally apply "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."[24] In such circumstances, the APA requires, subject to modification in the agency's governing statute, a number of trial-like procedures that one would find in a bench trial in federal court. Richard Pierce's *Administrative Law Treatise* identifies ten key statutory requirements of APA-governed formal adjudication, which are summarized in Table 1 and described here.[25] Table 1 adds an eleventh important feature—agency-head final decision-making authority—which is further discussed below.

The first three requirements reflect due process concerns of ensuring proper notice and a meaningful opportunity to be heard before an unbiased adjudicator. The APA requires that the parties subject to the adjudication be provided with timely notice of the hearing, including "the legal authority and jurisdiction under which the hearing is to be held" and "the matters of fact and law asserted."[26] The evidentiary hearing must be presided over by an impartial adjudicator, meaning the agency, "one or more members of the body which comprises the agency," or "one or more administrative law judges appointed under" the APA.[27] The adjudicator cannot engage in ex parte communications about the case "unless on notice and opportunity for all parties to participate."[28] Nor can the

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[22] 5 U.S.C. § 551(4)–(5).

[23] *Id.* § 551(6) (defining adjudication as the "agency process for the formulation of an order"); *id.* § 551(7) (defining an "order" as "the whole or part of a final disposition . . . of an agency in a matter other than rulemaking"). *But see* Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule"*, 56 ADMIN. L. REV. 1077, 1077 (2004) (noting that the APA's distinction between rulemaking and adjudication is confusing and arguing that the APA's definition of "rule" "may be the most blatantly defective provision in the" APA).

[24] 5 U.S.C. § 554(a). The APA includes a half-dozen exceptions, including where the agency adjudication is subject to a trial de novo review, "proceedings in which decisions rest solely on inspections, tests, or elections," "cases in which an agency is acting as an agent for a court," and so forth. *Id.* § 554(a)(1)–(6).

[25] 1 PIERCE, *supra* note 1, at 703 (discussing formal adjudication procedures set forth in 5 U.S.C. §§ 554–557).

[26] 5 U.S.C. § 554(b). This notice requirement applies to the agency and private parties when they moving parties, though the APA expressly requires private parties to "give prompt notice of issues controverted in fact or law." *Id.*

[27] *Id.* § 556(b) (2012); *see also id.* § 3105 ("Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title."). The APA provides that parties may move to exclude for "personal bias or other disqualification of a presiding or participating employee." *Id.* § 556(b)

[28] *Id.* § 554(d)(1).

adjudicator "be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency."[29]

Table 1. Classic APA-Governed Formal Adjudication

	Statutory Requirement	APA Provision
1.	Notice of Legal Authority and Matters of Fact and Law Asserted	§ 554(b)
2.	Oral Evidentiary Hearing Before the Agency or Administrative Law Judge Who Must Be Impartial	§ 556(b)
3.	Limitations on Adjudicator's Ex Parte Communications with Parties and Within Agency	§§ 554(d), 557(d)(1)
4.	Availability of Legal or Other Authorized Representation	§ 555(b)
5.	Burden of Proof on Order's Proponent	§ 556(d)
6.	Party Entitled to Present Oral or Documentary Evidence	§ 556(d)
7.	Party Entitled to Cross-Examine Witnessess if Required for Full Disclosure of Facts	§ 556(d)
8.	Decision Limited to Bases Included in Hearing Record	§ 556(d)
9.	Party Entitled to Transcript of Evidence from Exclusive Record for Decision	§ 556(e)
10.	Decision Includes Reasons for All Material Findings and Conclusions	§ 557(c)(3)(A)
11.	Agency Head Final Decisionmaking Authority and De Novo Review of ALJ Decisions	§ 557(b)

The APA provides four main requirements for the agency hearing. Parties may be represented by legal "counsel or, if permitted by the agency, by other qualified representative" at the agency proceeding.[30] In the proceeding, the burden of proof lies with the proponent, and the parties are entitled to present oral or documentary evidence—though "the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence."[31] A party is also allowed to submit rebuttal evidence and "to conduct such cross-examination as may be required for a full and true disclosure of the facts."[32]

The final three APA requirements featured in Pierce's treatise address the agency's order and decision. The agency's decision must be based only on the exclusive record created at the hearing and supported

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[29] *Id.* § 554(d)(2). Indeed, the APA has detailed prohibitions on ex parte communications "relevant to the merits of the proceeding," requirements to make any such communications part of the public record of the proceeding, and authority for the agency to require the offending party "to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation." *Id.* § 557(d).

[30] *Id.* § 555(b).

[31] *Id.* § 556(d).

[32] *Id.*

by "reliable, probative, and substantial evidence."[33] If a party believes the agency's decision is based on a material fact outside of the record, the party must have an opportunity to make a timely request for reconsideration.[34] Accordingly, the APA requires the agency to provide the parties with this "exclusive record" of "[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding."[35] Not only must the agency's decision be based solely on the exclusive record created at the hearing, but it must include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record."[36]

Every administrative law casebook covers the basics of APA "formal" adjudication, focusing primarily on what process is required under the Constitution.[37] The paradigmatic APA-governed formal adjudication involves an evidentiary hearing held before an administrative law judge (ALJ) in which parties are entitled to oral arguments, rebuttal, and cross-examination of witnesses. ALJs presiding over this formal adjudicatory hearing are functionally equivalent to a trial judge in a bench trial. The ALJ is the principal factfinder and initial decision maker in an agency adjudication, and the APA generally empowers ALJs to "regulate the course of the hearing."[38] Congress, moreover, has sharply limited agency control over the selection, retention, and removal of ALJs, such that they enjoy strong decisional independence.[39]

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[33] *Id.* (2012).

[34] *Id.* § 556(e).

[35] *Id.*

[36] *Id.* § 557(c)(3)(A).

[37] In the early years of the APA, the Supreme Court seemed to treat the APA's "formal" adjudication hearing provisions as constitutionally required under the Due Process Clause, only to quickly retreat from that position. *See* 1 PIERCE, *supra* note 1, at 704–05 (discussing *Wong Yang Sun v. McGrath*, 339 U.S. 33 (1950), which was overruled in relevant part by *Marcello v. Bonds*, 349 U.S. 302 (1955)). Today administrative law casebooks focus more on the balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

[38] 5 U.S.C. § 557(c)(A)–(B).

[39] While each agency may "appoint as many administrative law judges as are necessary" to handle their caseload, 5 U.S.C. § 3105, agencies are limited in selecting ALJs from a list of candidates selected by OPM. Once appointed, ALJs have significant protection from performance reviews, as their financial compensation is not dependent upon the evaluation of their performance by the agency but instead set by statute and OPM regulations. *Id.* § 5372 (2012). ALJs can only be removed for "good cause," as determined by an independent agency—the Merit Systems Protection Board—after a formal adjudicative hearing. *Id.* § 554(d)(2). Because ALJs do not serve a fixed time period, they in essence have life tenure. *See generally* Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 346 (1991); Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 112–20 (1981); Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1344 (1992).

The critical difference between an ALJ adjudication and a civil bench trial is that the agency head maintains de novo review authority, while an appellate court defers to trial court factual findings.[40] Indeed, federal courts scholars have long distinguished Article III federal courts *and* Article I legislative courts from agency adjudicatory tribunals on the theory that the agency head has final policymaking authority.[41] Given that agency head review provides numerous benefits that enhance the functioning of an agency, as discussed in Part IV.A, it is unsurprising that this agency-head final decision-making authority is what Ron Levin has coined the "standard federal model."[42]

In the *Administrative Law Treatise*, Pierce does not list agency-head final decision-making authority as one of the ten core features of APA-governed formal adjudication. Indeed, this feature has been underexplored in the administrative law literature.[43] But this agency-head final decision-making authority certainly deserves mention. The APA provides that, in cases where "the agency did not preside at the reception of the evidence, the presiding employee . . . shall initially decide the case," and that initial "decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule."[44] When the agency decides to review an initial decision—either on appeal or via sua sponte review—the agency head has final decision-making authority.[45]

Indeed, the Supreme Court has interpreted the APA to provide that the ALJ's initial decision is not entitled to deference on administrative review.[46] That is, an agency maintains complete freedom, as though it had heard the initial evidence itself, when reviewing the decision of the ALJ. Nevertheless, the agency is typically required to explain why it has rejected ALJ findings, and courts generally examine the evidence more

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[40] *See generally* Merrill, *supra* note 2, at 939; Christopher J. Walker, *Against Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. ONLINE 106, 111 (2017) ("The appellate review model in the civil litigation context is based on the record from the prior proceeding, and the reviewing court does not engage in independent fact-finding. Likewise, the standard of review reflects the comparative expertise of the various institutions, with more or less deferential review depending on whether the issue is more factual or legal, respectively.").

[41] *See, e.g.*, FALLON ET AL., *supra* note 8, at 379–80 (noting the policymaking function in agency adjudication); Fallon, *supra* note 8, at 923–24 (same).

[42] Levin, *supra* note 7, at 412.

[43] An important exception is Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251 (1996). *See also* Shapiro, *supra* note 9, at 922 (noting how agency heads have "the power to formulate policy by either adjudication or the promulgation of regulations").

[44] 5 U.S.C. § 557(b).

[45] *See* Weaver, *supra* note 43, at 252 (noting that while the APA "imposed strict divisions between those who prosecute and those who adjudicate," it "imposed far fewer restraints on the appellate process; under the APA, ALJ decisions were fully reviewable within the agency").

[46] FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 364–65 (1955).

critically when an agency's reversal of an ALJ ruling turns on the credibility of the witnesses who testified at the hearing.[47]

This traditional APA-governed formal adjudication is utilized by a number of so-called independent federal agencies, such as the Federal Trade Commission,[48] the Federal Communications Commission,[49] the International Trade Commission,[50] and the Securities and Exchange Commission.[51] It is also commonplace at a number of executive branch agencies, including at the Departments of Agriculture, Health and Human Services, Interior, and Labor.[52]

B. The New World: Adjudication Outside of the APA

Despite administrative law's fixation on APA-governed "formal" adjudication, the vast majority of agency adjudications—and federal regulatory actions generally—do not involve APA-governed formal adjudications before an ALJ or the agency itself. Instead, most agency actions are adjudicated by non-ALJ agency personnel that have diverse titles, such as administrative judge, administrative appeals judge, immigration judge, hearing officer, and presiding official—just to name a few. Some estimate that upwards of 90% of all agency adjudication occurs outside of APA-governed formal adjudication proceedings.[53] As Michael Asimow has observed, the APA "fails to regulate in any significant way the vast and rapidly increasing number of more or less formal evidentiary adjudicatory hearings required by federal statutes that are not conducted by ALJs and yet are functionally indistinguishable from the hearings that are conducted by ALJs."[54]

Kent Barnett has recently explained that non-ALJ administrative judges (AJs) "remain the most unknown of the 'hidden judiciary' [because] the data for AJs, as compared to ALJs is much more limited, dated, and

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[47] Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). Most frequently, the agency head may reverse the ALJ's initial decision for policy reasons. However, when the agency reverses for factual disputes, the Court has stated that "evidence supporting a conclusion may be less substantial when an impartial, experienced [ALJ] who has observed the witnesses and lived with the case has drawn conclusion different from the [agency's]." *Id.*

[48] 15 U.S.C. § 41 (2012).

[49] 47 U.S.C. § 151.

[50] 19 U.S.C. § 1330.

[51] 15 U.S.C. § 78d.

[52] OPM provides an agency-by-agency breakdown of ALJs on its website: https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency (last visited Feb. 24, 2018).

[53] AMERICAN BAR ASS'N, A GUIDE TO FEDERAL AGENCY ADJUDICATION 176 (Jeffrey B. Litwak ed., 2d ed. 2012) (citing Paul R. Verkuil, *A Study of Informal Adjudication Procedure*, 43 U. CHI. L. REV. 739, 741 (1976)).

[54] Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003, 1020 (2004) (footnote omitted).

inconsistent from survey to survey."[55] But we do have three relatively large surveys from 1992, 2002, and 2017, which provide some context on the scope of adjudicatory activities outside of the APA. For instance, in 2002 agencies reported that they conducted more than 550,000 adjudications annually outside of the APA-governed formal adjudication processes, a 41% increase from the 1992 survey.[56] In 2002, there were 3,370 non-ALJ adjudicators, a 25% increase from 2,692 non-ALJ adjudicators in 1992.[57] By comparison, there were only 1,351 ALJs in 2002 and 1,167 ALJs in 1992.[58] By 2017, there were 10,831 non-ALJ adjudicators in the surveyed agencies.[59] By comparison, the Office of Personnel Management reports that there were 1,965 ALJs across the federal administrative state as of March 2017, 85% of whom work at the Social Security Administration.[60] The non-ALJ workforce is thus five times as large as the ALJ workforce.

Moreover, there is great breadth and diversity in these non-APA-governed agency adjudications. The Administrative Conference of the United States (ACUS) has exhaustively documented that diversity, observing that these adjudications

> involve types of matters spanning many substantive areas, including immigration, veterans' benefits, environmental issues, government contracts, and intellectual property. Some involve disputes between the federal government and private parties; others involve disputes between two private parties. Some involve trial-type proceedings that are at least as formal as [APA-governed "formal"] adjudication. Others are quite informal and can be decided based only on written submissions. Some proceedings are highly adversarial; others are inquisitorial. Caseloads vary. Some have huge backlogs and long delays; others seem relatively current. The structures for internal appeal also vary.[61]

The new world of agency adjudication is further complicated by the array of agency adjudicatory proceedings that not only fall outside of APA-governed "formal" adjudication but do not even involve an agency-

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[55] *See* Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1656–57 (2016).

[56] RAYMOND LIMON, OFFICE OF ADMIN. L. JUDGES, THE FEDERAL JUDICIARY THEN AND NOW—A DECADE OF CHANGE 1992-2002 3 (2002) (comparing 2002 survey data with findings from John Frye, *Study of Non-ALJ Hearing Programs*, 44 ADMIN. L. REV. 261 (1992)).

[57] *Id.*

[58] *Id.* at 3 n.4.

[59] BARNETT ET AL., *supra* note 13, at 16–17. This number includes 7,856 Patent Examiners at the Patent Office, compared to a reported 1,000 Patent Examiners in the 2002 Limon study. *Id.* at 18. If Patent Examiners are excluded from both surveys, we see an increase in non-ALJ adjudicators from 2,370 in the 2002 survey to 2,976 in the 2017 survey—a 26% increase in 15 years.

[60] *Id.*

[61] Adoption of Recommendations, 81 Fed. Reg. 94,312, 94,315 (Dec. 23, 2016).

administrated evidentiary hearing. The 1992, 2002, and 2017 surveys of non-ALJ agency adjudicators captured primarily the agency officials who conduct evidentiary hearings, not those agency officials who engage in these millions of less-formal agency adjudicatory activities conducted each year.[62] To provide but one example, the IRS routinely makes tax deficiency determinations following an audit, but without a legally required evidentiary hearing.[63] Although the number of IRS deficiency determinations does not appear to be publicly available, we know that the IRS audits/reviews around 5%—more than five million returns—of the returns filed each year.[64] And in fiscal year 2016, for instance, the IRS imposed civil penalties on nearly 40,000 filers.[65]

In light of these critical differences in "informal" adjudication, ACUS and the American Bar Association's Section of Administrative Law and Regulatory Practice have discouraged the use of the traditional, binary distinction between "formal" and "informal" for agency adjudication under the APA.[66] Instead, they advocate for three categories of federal administrative adjudication:

> (a) Adjudication that is regulated by the procedural provisions of the Administrative Procedure Act (APA) and usually presided over by an administrative law judge (referred to as Type A in the report that underlies this recommendation and throughout the preamble);

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[62] *See* MICHAEL ASIMOW, ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 11 (Admin. Conf. U.S. ed., 2016) https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-updated-draft-report.pdf ("Two earlier studies by John Frye and Ray Limon sought to map the world of Type B adjudication. . . . The studies take snapshots of Type B adjudications in 1992 and 2002.").

[63] *See* Hoffer & Walker, *supra* note 20, at 235–37 (describing IRS tax deficiency adjudicatory process and subsequent judicial review). A second example of IRS informal adjudication involves its review of innocent spouse claims. *See id.* at 237–40. A final IRS example concerns collections due process proceedings. *See id.* at 240–41. As Asimow explains, it is more difficult to categorize collection due process adjudications as tax regulations require the IRS to conduct a "hearing," but that hearing is quite informal. *See* ASIMOW, *supra* note 62, at 11 ("I originally included IRS CDP hearings as Type B adjudication, but have now decided that they are not 'evidentiary hearings.' Instead, they should be treated as Type C adjudication.").

[64] *See, e.g.*, TAXPAYER ADVOCATE SERVICE, 2016 ANNUAL REPORT TO CONGRESS 28 fig.S.6 (2016), https://taxpayeradvocate.irs.gov/Media/Default/Documents/2016-ARC/ARC16_Volume1.pdf (reporting that 6,825,987 of the 146,777,623 returns filed in 2014 were audited or reviewed to some extent by the IRS).

[65] *Id.* at 42 tbl.7.

[66] *See* Adoption of Recommendations, 81 Fed. Reg. 94,312, 94,314–94,315 (Dec. 23, 2016) (distinguishing Type A, B, and C adjudications); *accord* AMERICAN BAR ASS'N, RESOLUTION 114 (Feb. 2005) [hereinafter ABA RESOLUTION 114], https://www.americanbar.org/content/dam/aba/administrative/administrative_law_judiciary/resolution_114.authcheckdam.pdf. *See generally* Asimow, *supra* note 54 (presenting and discussing further ABA Resolution 114).

> (b) Adjudication that consists of legally required evidentiary hearings that are not regulated by the APA's adjudication provisions in 5 U.S.C. 554 and 556–557 and that is presided over by adjudicators who are often called administrative judges, though they are known by many other titles (referred to as Type B in the report that underlies this recommendation and throughout the preamble); and
>
> (c) Adjudication that is not subject to a legally required (i.e., required by statute, executive order, or regulation) evidentiary hearing (referred to as Type C in the report that underlies this recommendation and throughout the preamble).[67]

In other words, Type A adjudication is the same as APA-governed "formal" adjudication discussed in Part I.A, whereas Type B adjudication generally tracks those adjudications done by the non-ALJ adjudicators discussed in the 1992, 2002, and 2017 surveys—those administrative adjudications where a statute, regulation, or executive order requires an evidentiary hearing that is not governed by the APA's extensive adjudication provisions.[68] Type C adjudication is the residual category for less-formal adjudications that do not require an evidentiary hearing.

Although the emergence of this new typology is of relatively recent vintage, scholars have been studying non-APA adjudications for at least four decades. For instance, in 1976, Paul Verkuil surveyed the variety of informal adjudications (Type B and Type C) and explored constitutional due process issues with respect to these adjudications.[69] Before that, a number of scholars had attempted to categorize and identify best practices for what we now call Type C adjudications.[70] It was not until the 1990s, however, that scholars turned to the distinction between what we now call Type A and Type B adjudication. In 1992, ACUS published a report by

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[67] 81 Fed. Reg. at 94,314 (footnotes omitted).

[68] *See* ASIMOW, *supra* note 62, at 2. As Asimow explains, distinguishing Type B adjudications from both Type A and Type C adjudications is not an exact science. *See id.* at 7–13. For many Type B adjudications, the relevant statute may not indicate whether the APA's formal adjudication provisions should apply. Asimow identifies four ways to distinguish Type B from Type A: (1) whether the relevant statute uses the APA's magic words "on the record" after an agency hearing, 5 U.S.C. § 554(a); (2) whether the relevant statute does not use the magic words but otherwise assumes record exclusivity and requires an evidentiary hearing; (3) whether courts apply *Chevron* deference to agency statutory interpretations developed in the adjudication; and (4) whether courts determine congressional intent to have the APA apply due to the adjudication of serious public policy issues. *See* ASIMOW, *supra* note 62, at 7–9. Like Asimow, we do not take a definitive position here on the best criteria for distinguishing Type A from Type B, though some version of the second option seems reasonable, coupled with either the use of an ALJ or final review by the head of the agency.

[69] Verkuil, *supra* note 53, at 757–92.

[70] *See, e.g.*, William J. Lockhart, *The Origin and Use of "Guidelines" for the Study of Informal Action in Federal Agencies*, 24 ADMIN. L. REV. 167 (1972); Warner W. Gardner, *The Procedures by Which Informal Action Is Taken*, 24 ADMIN. L. REV. 115 (1972).

Paul Verkuil, Daniel Gifford, Charles Koch, Richard Pierce, and Jeffrey Lubbers that focused on the distinctions between Type A and Type B adjudication.[71] In 2005, the ABA passed a resolution that urged Congress to amend the APA to apply most of the APA's formal adjudication provisions to Type B adjudications.[72]

In 2015, ACUS, in collaboration with Stanford Law School, launched an online database of federal agency adjudication that at its inception covered over 133 federal agencies and 159 major adjudicatory schemes.[73] From this database, ACUS embarked on the most ambitious study of Type B adjudication to date with a particular focus on identifying best practices for Type B adjudication by focusing on ten cases studies.[74] We return to these best practices in Part III.B when examining the PTAB process in greater detail. In his ACUS report, Asimow provides ten cases studies of Type B adjudications that provide important context and texture about the variety of Type B agency adjudications. For example, Asimow details how the Department of Agriculture utilizes Type B adjudications to resolve disputes between businesses in the fruit and vegetable markets,[75] how the Department of Energy adjudicates personnel security and whistleblowing claims using Type B procedures,[76] how the EEOC engages in Type B adjudication to resolve employment discrimination disputes brought by employees at certain federal agencies,[77] and how the EPA conducts Type B adjudications to address cases involving minor civil penalties or permitting requests.[78]

Similar to Type A adjudication discussed in Part I.A, a common feature of Type B adjudication is that the agency head has final decision-making authority. Although the APA does not require that for Type B adjudication (as it does for Type A adjudication), the vast majority of Type B adjudications have some agency-head decision-making authority. Indeed, the 2017 ACUS survey found only 13 types of non-ALJ trial-like hearings where there is no administrative appeal: "The matters in which the non-ALJ could issue a final decision without the possibility of any

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[71] PAUL R. VERKUIL ET AL., RECOMMENDATION 92-7: THE FEDERAL ADMINISTRATIVE JUDICIARY (Admin. Conf. of U.S. ed. 1992).

[72] *See* ABA RESOLUTION 114, *supra* note 66. *See generally* Asimow, *supra* note 54 (presenting and discussing ABA Resolution 114).

[73] *Adjudication Research: Joint Project of ACUS and Stanford Law School*, STAN. U., acus.law.stanford.edu (last visited Feb. 24, 2018).

[74] This project culminated with Asimow's report and recommendations of best practices, *see* Adoption of Recommendations, 81 Fed. Reg. 94,312, 94,314–94,316 (Dec. 23, 2016), which ACUS adopted in December 2016. ACUS ultimately adopted thirty-one recommendations that agencies should consider implementing when conducting Type B adjudication, including recommendations on the integrity of the decision-making process, pre-hearing practices, hearing practices, post-hearing practices, and effective management of procedures.

[75] *See* ASIMOW, *supra* note 62, at 36–39 (app.A-1).

[76] *See id.* at 43–51 (app.A-3).

[77] *See id.* at 52–56 (app.A-4).

[78] *See id.* at 56–62 (app.A-5).

appellate review were limited to CFTC wage-garnishment proceedings, labor arbitrations within the Alcohol and Tobacco Tax and Trade Bureau of Treasury, public/private partnerships with NASA, and certain license-transfer agreements before the NRC."[79] Out of Asimow's ten in depth case studies, only the Civilian Board of Contract Appeals and the Board of Veterans Appeals—in addition to PTAB—also lacked higher-level agency reconsideration.[80] In Part III.C and Part IV we explore in much greater detail the importance of agency-head review in Type B adjudication, including the numerous benefits associated with agency-head final decision-making authority.

II. REVOLUTION OF PTAB

In 2011, Congress introduced yet another new form of federal agency adjudication: certain proceedings before the Patent Trial and Appeal Board (PTAB) at the Patent and Trademark Office (Patent Office).[81] The Leahy-Smith America Invents Act (AIA), which represents the most significant overhaul to the patent system in over a hundred years, created novel proceedings for private parties to challenge issued patents before the newly formed PTAB.[82]

The AIA was enacted, in part, to respond to the growing criticism that the Patent Office issues too many invalid patents, which drains consumer welfare.[83] While erroneously issued patents can be invalidated by courts, the costs of patent litigation have skyrocketed over the past decade, hampering the ability of entities to challenge wrongly issued patents in federal court.[84] These new PTAB adjudicatory proceedings were designed to create a cheaper, faster alternative to district court patent litigation to challenge the validity of an issued patent.[85] As a result, each new

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[79] BARNETT ET AL., *supra* note13, at 34.

[80] ASIMOW, *supra* note 62, at 33.

[81] Leahy-Smith America Invents Act, Pub. L. No. 112–29, 125 Stat. 284 (2011).

[82] *See id.* § 6 (codified at 35 U.S.C. §§ 311–319, 321–329) (post-grant review proceedings), § 12 (codified at 35 U.S.C. § 257) (supplemental examination), § 18 (codified at 35 U.S.C. § 321) (transitional program for covered business-method patents).

[83] Michael D. Frakes & Melissa F. Wasserman, *Does the U.S. Patent Office Grant Too Many Bad Patents: Evidence from a Quasi-Experiment*, 67 STAN. L. REV. 613, 621 (2015).

[84] *Compare* AM. INTELLECTUAL PROP. LAW ASS'N, 2001 REPORT OF THE ECONOMY SURVEY (noting that for controversies ranging from 10–25 million dollars the average costs through trial were $797,000), *with* AM. INTELLECTUAL PROP. LAW ASS'N, 2015 REPORT OF THE ECONOMY SURVEY (noting that the average costs through trial were $3.5 million for this same range).

[85] The House Report on the AIA states that the Act intended to "convert[] *inter partes* reexamination from an examinational to an adjudicative proceeding" while establishing a new agency procedure known as post-grant review that "would take place in a court-like proceeding," H.R. REP. No. 112–98, pt. 1, at 46, 68 (2011).

proceeding provides third parties with a robust, streamlined way to contest the legitimacy of issued patents at the Patent Office.

A third party seeking to challenge an issued patent in one of these new proceedings files a petition with the Patent Office and pays a substantial fee, often in excess of $15,000, if the proceeding is instituted.[86] Although agency leadership decides whether to institute the proceeding based on the strength of the petition, the agency itself is not a party to the proceeding.[87] Instead, unlike prior adjudicatory powers of the Patent Office, these new proceedings involve two private parties (the challenger and the patent owner) disputing the validity of a granted patent.[88]

More specifically, the AIA provides that the PTAB oversees three new, fast-track proceedings for the agency to reconsider its patent grants: Inter Partes Review (IPR),[89] Post-Grant Review (PGR),[90] and the transitional program for Covered Business Method Review (CBMR).[91] Each differs in certain aspects, including limitations on who may file, when a petition may be filed, and the grounds on which a patent can be challenged.[92] For instance, IPR and CBMR become available only after nine months of a patent grant, whereas the PGR procedure is available only within nine months of the grant of a patent.[93] As in district court, a petitioner may argue any ground of invalidity in a PGR and CBMR proceeding,[94] whereas in an IPR proceeding the Patent Office will consider only novelty or obviousness arguments based on patents or printed publications.[95] While anyone can challenge the validity of a patent in IPR or PGR, only a party that has been charged with patent infringement of an eligible business method patent can initiate a CBMR challenge.[96]

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[86] 37 C.F.R. §§ 42.15(a)(1), (b)(2) (2017).

[87] 35 U.S.C. § 314(a) (2012) (providing that the standard for instituting an inter partes review proceeding is a "reasonable likelihood that the petitioner would prevail with respect to at least [one] of the claims challenge in the petition"); 35 U.S.C. § 324 (providing that the standard for instituting a post-grant review proceeding is "showing that it is more likely than not that at least one claim will be found invalid").

[88] Prior to the AIA, the Patent Office had limited procedures for reviewing granted patents known as ex parte and inter partes reexamination. Ex parte reexamination bars the participation of a third party once the Patent Office has determined whether a reexamination should commence. 37 C.F.R § 1.550(g) (2006). Inter partes reexamination, which the AIA abolished, allowed for third-party participation but in a limited manner: the third party has the right to file written comments addressing "issues raised by the office action or the patent owner's response." *Id.* § 1.947.

[89] 35 U.S.C. § 257.

[90] *Id.* §§ 311–319, 321–329.

[91] *Id.* § 321.

[92] *See infra* note 87.

[93] 35 U.S.C. §§ 311(c)(1); 321(c) (2012).

[94] *Id.* § 321(b).

[95] *Id.*

[96] *Id.* § 314(a).

Despite differences, all three proceedings share a host of common features that make them viable alternatives to litigation in federal courts, as well as set them squarely apart from the Patent Office's prior adjudicatory authority.[97] Perhaps most saliently, the AIA requires these new administrative hearings to take place in an adversarial, court-like hearing, in which parties are entitled to oral arguments and discovery.[98] The AIA also calls for the Patent Office to promulgate regulations regarding other trial-type dealings, such as prescribing sanctions for attorney misconduct[99] and providing protective orders governing the exchange of confidential information.[100] The regulations governing these new proceedings require that Federal Rules of Evidence apply.[101] A panel of at least three administrative patent judges (APJs) with scientific expertise—rather than patent examiners—conducts the initial review of the patent and makes the trial-level determination.[102]

Although these new proceedings differ in dramatic ways from the Patent Office's prior adjudicatory powers, they do share at least one salient feature with PTAB's predecessor: there is no higher-level reconsideration of the Board's decisions within the agency.[103] Parties can request a rehearing by the Board, but the Director of the Patent Office

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[97] Wasserman, *supra* note 17.

[98] *See infra* note 101.

[99] 35 U.S.C. §§ 316(a)(6), 326(a)(6) (2012).

[100] *Id.* §§ 316(a)(7), 326(a)(7).

[101] 37 C.F.R. § 42.62 (2017). *See infra* note 102 and accompanying text.

[102] 35 U.S.C. § 6(a)–(b)(1). While having APJs preside over the proceedings, rather than patent examiners, does increase the court-like nature of these novel adjudications, APJs are not afforded the same level of insulation from agency control and hence have arguably less independence in decision making than administrative law judges. An outside agency, such as the Office of Personnel Management (OPM), is involved in the selection process of ALJs. The Patent Office, by contrast, interviews and makes recommendations of potential hires to the Director of the Patent Office and then to the Secretary of Commerce, the latter who ultimately approves the candidate. U.S. Patent & Trademark Office, PTAB Brochure, https://www.uspto.gov/ip/boards/bpai/ptab_brochure_v2_4_10_14.pdf. To the Patent Office's credit, the agency appears to utilize a competitive process to hire APJs, requiring them to have both legal and technical degrees, active bar membership in good standing, and preferably 10-15 years of patent litigation or prosecution experience. Jennifer R. Bush, *Administrative Patent Judges: Not Your Typical Federal Judge*, DAILY J. (July 10, 2014). Once appointed, however, APJs also have less independence than ALJs from their agency-employers. Unlike ALJs, whose salaries are set by an outside agency, the Director of the Patent Office has the power to "fix the rate of basic pay for the administrative patent judges." 35 U.S.C. § 3(b)(6). APJs are also subject to performance appraisals within the Patent Office and can receive bonuses, *see* U.S. Patent & Trademark Office, PTAB Brochure, *supra*, both which OPM regulations forbid with respect to ALJs, *id.* Finally, APJs are more easily removed from office than ALJs. *But see* Michael Abramowicz & John F. Duffy, *Ending the Patenting Monopoly*, 157 PENN. L. REV. 1541, 1553 (2009) (noting the difficulties associated with firing anyone from the Patent Office).

[103] PTAB's predecessor was Board of Patent Appeals and Interferences.

does not have direct review authority over PTAB determinations.[104] Instead, the aggrieved party can immediately appeal the PTAB decision to the Federal Circuit, which has near-exclusive jurisdiction over patent appeals.[105] Although the Director does not have final decision-making authority, she can influence PTAB outcomes—as she could with PTAB's predecessor.[106] In particular, the Director has the authority to designate panel members that she hopes share her views in an effort to influence PTAB determinations—an authority that would appear to violate the APA if the administrative patent judges were, in fact, administrative law judges, the latter which are afforded more protections than the former.[107]

These new proceedings—in particular IPRs—have proven immensely popular. Since they went into effect in late 2012, the Patent Office has received over 7,000 post-grant petitions—an amount that is over three times the anticipated quantity.[108] The agency has hired a record-breaking number of APJs to staff these proceedings, tripling the size of its adjudicatory workforce to nearly 300 APJs.[109] It is undeniable that the PTAB volume of work pales in comparison to that of the Patent Office's prior internal adjudicatory board.[110] For the first time since its inception, the Federal Circuit has docketed more patent appeals arising from the Patent Office through PTAB proceedings than from the district courts.[111]

There is little doubt that these new adjudicatory proceedings have fundamentally changed the relationship between Article III patent litigation and the administrative state. The growing popularity of the PTAB proceedings has shifted the venue of deciding a patent's validity

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[104] 35 U.S.C. § 6(c).

[105] *Id.* § 141(c).

[106] *See infra* Part IV.B.

[107] 5 U.S.C. § 3105 (2012) ("Administrative law judges shall be assigned to cases in rotation so far as practicable . . . "). *See supra* note 102.

[108] U.S. PATENT & TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT, FISCAL YEAR 2013, at 23 (noting that the "tremendous inflow of new proceedings is higher than initially estimated"); U.S. PATENT & TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT, FISCAL YEAR 2014, at 3 (noting that PTAB "received nearly 1,500 petitions for AIA trials in the FY 2014, which was three times the expected number); U.S. PATENT & TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT, FISCAL YEAR 2015, at 70; U.S. PATENT & TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT, FISCAL YEAR 2016, at 71.

[109] *See, e.g.*, BARNETT ET AL., *supra* note 13, at 34 (reporting 275 APJs in 2017); Gene Quinn, *Chief Judge Rader Swears in New Administrative Patent Judges*, IP WATCHDOG (Jan. 25, 2012), http://www.ipwatchdog.com/2012/01/25/chief-judge-rader-swears-in-new-administrative-patent-judges/id=21969/ (noting there were approximately 100 APJs in 2011).

[110] The Patent Office's prior adjudicative board was named the Board of Patent Appeals and Trials. Michael Wagner, *An Introduction to Administrative Patent Judges at the Patent Trial and Appeal Board*, FED. LAW., May 2015, at 36.

[111] Rantanen, *supra* note 14.

away from the district courts to the Patent Office.[112] The import of this shift is reflected in the creation of a new bar association dedicated to lawyers and stakeholders who appear before the PTAB[113] and the explosion of conferences—both academic and practitioner focused—devoted to these new PTAB proceedings.[114]

The revolution of the PTAB, however, has been subject to substantial controversy.[115] The federal judiciary is considering a number of legal challenges alleging PTAB violations of administrative law, regulatory practice, or the Constitution.[116] Indeed, the Supreme Court will decide this year whether PTAB adjudication unconstitutionally revokes private property rights of patent owners.[117] While scholars have questioned the legitimacy of the PTAB in the modern administrative state, there has been no sustained analysis of the Patent Office's new adjudicatory powers in comparison to other agency adjudications. This comparison, as noted in the Introduction, will provide numerous of payoffs.

III. SITUATING PTAB ADJUDICATION WITHIN THE NEW WORLD

Part III situates the relatively new PTAB adjudication process within the new world of agency adjudication detailed in Part I.B. Part III.A details how PTAB adjudication, while technically not APA-governed formal adjudication, nevertheless possesses most of the characteristics of such Type A adjudication. Part III.B compares PTAB adjudication to other

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[112] Saurabh Vishnubhakat et al., *Strategic Decision Making in Dual PTAB and District Court Proceedings*, 31 BERKELEY TECH. L.J. 45, 49-50 (2016).

[113] PTAB BAR ASS'N, http://www.ptabbar.org/ (last visited Feb. 24, 2018). The PTAB Bar Association has approximately 900 members. Email from Kristen Leikwold, Assoc. Member Serv., PTAB Bar Ass'n, to Melissa F. Wasserman, Professor of Law, The Univ. of Tex. School of Law (Feb. 14, 2018 11:09AM CST) (on file with author).

[114] *See, e.g.*, PTAB Bar Ass'n Annual Conference, Washington D.C., (Mar. 2018); 8th Annual Patent Administrative Law Conference, American University Washington College of Law (Mar. 2018); Perspectives on the PTAB: The New Role of the Administrative State in the Innovation Economy, Antonin Scalia Law School of George Mason University (November 2017); The Power of the PTAB: The New Authority in Patent Law, Chicago-Kent College of Law, Chicago, IL (October 2017); Is Administrative Review of Granted Patents Constitutional?, The Center for Innovation Policy at Duke Law School (September 2017).

[115] *See, e.g.*, Greg Dolin, *Dubious Patent Reform*, 56 B.C. L. REV. 881, 903-907 (2015).

[116] *See, e.g.*, Cuozzo Speed Tech. v. Lee, 136 S. Ct. 2131, 2135 (2016) (holding that the Patent Office had the legal authority to adopt the broadest reasonable interpretation standard for claim construction for PTAB proceedings); Wi-Fi One, LLC v. Broadcom Corp., No. 2015-1994 (Fed. Cir. 2018) (en banc) (holding that the time-bar determinations under § 315(b) are appealable); Aqua Prod., Inc. v. Matal, 872 F.3d 1290 (Fed. Cir. 2017) (en banc) (holding in a fractured decision that the PTAB can no longer place the burden of establishing the patentability of amended claims on the patent owner in IPR proceedings).

[117] Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 137 S. Ct. 2239 (2017).

types of Type B adjudications and demonstrates that PTAB adjudication embraces the vast majority of best practices that have been identified for any adjudication that requires an evidentiary hearing. Part III.C looks beyond the new world of agency adjudication to explore the ways in which PTAB adjudication differs from other types of Type B adjudications.

A. PTAB Adjudication, the APA, and the Lost World

Based on the statutory framework for the PTAB adjudication, PTAB is not technically a Type A, APA-governed formal adjudication, despite the Federal Circuit suggesting otherwise.[118] To be sure, Congress in the AIA commanded the Patent Office Director to promulgate regulations that set forth a number of procedures, including "providing either party with the right to an oral hearing as part of the proceeding."[119] So a hearing is required, but Congress stopped short of using the magic language "on the record" with "an agency hearing,"[120] which is the surefire way to signal that the APA's formal adjudication provisions apply.[121] There currently is a circuit split as to whether the word "hearing" alone is sufficient to trigger the APA's formal adjudication.[122] The dominant approach applies the *Chevron* two-step test to an agency's determination as to whether APA formal adjudication provisions govern.[123] If the reviewing court determines the word "hearing" is ambiguous, it then defers to the expertise of the administrative officials in designing a hearing process that best fit the decision that an agency was congressionally authorized to make.

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[118] *See supra* note 18 and accompanying text; *infra* note 137 and accompanying text.

[119] *See* 35 U.S.C. § 316 (2012) (for inter partes review); *id.* § 326 (for post-grant review).

[120] 5 U.S.C. § 554(a) (emphasis added).

[121] *See supra* note 68. When an agency's enabling act utilizes the words "hearing" and "on the record," the agency must utilize formal adjudication to effectuate the proceedings in question. 5 U.S.C. § 554 (stating that "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing" formal procedures outlined in § 554 and §§ 556–57 are triggered); *see also* Melissa M. Berry, *Beyond* Chevron's *Domain: Agency Interpretations of Statutory Procedural Provisions*, 30 SEATTLE U. L. REV. 541, 561-52 (2006) ("[N]o one would dispute that formal procedures should be required if the enabling statute includes 'on the record' language . . ."). Like many other statutes, the AIA utilizes the term "hearing" without the phrase "on the record." *See* 35 U.S.C. § 326(a)(10) (for post-grant review, "either party with the right to an oral hearing as part of the proceeding"); *accord id.* § 316(a)(10) (same for inter partes review).

[122] *See* Wasserman, *supra* note 17, at 1978–89 (describing the three approaches taken by circuit courts: presumption for formal procedures; presumption against formal procedures; apply the two-part *Chevron* test to the agency's interpretation of the word "hearing").

[123] *See id.* at 1984–85.

At the time of this writing, the Patent Office has not taken an explicit position as to whether PTAB proceedings are Type A adjudication. However, because the proceedings fail to meet several of the APA formal adjudication provisions, one could assume that the Patent Office, at least implicitly, believes they are not APA-governed formal adjudication. Additionally, there are several reasons to conclude that Congress did not intend for the Patent Office to effectuate PTAB proceedings through APA-governed formal adjudication—that is, the term hearing in the Patent Act is unambiguous and thus does not trigger the APA formal adjudicatory provisions.

Perhaps the clearest evidence against Type A classification is that the AIA does not command that the agency's evidentiary hearing be presided over by the agency, "one or more members of the body which comprises the agency," or "one or more administrative law judges appointed under" the APA.[124] To the contrary, the AIA instructs that these hearings be presided over by a three-member panel of "administrative patent judges"—"persons of competent legal knowledge and scientific ability who are appointed by the Secretary [of Commerce], in consultation with the [Patent Office] Director."[125] A second core difference, as explored in greater detail in Part III.C and Part IV, is that there is no direct appeal of a PTAB decision to the agency head.

Despite these differences, PTAB proceedings have many of the hallmarks of APA-governed formal adjudication.[126] The Patent Office

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[124] 5 U.S.C. § 556(b).

[125] 35 U.S.C. § 6(a), (c). To be sure, the APA contemplates that a statute can override the need to have ALJ preside over APA-governed formal adjudication. *See* 5 U.S.C. § 556(b) ("This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute."). But the lack of ALJs, "on the record" language, and agency-head review suggest that Congress did not intend for the PTAB proceedings to be governed by the APA formal adjudication provisions. In other words, the word "hearing" with respect to PTAB is not ambiguous and hence the intent of Congress—that APA formal adjudication provisions should not apply—should prevail. *See* Emily Bremer, *The Exceptionalism Norm in Agency Adjudication* (on file with authors) (reaching similar conclusion that AIA does not require the PTAB to engage in APA-governed formal adjudication, though the agency may have the discretion to engage in such formal adjudicative procedures).

[126] One of us has previously argued that PTAB proceedings are formal enough to warrant *Chevron* deference for its legal interpretations of ambiguous terms of the Patent Act. Wasserman, *supra* note 17. *Accord* Christopher J. Walker, Chevron *Deference and Patent Exceptionalism*, 65 DUKE L.J. ONLINE 149, 153 (2016). Other scholars have also argued that PTAB proceedings are formal-like adjudication and hence its legal interpretations of ambiguous terms of the Patent Act should be afforded *Chevron* deference. Arti K. Rai, Essay, *A Patent Validity Across the Executive Branch: Ex Ante Foundations for Policy Development*, 61 Duke L.J. 1237, 12180 (2012); Stuart Minor Benjamin & Arti K. Rai, *Administrative Power in the Era of Patent Stare Decisis*, 65 DUKE L.J. 1563, 1584-86 (2016). One of us also previously argued that PTAB proceedings could

promulgated extensive regulations governing the conduct before the proceedings that include nearly all of the trial-type protections afforded formal adjudication outlined in the APA requirements. Table 2 compares the PTAB regulations with the APA's key "formal" adjudication requirements discussed in Part I.A and depicted in Table 1.

Table 2. APA-Governed Formal Adjudication v. PTAB Adjudication

	APA Statutory Requirement	Related PTAB Requirement
1.	Notice of Legal Authority and Matters of Fact	Yes (37 C.F.R. §§ 42.2, 42.4, 42.8, 42.21)
2.	Oral Evidentiary Hearing Before the Agency or Administrative Law Judge Who Must Be Impartial	Oral evidentiary hearing (35 U.S.C. §§ 316, 326), but before non-ALJ "adminstrative patent judges" (35 U.S.C. § 6) with no express provisions for challenging impartiality
3.	Limitations on Adjudicator's Ex Parte Communications with Parties and Within Agency	Yes (37 C.F.R. § 42.5(d))
4.	Availability of Legal or Other Authorized Representation	Yes (37 C.F.R. §§ 1.31, 11.6)
5.	Burden of Proof on Order's Proponent	Yes (37 C.F.R. § 42.20(c))
6.	Party Entitled to Present Oral or Documentary Evidence	Yes (37 C.F.R. §§ 42.53,42.63, 42.65, 42.70)
7.	Party Entitled to Cross-Examine Witnessess if Required for Full Disclosure of Facts	Yes, via deposition not at hearing (37 C.F.R. § 42.53)
8.	Decision Limited to Bases Included in Hearing Record	Probably, as "[a]ll evidence must be filed in the form of an exhibit" (37 C.F.R. § 42.63(a))
9.	Party Entitled to Transcript of Evidence from Exclusive Record for Decision	No requirement in current regulations, though parties must submit all evidence as exhibits (37 C.F.R. § 42.63(a))
10.	Decision Includes Reasons for All Material Findings and Conclusions	Apparently no requirement in current regulations (37 C.F.R. §§ 42.71-42.73)
11.	Agency Head Final Decisionmaking Authority and De Novo Review of ALJ Decisions	No, the PTO Director lacks final decisionmaking authority

In particular, the implementing regulations require that the parties receive notice from the agency of the trial[127] and be served notices from the parties.[128] Indeed, the regulations explain that "[a] trial begins with a written decision notifying the petitioner and patent owner of the institution of the trial."[129] Like the APA's formal adjudication provisions, the regulations prohibit ex parte communications[130] and allow parties to be represented by counsel.[131] The party seeking relief bears the burden of proof, and parties are entitled to present oral and documentary evidence

constitute formal APA governed adjudication, contending the Patent Act overrode the APA provision that ALJs must preside at formal hearings. Wasserman, *supra* note 17. The author's views have changed.

[127] 37 C.F.R. § 42.4 (2017).

[128] *Id.* § 42.8. The PTAB also has discretion to require parties to file a notice of the request for relief. *Id.* § 42.21.

[129] *Id.* § 42.2.

[130] *Id.* § 42.5(d).

[131] *Id.* § 1.31.

through deposition and exhibits.[132] Parties are entitled to cross-examine witnesses, but must do so via deposition and not at the hearing itself.[133]

The application of the remaining APA-governed formal adjudication provisions is less clear. The regulations provide no express mechanism, for instance, for disqualifying an administrative patent judge for bias, though in practice that occurs.[134] The regulations do not expressly require that the PTAB decision be limited to bases included in the hearing record,[135] that the parties be provided with a transcript of the evidence from the exclusive record for decision, or that the PTAB decision provide reasons for all material findings of fact and legal conclusions.[136] The Federal Circuit, however, has required the PTAB to do so.[137]

Beyond the APA's mandated formal adjudication procedures, the implementing regulations also set forth general policies regarding other trial-type procedures, at least some of which are mandated by AIA, such as imposing sanctions against a party for misconduct,[138] compelling testimony and production,[139] and allowing for expert testimony.[140] The regulations also allow the parties to seek rehearing of a PTAB decision.[141]

B. PTAB Adjudication Within the New World

Although PTAB adjudication does not appear to be Type A formal adjudication, it is at least Type B formal adjudication because an evidentiary hearing is required.[142] This subpart turns to answering the

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[132] *See id.* § 42.53 (deposition testimony), § 42.63 (all evidence as marked exhibits), § 42.65 (expert testimony), § 42.70 (oral argument and demonstrative exhibits).

[133] *Id.* § 42.53.

[134] *Id.*

[135] *But see* 37 C.F.R. § 42.62(a) (requiring that "[a]ll evidence must be filed in the form of an exhibit").

[136] The regulations also do not prevent APJs from discussing disputed facts with other agency members. *See* 5 U.S.C. § 554(d)(1).

[137] *See, e.g.*, Synopsys, Inc. v. Mentor Graphics Corp., 814 F.3d 1309, 1322 (Fed. Cir. 2016) (requiring PTAB to meet the requirements of APA-governed formal adjudication including 5 U.S.C. § 557(c)(3)(A) which requires the adjudicative board to "include a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record").

[138] 37 C.F.R. § 42.12; *see* 35 U.S.C. § 316(a)(6) (2012) (commanding the Patent Office Director to promulgate regulations for inter partes review proceedings that "prescribe[] sanctions for abuse of discovery, abuse of process, or any other improper use of the proceeding, such as to harass or to cause unnecessary delay or an unnecessary increase in the cost of the proceeding"); *accord id.* § 326(a)(6) (same for post-grant review proceedings).

[139] 37 C.F.R. § 42.52 (2017).

[140] *Id.* § 42.65.

[141] *Id.* § 42.71(c) ("A party dissatisfied with a decision may file a request for rehearing.").

[142] This was Asimow's conclusion as well: "The statute does not specifically provide for evidentiary hearings. In context, however, the statutory provisions

difficult and important question of how PTAB adjudication compares to its Type B peers, in terms of procedural protections and other best practices.

In doing so, this subpart draws heavily on the extensive ACUS study on Type B adjudication, discussed in Part I.B, which focused on identifying best practices for these proceedings.[143] ACUS ultimately adopted thirty-one recommendations that agencies should consider implementing when conducting Type B adjudication.[144] In his report to ACUS, Asimow evaluated twenty of these best practices from the ten agencies comprising his detailed case studies, based on the "procedural regulations, manuals, and other sources of procedure law."[145] He found that the PTAB had already incorporated fourteen of the twenty best practices, where the other agencies incorporated between seven and nineteen best practices with a mean of 14.4 and a median of 14.25.[146] Table 3 depicts Asimow's findings as to the PTAB's incorporation of these best practices.

As Table 3 illustrates, these twenty best practices are not of equal value, such that ranking the ten agencies based on raw numbers can be misleading. The PTAB has incorporated almost all of the most important procedural protections ACUS has recommended. Concerning the integrity of the decision-making process, PTAB decisions are based on an exclusive record of decision, ban ex parte communications and separate the functions between the deciders and adversaries within the agency (this is not an issue in PTAB trials as the adversaries are the parties, not the agency). As for prehearing procedures, the PTAB require written notice of the issues to the parties and a pretrial conference. PTAB prehearing procedures also allow for electronic document filing, pretrial discovery, and subpoena power for uncooperative witnesses. The PTAB hearing procedures use administrative patent judges who issue written decisions, the Federal Rules of Evidence apply, and the parties have an opportunity

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calling for 'appeals,' 'reviews,' and 'proceedings,' require evidentiary hearings, although as discussed below these hearings are based entirely on written evidence. Therefore, PTAB conducts Type B adjudication." ASIMOW, *supra* note 62, at 66. If one were to quibble with Asimow's conclusion, one could more forcefully argue that the statute itself requires evidentiary hearings, as the AIA requires the Patent Office Director to promulgate regulations for the submissions of evidence and development of the record, including "providing either party with the right to an oral hearing as part of the proceeding." *See* 35 U.S.C. § 316 (for inter partes review); *id.* § 326 (for post-grant review).

[143] *See* ASIMOW, *supra* note 62, at 17–35.

[144] *See* Adoption of Recommendations, 81 Fed. Reg. 94,312, 94,314–94,316 (Dec. 23, 2016).

[145] ASIMOW, *supra* note 62, at 35.

[146] *Id.* at 35 tbl.3. Asimow actually reports only thirteen best practices because he consolidates PTAB and TTAB trial and appellate adjudications, and he gives half credit for two best practices because the appellate adjudications (not at issue here) do not incorporate them whereas the PTAB trial adjudications do. *See id.* at 35 n.133 & tbl.3.

to rebut. Post-hearing procedures also involve written decisions, and a complete statement of the important procedures is publicly available.

Table 3. PTAB Type B Best Practices

	ACUS Recommendation	PTAB Incorporation
Integrity of the Decisionmaking Process		
1.	Exclusive of the Record	Yes
2.	Disqualification Mechanism for Adjudicator Bias	No
3.	Ban on Outsider Ex Parte Communications	Yes
4.	Separation of Adversary-Decisional Functions	Yes
Prehearing Procedures		
5.	Written Notice of Issues in Case	Yes
6.	Allowance for Lay Representation	No
7.	Alternative Dispute Resolution	No
8.	Pretrial Conference	Yes
9.	Electronic Document Filing	Yes
10.	Pre-Trial Discovery	Yes
11.	Subpoena Power	Yes
12.	Open Hearings	No
Hearing Procedures		
13.	Use of Administrative Judges	Yes
14.	Videoconference Hearings	No
15.	Written-Only Opinions	Yes
16.	Evidentiary Rules	Yes
17.	Opportunity for Rebuttal	Yes
Post-Hearing Procedures		
18.	Written Decisions	Yes
19.	Higher-Level Reconsideration	No
Procedural Regulations		
20.	Complete Statement of Important Procedures	Yes

As for the half-dozen missing best practices, the PTAB does not have a formal procedural mechanism for parties to move to disqualify patent administrative law judges for bias. The 2017 ACUS survey of Type B adjudications revealed that roughly half (54.1%) of Type B adjudications reported in the survey had incorporated by regulation or by statute formal procedures and standards for disqualification and removal.[147] The importance of impartiality—and the sensitivity involved in parties requesting that an adjudicator recuse herself—strongly counsel that the PTAB codify by regulation (or at least formal guidance) the standards and procedures for disqualification.[148]

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[147] BARNETT ET AL., *supra* note 13, at 49.

[148] ASIMOW, *supra* note 62, at 23 ("Procedural regulations and manuals should spell out this standard and explain how and when parties should raise bias claims. Some Part B procedural regulations and manuals do not contain explicit

Nor does the PTAB provide for alternative dispute resolution, open hearings, or videoconference hearings—at least based on the regulations and manuals at the time of Asimow's study. On its website, the Patent Office now provides guidelines on how to request a telephonic or video hearing[149] and notes that it allows the public to observe in person. But its website also confirms that the PTAB "currently does not create or provide any electronic recording of oral hearings" and "generally does not offer telephonic or audiovisual connections to inventors or the public."[150] The PTAB regulations provide for legal representation for parties, but they do not provide for lay representation.[151] Similarly, although the PTAB regulations permit petitions for rehearing of PTAB decisions, such rehearing petitions are not decided by a higher-level body but instead, if granted, reheard by the PTAB itself. As further discussed in Part IV, the Patent Office Director does have some power to influence rehearing by ordering it and deciding which PTAB members serve on that the panel. But the Director cannot decide the case herself.

In sum, the Patent Office has already codified by regulation most of the best practices ACUS has recommended for Type B adjudication. It would probably be wise for the Patent Office to more expressly codify the exclusive record rule, as well as implement regulations to provide procedures for disqualification of administrative patent judges and formalized alternative dispute resolution procedures. It might also be worth exploring the option of lay representation and means to encourage more open hearings. The most critical improvement, however, concerns higher-level reconsideration by the Patent Office Director. We return to that issue in Part III.C and then in even greater detail in Part IV.

C. PTAB Adjudication Beyond the New World

This Part so far has focused on whether PTAB adjudication possesses the core features of APA-governed formal adjudication (Part III.A) and whether it has embraced the best practices of Type B adjudication (Part III.B). Part III.C looks beyond the new world of agency adjudication to underscore the ways in which PTAB adjudication departs from a typical Type B adjudication. We focus on five differences. For the first four we merely introduce them and call for further empirical examination and theoretical development. The last difference—the lack of agency-head

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provisions concerning bias or explain how and when bias claims should be raised.").

[149] *Video & Telephonic Hearings*, USPTO, https://www.uspto.gov/page/video-and-telephonic-hearings (last visited Feb. 24, 2018); *Hearings*, USPTO [hereinafter *USPTO Hearings*], https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/hearings (last visited Feb. 24, 2018).

[150] *USPTO Hearings*, *supra* note 149.

[151] *See* 37 C.F.R. §§ 1.31, 11.6 (2017). Patent agents, individuals who have passed the U.S. Patent and Trademark Office's Patent bar but do not necessarily have law degrees, can represent parties before PTAB. *Id.*

final decision-making authority—is examined in more detail and then further explored in Part IV.

1. PTAB Departures from Typical Type B Adjudication: Call for Further Research

There are at least four differences between the PTAB and typical Type B adjudication that merit additional theoretical mooring and empirical analysis. This Part introduces these four dissimilarities.

Agency Private Enforcement Actions. Perhaps the unique feature of PTAB adjudication that has received the most attention to date is that PTAB adjudication involves agency adjudication of disputes between private parties, as opposed to adjudicating disputes between the government and a private party. After all, when we think about agency adjudication it is usually within the context of adjudicating public benefits (e.g., immigration, Social Security, and veterans' benefits).

Although agency adjudication of private enforcement actions may be less common and more of a modern innovation, PTAB adjudication is not a complete outlier. The Interstate Commerce Commission, for instance, originally adjudicated claims between shippers and other private parties.[152] In the seminal *Crowell v. Benson* decision, the Supreme Court in 1932 provided a constitutional basis for the current authority of administrative agencies to adjudicate certain private disputes.[153] Frye's 1992 survey of non-ALJ adjudications identifies a number of other examples of private enforcement actions via agency adjudication.[154] The Trademark Trial and Appeal Board (TTAB), which adjudicates the

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[152] *See, e.g.*, FTC v. Klesner, 280 U.S. 19, 26 (1929) (citing and discussing statutes that allowed "private individuals the right to institute proceedings and upon the administrative tribunal [of the Interstate Commerce Commission] the power to award reparations").

[153] Crowell v. Benson, 285 U.S. 22, 51 (1932) ("The present case does not fall within the categories just described, but is one of private right, that is, of the liability of one individual to another under the law as defined. But, in cases of that sort, there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges."). *But see* Stern v. Marshall, 564 U.S. 462, 489 n.6 (2011) ("Although the Court in *Crowell* went on to decide that the facts of the private dispute before it could be determined by a non-Article III tribunal in the first instance, subject to judicial review, the Court did so only after observing that the administrative adjudicator had only limited authority to make specialized, narrowly confined factual determinations regarding a particularized area of law and to issue orders that could be enforced only by action of the District Court. . . . In other words, the agency in *Crowell* functioned as a true 'adjunct' of the District Court."); *see also id.* at 504–05 (Scalia. J., concurring) ("Leaving aside certain adjudications by federal administrative agencies, which are governed (for better or worse) by our landmark decision in *Crowell v. Benson*, in my view an Article III judge is required in all federal adjudications, unless there is a firmly established historical practice to the contrary." (citation omitted)).

[154] John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261, 309–10 (1992).

validity of federally registered trademarks between two private parties, is another example.[155]

Perhaps the most well-known example involves the Commodity Futures Trading Commission (CFTC), as it was the involved in *CFTC v. Schor*.[156] As the Supreme Court explained in *Schor*, Congress charged the CFTC with "the administration of a reparations procedure through which disgruntled customers of professional commodity brokers could seek redress for the brokers' violations of the Act or CFTC regulations."[157] The *Schor* Court held that "the limited jurisdiction that the CFTC asserts over state law claims as a necessary incident to the adjudication of federal claims willingly submitted by the parties for initial agency adjudication does not contravene separation of powers principles or Article III."[158]

The 2017 ACUS survey identified at least a half-dozen other examples from the Type B adjudication context[159]: The USDA Agricultural Marketing Service adjudicates disputes between private parties over produce and livestock. The Labor Department's Benefits Review Board adjudicates certain benefits disputes between employees, employers, or carriers. The Federal Maritime Commission adjudicates certain informal, small-dollar claims between private parties. The Library of Congress adjudicates royalty-rate disputes—both determination claims and distribution claims. The National Labor Relations Board adjudicates a number of disputes between employers, employees, and unions. And the Peace Corps adjudicates sexual misconduct hearings.

Parallel Article III Civil Litigation. Another somewhat unusual feature of PTAB adjudication is that it is not the exclusive means of resolving the dispute between the private parties. That is, a third party who questions the validity of an issued patent can bring a challenge before the PTAB or file a declaratory judgment action in federal district court. Despite the popularity of the PTAB adjudication, the validity of most patents is still challenged in patent infringement suits filed in federal court.[160] Concurrent proceedings are also found within the trademark context: the validity of a trademark may be adjudicated before the TTAB or in federal court.[161] These concurrent proceedings, however, are unusual in the administrative state. Such parallel court proceedings are not available in the public benefits context, where courts usually only get

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[155] *See* ASIMOW, *supra* note 62, at 76–79 (providing a case study on TTAB adjudication).

[156] CFTC v. Schor, 478 U.S. 833 (1986).

[157] *Id.* at 836 (citing 7 U.S.C. § 18 (1976)).

[158] *Id.* at 857.

[159] *See* BARNETT ET AL., *supra* note 13, at 33.

[160] Vishnubhakat et al., *supra* note 112, at 69.

[161] Technically, the TTAB adjudicates the validity of the federal registration of a mark whereas the federal judiciary adjudicates the validity of a mark. However, there is substantial overlap between these requirements. *See* Melissa F. Wasserman, *What Administrative Law Can Teach the Trademark System*, 93 WASH. U. L. REV. 1, 10, 13 (2016).

involved once there is a final agency action to review.[162] Similarly, with public enforcement actions, the agency generally must choose to litigate the issue either via agency adjudication or federal court.[163] This feature of PTAB adjudication has already received substantial criticism,[164] and it will no doubt continue to receive extensive scholarly attention.

Filing Fees. The third way in which PTAB adjudication differs from typical Type B adjudication is that the Patent Office has a unique power among federal agencies to collect and, after the AIA, even set fees for its various applications and adjudications, including PTAB adjudication.[165] For instance, as of January 16, 2018, a request for inter partes review costs at least $15,000, with additional fees for a variety of actions, including requesting an oral hearing ($1,300) and filing a notice of appeal ($800).[166] We are unaware of other agency adjudications where a private party must pay a fee to participate in the adjudication, much less where the agency itself has the authority to set that fee.

High-Volume Adjudication. Finally, unlike most private enforcement agency adjudications, PTAB adjudications involve much greater numbers of cases. As detailed in Part II, since 2012 the Patent Office has received over 7,000 post-grant petitions. To be sure, this quantity falls short of the tens or hundreds of thousands of cases that one would normally expect to call it mass agency adjudication, such as in the context of Social Security, veterans, and immigration adjudication. But the PTAB is facing many of the same challenges of caseload management, consistency in adjudication, and so forth, that have long plagued mass agency adjudication contexts. We explore these challenges, at least tangentially, in Part IV.

2. The Final PTAB Departure: The Lack of Agency-Head Final Decision-making Authority

The final way in which the PTAB differs from typical Type B adjudication is that the Patent Office Director lacks final decision-making authority over the PTAB decisions, although she can influence PTAB outcomes by designating APJs to the PTAB panel that she hopes share her views. As discussed in Part I, agency head control is a core feature of both the old and new world of agency adjudication. Notwithstanding the

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[162] *See* 5 U.S.C. § 704 (2012) ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.").

[163] For a discussion of this adjudication/court choice in the SEC context, see, for example, Stephen J. Choi & A.C. Pritchard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment*, 34 YALE J. ON REG. (2017).

[164] Dolin, *supra* note 115 at, 903-907.

[165] *See generally* Jonathan S. Masur, *CBA at the PTO*, 65 DUKE L.J. 1701, 1707–22 (2016).

[166] *Fee Schedule*, USPTO, https://www.uspto.gov/sites/default/files/documents/USPTO%20fee%20schedule_current.pdf (last updated Jan. 16, 2018).

prevalence of agency-head review, little scholarly attention has been paid to its impact on the new world of agency adjudication.[167]

To be sure, as discussed in Part I.B, ACUS has identified a handful of Type B adjudications where there is no agency-head final decision-making authority.[168] In addition, two out of Asimow's ten case studies—in addition to PTAB—lacked higher-level agency reconsideration of their decisions: the Civilian Board of Contract Appeals and the Board of Veterans Affairs.[169] Despite these exceptions, the majority of Type B

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[167] One major exception is immigration adjudication, wherein the Attorney General's final decision-making authority has received sustained scholarly attention. *See, e.g.*, Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619, 640 n.89 (2012); Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME L. REV. 644, 650 (1981); David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1345 n.265 (1990); Margaret H. Taylor, *Behind the Scenes of* St. Cyr *and* Zadvydas*: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L.J. 271, 288 (2002); Laura S. Trice, Note, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766, 1767 (2010). Most recently, the *Iowa Law Review* published a coauthored article on the subject by former U.S. Attorney General and now Dean Alberto Gonzales, *see* Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841 (2016), and a series of responses. *See* David A. Martin, *Improving the Exercise of the Attorney General's Immigration Referral Power: Lessons from the Battle over the "Categorical Approach" to Classifying Crimes*, 102 IOWA L. REV. ONLINE 1 (2016); Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE 129 (2017); Margaret H. Taylor, *Midnight Agency Adjudication: Attorney General Review of Board of Immigration Appeals Decisions*, 102 IOWA L. REV. ONLINE 18 (2016). One of us explored how courts can leverage the Attorney General's referral authority to engage in a richer dialogue with the agency on remand and to have a more systemic effect in adjudication. *See* Christopher J. Walker, *Referral, Remand, and Dialogue in Administrative Law*, 101 IOWA L. REV. ONLINE 84, 95 (2016).

[168] *See supra* note 79 and accompanying text. Weaver also identifies the Labor Department's Wage Appeals Board (now Administrative Review Board) as another example of an adjudication where the agency head does not have final decision-making authority. *See* Weaver, *supra* note 43, at 260.

[169] ASIMOW, *supra* note 62, at 33. Veterans' benefits adjudication is a peculiar agency adjudication model. Veterans file more than one million new claims per year, which regional offices of the Veterans Administration initially adjudicate. *Id.* at 83. Claimants may then seek review within the agency at the Board of Veterans Appeals, and the Board's decision is the final agency action. *See* Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 431 (2011) ("[I]f a veteran is dissatisfied with the regional office's decision, the veteran may obtain *de novo* review by the Board of Veterans' Appeals. The Board is a body within the VA that makes the agency's final decision in cases appealed to it." (citing 38 U.S.C. §§ 7101, 7104(a))). The next level of review, however, is not an Article III federal court, but an Article I legislative court—the United States Court of Appeals for Veterans Claims. *See id.* at 432 (citing 38 U.S.C. §§ 7251, 7252(a)). After this

adjudications are subject to agency-head review, although some are first subject to an intermediate level review before review by the agency head.[170] Agency-head review typically comes in one of two flavors: mandatory and discretionary. Immigration adjudication, which is perhaps the predominant Type B adjudication in the modern administrative state, is illustrative of the latter.[171]

In immigration adjudication, removal proceedings for noncitizens are adjudicated before non-ALJ immigration judges, who are part of the Justice Department's Executive Office of Immigration Review. In fiscal year 2016, immigration courts received 328,112 matters and completed 273,390 matters.[172] Immigration judge decisions can be administratively appealed by the noncitizen or the government to the Board of Immigration Appeals (BIA). The BIA chair divides the 17-member BIA into three-member panels to review immigration-judge decisions (though most cases are heard by one BIA member).[173] In fiscal year 2016, the BIA received 30,200 cases and completed 33,240 cases.[174]

As is the case for virtually all Type A and Type B adjudications, the agency head—the Attorney General—has final decision-making authority over immigration adjudication, although it is discretionary.[175] More specifically, one of three legal actors can refer a BIA case to the Attorney General: the Attorney General herself, the BIA (acting through its Chair or a majority of its members), or the Secretary of Homeland Security.[176] The ultimate decision as to whether to accept the referral request lies with

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legislative court review, claimants may proceed to an Article I court—the Federal Circuit. *See id.* at 433 (citing 38 U.S.C. § 7292).

[170] ASIMOW, *supra* note 62, at 33. *See* SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE OF AMERICAN BAR ASSOCIATION, A GUIDE TO FEDERAL AGENCY ADJUDICATION, at 88-89 (Michael Asimow, ed., 2003).

[171] *See* BARNETT ET AL., *supra* note 13, at 62–68 (app.A-6).

[172] As of June 2017, there were 326 immigration judges nationwide. Justice Department Press Release, Executive Office for Immigration Review Swears in 11 Immigration Judges (June 16, 2017), https://www.justice.gov/eoir/pr/executive-office-immigration-review-swears-11-immigration-judges; U.S. DEP'T OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2016 STATISTICS YEARBOOK A2 fig.1 (2017) [hereinafter EOIR FY 2016 YEARBOOK], https://www.justice.gov/eoir/page/file/fysb16/download. Regulations established proceedings for immigration court, including notice requirements, entitlement to be represented by an attorney, in-person or video-conference hearing provisions, and rights to introduce evidence and cross-examine witnesses. *See* 8 C.F.R. §§ 1003.12–.47; *see also* ASIMOW, *supra* note 62, at 63–66 (describing process).

[173] *See* 8 C.F.R. § 1003.1 (2017); *see also* ASIMOW, *supra* note 62, at 66–68 (describing process). Cases heard by a single BIA member are decided without oral argument and usually without a detailed, reasoned opinion. By definition, single-member BIA decisions should not be precedential as they merely apply existing law. *See* 8 C.F.R. § 1003.1(e)(4).

[174] EOIR FY 2016 YEARBOOK, *supra* note 172, at Q2 fig.27.

[175] *See* 8 C.F.R. § 1003.1(h). *See generally* Gonzales & Glen, *supra* note 167.

[176] *Id.* § 1003.1(h)(1).

the Attorney General.[177] That is, the Attorney General only reviews cases on a discretionary basis. Given the workload demands on the BIA, it is unsurprising that her review authority is discretionary. Requiring the Attorney General to review every BIA decision would likely result in an overwhelming administrative burden to the Attorney General.

In contrast to the discretionary review associated with immigration adjudication, other Type B adjudications mandate agency-head review of their determinations. Agencies that guarantee an aggrieved party a right of appeal to the agency head, however, tend to have smaller adjudicative caseloads than the BIA or even the PTAB. For example, personnel security cases—also known as security clearance cases—are Type B adjudications in which the Department of Energy (DOE) or contractor employees challenge a decision that the employee be denied access to classified materials.[178] An aggrieved employee can elect a hearing before a non-ALJ administrative judge at the DOE.[179] The employee can appeal an unfavorable decision to the three-member DOE Headquarter Appeals Panel.[180] The aggrieved party can further appeal to the Secretary of Energy in limited scenarios.[181] In contrast to immigration adjudication that processes hundreds of thousands of cases a year, in the fiscal year of 2014 the DOE adjudicated only 121 personnel security cases.[182]

Regardless whether agency-head final decision making is effectuated through a mandatory or discretionary basis, it remains a hallmark of Type A and Type B adjudication and is deeply rooted in the administrative state. Part IV explores the implications of the lack of agency-head final decision-making authority at the Patent Office.

IV. THE IMPORTANCE OF AGENCY-HEAD FINAL DECISION-MAKING AUTHORITY

Part I demonstrated how the new world of agency adjudication diverges considerably from the APA-governed formal adjudication that dominates what students learn in the classroom. It then documented the emergence of Type B adjudication: agency adjudication with a statutory requirement of a written or oral hearing but that, nonetheless, technically falls outside the scope of APA-governed formal adjudication. Finally, Part III situated PTAB adjudication within this new world, highlighting a number of ways in which PTAB adjudication differs from typical Type B adjudications.

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[177] *See* Walker, *supra* note 167, at 84.

[178] 10 C.F.R. § 710; *see also* ASIMOW, *supra* note 62, at 42–46 (describing the process).

[179] 10 C.F.R. § 710.21 (2017).

[180] *Id.* § 710.29.

[181] *See* Personnel Security Hearing, Case No. PSH-14-0011 (Dep't of Energy June 19, 2014) (ALJ decision), http://energy.gov/sites/prod/files/2014/06/f16/PSH-14-0011.pdf.

[182] *See* ASIMOW, *supra* note 62, at 42.

This final Part explores the implications of this analysis, focusing on one key difference: the lack of agency-head final decision-making authority. Part IV.A starts by examining the concerns associated with the lack of appellate review structure within the Patent Office and argues that unique aspects of the Patent Office compound these disadvantages. Part IV.B examines the primary way in which the Patent Act provides the Director with control over the PTAB's outcomes: by selecting the members of the three-body panel or "stacking" the panel to help ensure the outcome aligns with the Director's policy preferences. After concluding that the Director's designation procedures are statutorily authorized by the Patent Act, this Part argues that the procedure raises a colorable due process violation. Part IV.C closes by surveying alternative mechanisms that would help remedy the Director of the Patent Office's lack of final decision-making authority.

A. Ramifications of the Lack of Agency-Head Final Decision-Making Authority

As Part I illustrated, the traditional administrative model vests final decision-making authority with the agency head. In APA-governed formal adjudication, the APA stipulates that the ALJ's initial decision is not entitled to deference on administrative review.[183] That is, an agency head maintains complete freedom, as though it had heard the initial evidence itself, when reviewing the decision of the ALJ. The same typically holds for Type B adjudications, although agency heads are normally reviewing decisions by non-ALJ adjudicators.[184]

There are several reasons why the traditional administrative model vests final decision-making authority with the agency head. Perhaps most saliently, it ensures agency heads control the regulatory structure they supervise. Agency heads—who can comprise of a single director, secretary, or administrator; or a commission, board, or body consisting of between five to seven members—oversee the agency's activities and set the agency's policy preferences. It widely accepted that agency heads have the comparative advantage in policy expertise relative to agency adjudicators.[185] Agency leadership generally has greater access to experts and staff that provide inputs and partake in the deliberative process that lead to better, informed decisions than adjudicatory officers.[186] Moreover, in contrast to agency heads, adjudicatory officers often have significant caseloads that rob them of the time necessary to think deeply about policy matters.[187] Because adjudication is a primary policymaking vehicle for

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[183] FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 364–65 (1955).

[184] *See supra* Part I.B.

[185] PAUL R. VERKUIL ET AL., THE FEDERAL ADMINISTRATIVE JUDICIARY, 1992 ACUS 898–99.

[186] *Id.*

[187] *Id.*

federal agencies, granting agency-head review over adjudication helps to ensure agency-head control over policy development.[188]

Although the literature to date is largely supportive of the traditional administrative model, there are a few detractors.[189] Opponents of agency heads having final decision-making authority over adjudication argue that the need for such agency-head review varies across agencies. These commentators often point out that a number of agencies with the traditional adjudicatory structure have agency heads that either rarely invoke review authority or have delegated the authority to independent subordinates.[190] Of course, the frequency at which an agency head evokes her review authority does not necessarily reveal how important this function is to policing the consistent application of agency policy preferences. Even if it is infrequently evoked, such authority may still play a disproportionate role in the agency head's supervisory authority.[191] Even when the agency head has relinquished review authority to subordinates, moreover, the agency head still maintains ultimate control. If the agency head dislikes the reviewer's decisions, she can remove the reviewer and appoint someone else—although as discussed above the removal may have to occur at the end of the proceeding.[192]

Additionally, particular features of the Patent Office suggest an even greater need for the Director to have final decision-making authority than other agency heads. Most saliently, the Patent Office lacks one of the primary vehicles agencies utilize to make policy: a broad grant of substantive rulemaking authority.[193] Because rulemaking and adjudication are at least partial substitutes for agency policymaking, the Patent Office disproportionately relies on the process of adjudication (at least with respect to most agencies that possess both policymaking vehicles) to address novel legal issues that implicate policy choices.[194]

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[188] *See* Magill, *supra* note 9, at 1386.

[189] Levin, *supra* note 42, at 413 & n.36 (noting "[m]odels in which administrative judges' decisions may not be reviewed by agency heads have been widely criticized in scholarly literature").

[190] *See* Weaver, *supra* note 43, at 287–88. *See also* Shah, *supra* note 167; Taylor, *supra* note 167.

[191] *See, e.g.*, Gonzales & Glen, *supra* note 167.

[192] *See generally* Jennifer Nou, *Subdelegating Powers*, 116 COLUM. L. REV. 473 (2017) (further categorizing and theorizing the phenomenon of agency subdelegation of various powers).

[193] Merck & Co. v. Kessler, 80 F.3d 1543, 1549–50 (Fed. Cir. 1996) (noting that the Patent Office lacks the ability to promulgate rules on the core patentability standards that carry the force of law).

[194] Magill, *supra* note 9, at 1398. There are exceptions, such as the National Labor Relations Board (NLRB), which possess broad rulemaking authority but nonetheless chooses to formulate policy primarily through adjudication. *See* Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 274 (1991) ("Despite having been granted both rulemaking and adjudicatory power in its statutory charter more than half a century ago, the

Given the agency's skewed reliance on adjudication to make policy, the lack of direct agency-head review is even more concerning.

A second reason agency heads possess direct review of adjudications is to help ensure consistency in adjudicative outcomes. In his seminal book *Bureaucratic Justice*, Jerry Mashaw grounded his theory of agency adjudication in "bureaucratic rationality," which values consistency and accuracy in adjudicative outcomes achieved via agency-head control and policymaking.[195] From a normative perspective, consistency in adjudicatory outcomes is important to fairness arguments underlying equal enforcement as well as encouraging confidence and hence ex ante compliance with agency policy.[196] Unfortunately, inconsistent decisions are a reality of the adjudicative process. Agency heads often try to limit the discretion of their staff through the promulgation of guidelines, regulations, and manuals that agency officials must follow.[197] Nevertheless, agency officials often retain substantial discretion in their decision making for a number of reasons, including the inability of an agency head to delineate every circumstance in which the official who must make a decision will face. As a result, agency-head review of adjudicatory outcomes helps ensure that agency policy preferences are consistently applied and that similarly situated parties receive similar results across decision makers.

Consistency across decision makers is especially pressing for an agency like the Patent Office, which makes a relatively high volume of determinations each year on comparatively complex subject matter. The PTAB, which comprises close to three hundred administrative patent judges, has been subject to criticism for issuing inconsistent decisions.[198] Moreover, the complex scientific inquiries associated with determining

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[NLRB] has chosen to formulate policy almost exclusively through the process of adjudication.").

[195] JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY BENEFITS CLAIMS 25–26 (1985); Robert A. Kagan, *Inside Administrative Law*, 84 COLUM. L. REV. 816, 820 (1984) (detailing how Mashaw's "bureaucratic rationality" is a model of agency adjudication that facilitates "[g]reater control and consistency" by placing the "overriding value" on "accurate, efficient and consistent implementation of centrally-formulated policies"). *See also* Hoffer & Walker, *supra* note 20, at 276–89 (exploring the importance of consistency, efficiency, and equity in agency adjudication).

[196] *See, e.g.*, Hoffer & Walker, *supra* note 20, at 278.

[197] JOHN BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE IN A DEMOCRATIC REPUBLIC 21 (1999); Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 280 (2009).

[198] Stuart Minor Benjamin & Arti K. Rai, *Administrative Power in the Era of Patent Stare Decisis*, 65 DUKE L.J. 1563, 1589 (2016) (noting "complaints by the patent bar that PTAB panel opinions on a number of issues are inconsistent"). Notably, this occurs even though each PTAB panel comprises multiple judges—a multi-judge panel helps to limit an outlier adjudicator ability to skew agency decision making.

the validity of a patent only increase the risk that different PTAB panels may render different determinations. As a result, the lack of agency-head review of PTAB adjudications also frustrates the Director's ability to bring consistency to its adjudicatory body's outcomes or ensure similar situated parties receive similar results across PTAB panels.

A final benefit is, as Russell Weaver puts it, that agency-head review "helps the agency head gain greater awareness of how a regulatory system is functioning."[199] Such awareness does not just assist the agency head in tailoring training and instruction for the agency's adjudicators. It also helps the agency head consider whether adjustments to the regulatory scheme are necessary via rulemaking, precedential adjudication, agency guidance, legislative recourse, or some other means. Such agency-head awareness is of even greater importance with respect to agencies that have substantial enforcement or similar regulatory responsibilities.

This benefit is quite significant to the Patent Office. The Patent Office employs more than 8,000 patent examiners that process over six hundred thousand patent applications per year.[200] As one of us has explored in a series of papers, the quality and consistency of patent examination varies widely, and effective training can play a significant role in improving agency adjudication at the patent-issuing level.[201] The better the Director understands how the regulatory system is functioning, the better positioned she is to address systemic issues through further guidance and training. Final decision-making authority of PTAB decisions would aid on that front. Indeed, she can help provide that guidance through her precedential decisions on rehearing of PTAB adjudications.

In sum, if the Director of the Patent Office had final decision-making authority over PTAB adjudication, she would be able to more effectively exercise policy control of PTAB adjudication, bring greater consistency to PTAB adjudications, and better understand how the Patent Office's regulatory system is functioning. These benefits would extend beyond improving PTAB adjudication to also assist the agency in examining patents in the first place.

B. The Director's Ability to "Stack" PTAB Panels

Although the PTAB lacks appellate review and agency-head final decision-making authority, the Director can influence PTAB outcomes. The Patent Act enables the Director to designate members of the PTAB for any particular case and vests exclusive authority to grant a rehearing

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[199] Weaver, *supra* note 43, at 289.

[200] UNITED STATES PATENT AND TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT FISCAL YEAR 2017, at 10 & 168 tb.1.

[201] *See* Michael D. Frakes & Melissa F. Wasserman, *Patent Office Cohorts*, 65 DUKE L.J. 1601 (2016); Michael D. Frakes & Melissa F. Wasserman, *Does the U.S. Patent & Trademark Office Grant Too Many Patents?: Evidence from a Quasi-Experiment*, 67 STAN. L. REV. 613 (2015); Michael D. Frakes & Melissa F. Wasserman, *Does Agency Funding Affect Decisionmaking?: An Empirical Assessment of the PTO's Granting Patterns,* 66 VAND. L. REV. 67 (2013).

to the PTAB.[202] The Director has utilized this ability to designate like-minded members to a panel—i.e., to "stack" the panel—to ensure PTAB outcomes consistently align with her desired policy preferences.[203]

Perhaps the most famous example of the Director's ability to influence the Patent Office's adjudicatory tribunal's outcomes is *In re Alappat*.[204] In *Alappat*, a three-member panel of PTAB's predecessor reversed the patent examiner's pending rejection of claims; the patent examiner had found that the claims should be rejected as they were directed to non-statutory subject matter.[205] The examiner requested reconsideration on the basis that the "panel's decision conflicted with [Patent Office] policy" and "that such reconsideration be carried out by an expanded panel."[206] An expanded eight-member panel of the Patent Office's adjudicatory board consisting of the three original members and five high-ranking officials of the Patent Office evaluated the request for reconsideration.[207] The majority of the expanded panel consisting of the newly appointed panel members issued a new opinion in which they affirmed the patent examiner's patentable subject matter rejection; the three original panel members dissented on the merits for the reasons set forth in their original opinion.[208]

A more recent example is *Nidec Motor Corp. v. Zhongshan Board Ocean Motor Co.*[209] The *Nidec* case involved the issue of joining two petitions of the same petitioning party when there were arguably conflicting PTAB decisions on joinder practices.[210] Similar to *Alappat*, the

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[202] 35 U.S.C. § 6(c) (2012). It is worth noting that, in the immigration adjudication context, the head of the Board of Immigration Appeals—not the Attorney General himself—"may from time to time make changes in the composition of such panels and of presiding members." 8 C.F.R. § 1003.1(a)(3) (2017). We are not aware of any instance in which the BIA chair has exercised this authority to stack a panel to reach a particular outcome, though the Attorney General has historically used his separate final decision-making authority to overrule BIA decisions and impose different policy outcomes. *See supra* note 167.

[203] This ability has led at least one commentator to note that the Director of the Patent Office "retains formal control" over the Board. Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965 (1991). (This article was referring to BPAI, the predecessor of PTAB, but the AIA utilizes the same language regarding the designate of Board members.).

[204] 23 U.S.P.Q.2d (BNA) 1340 (B.P.A.I. 1991), *rev'd*, 33 F.3d 1526 (Fed. Cir. 1994).

[205] *Id.* at 1546.

[206] *Id.*

[207] *Id.*

[208] *Id.* at 1547.

[209] Nidec Motor Corp. v. Zhongshan Board Ocean Motor Co., 868 F.3d 1013 (Fed. Cir. 2017).

[210] *Compare* Target Corp. v. Destination Maternity Corp. IPR 2014-00508, Paper 18 (PTAB Sept. 25, 2014) (denied joining of two petitions of a same petitioning party under 35 U.S.C. § 315(c) as a matter of law), *with* (Microsoft Corp. v. Proxyconn, Inc. IPR 2012-00026, Paper 17 (PTAB Dec. 21, 2012)

underlying case was initially decided by a three-member PTAB panel.[211] In a split decision, the panel held the joining was improper, and Board Ocean requested rehearing and expanded-panel consideration.[212] An expanded five-member panel consisting of the three original members and two new administrative patent judges issued a new opinion in which the majority—comprising the new panel members and the original dissenting judge—held the joining was proper.[213]

Moreover, agency leadership, at times, has found it necessary to utilize multiple rounds of expanded panels to ensure that PTAB decisions conform to the agency's policy preferences. Consider, for example, *Target Corp. v. Destination Maternity Corp.*, another recent case that involved the PTAB's joinder practices.[214] The initial panel consisted, per normal practice, of three administrative patent judges.[215] Before the decision issued, however, two additional administrative judges were added.[216] The expanded five-judge panel did not rule the way the Director had hoped. In a 3-2 decision, with the two added judges dissenting, the panel denied joinder.[217] The agency granted a request for rehearing and expanded the panel a second time, adding two more administrative patent judges to bring the total number to seven.[218] The twice-expanded panel issued a 4-3 decision allowing joinder, with the four added administrative patent judges in the majority.[219]

The Director's enlargement of the PTAB panel upon rehearing raises at least two legal questions. First, does the Director have the statutory authority to expand the panel and rehear the case after the original panel issues its decision?[220] Second, does the expanded panel in which the Director has designated like-minded individuals in hopes of reversing the initial three-judge panel offend constitutional due process principles?

(permitting joining of two petitions of the same petitioning party under 35 U.S.C. § 315(c) as a matter of law).

[211] *Nidec*, 868 F.3d at 1015.

[212] *Id.*

[213] *Id.*

[214] Target Corp. v. Destination Maternity Corp., No. IPR 2014-00508, Paper 18 (PTAB Sept. 25, 2014).

[215] *See* Order on the Conduct of the Proceeding, Target Corp. v. Destination Maternity Corp., No. IPR 2014-00508, Paper 4 (PTAB Mar. 25, 2014).

[216] Target Corp. v. Destination Maternity Corp., No. IPR 2014-00508, Paper 18 (PTAB Sept. 25, 2014). The PTAB Standard Operating Procedures allow for an expanded panel to be granted before the initial decision is issued. PATENT TRIAL AND APPEAL BD., STANDARD OPERATING PROCEDURE 1 (REV. 14): ASSIGNMENT OF JUDGES TO MERITS PANELS, INTERLOCUTORY PANELS, AND EXPANDED PANELS 3 (2015) [hereinafter SOP 1], https://www.uspto.gov/sites/default/files/documents/SOP1%20-%20Rev.%2014%202015-05-08.pdf,

[217] *Id.*

[218] Target Corp. v. Destination Maternity Corp., No. IPR 2014-00508, Paper 31 (PTAB Feb. 12, 2015).

[219] *Id.*

[220] 35 U.S.C. § 6(a) (2012).

1. Statutory Authority Challenge

The legal controversy associated with the Director's authority to stack panels stems primarily from rehearings. That is, can the Director handpick members to create an expanded panel after the initial decision has been rendered with the hope that the expanded panel will grant the rehearing and reverse? The answer seems to be yes.

The Patent Act defines the overall membership of the PTAB: "The Director, the Deputy Director, the Commissioner for Patents, the Commissioner for Trademarks, and the administrative patent judges shall constitute the Patent Trial and Appeal Board."[221] The Act also enables the Director to designate the members who shall constitute the PTAB for any given case: "Each . . . post-grant review, and inter partes review shall be heard by at least 3 members of the Patent Trial and Appeal Board, who shall be designated by the Director."[222] However, with respect to rehearings, the Patent Act provides only that exclusive authority to grant a rehearing is vested with the PTAB: "Only the Patent Trial and Appeal Board may grant rehearings."[223]

Notably, the Act is silent as to who may act as the PTAB to rehear the case. If the term PTAB means all members of PTAB acting as a collective unit or only the original panel members who heard the initial hearing, then the Director's designation practices would violate the Patent Act. If, however, the term PTAB included an expanded panel hand-picked by the Director, then the Patent Act would authorize the Director's designation procedures. The sparse language of the Patent Act regarding rehearings does not appear to compel or prohibit any of these interpretations, and hence the term PTAB appears to be ambiguous.

The Patent Act does grant the Director broad administrative powers, including the ability to promulgate regulations governing inter partes and post-grant review.[224] As a result, under standard administrative law principles, this grant of rulemaking authority gives the agency leeway to enact rules that are reasonable for ambiguous terms of the Patent Act in light of the text, nature, and purpose of the statute.[225] Because no statutory provision unambiguously mandates who comprises the PTAB to grant a rehearing, the agency's interpretation to include an expanded panel is reasonable. Thus, under the deference framework outlined in *Chevron v. Natural Resources Defense Council*,[226] the Director's designation procedures, at least if promulgated in a final rule, comply

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[221] *Id.*

[222] 35 U.S.C. § 6(c).

[223] *Id.*

[224] 35 U.S.C. §§ 2, 6.

[225] United States v. Mead Corporation, 533 U.S. 218, 229 (2001).

[226] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (instructing courts to defer to an agency's reasonable interpretation of an ambiguous statute that the agency administers).

with the Patent Act.[227] That "[t]he Director shall be responsible for providing policy direction and management supervision for the Office and for the issuance of patents" provides further evidence that the agency's interpretation is permissible.[228]

The Federal Circuit held that the Director's expanded panel practices did not constitute a clear violation of the Patent Act in *In re Alappat*,[229] which involved an adjudicatory body that preceded the PTAB but such reasoning should apply with the same force to the PTAB.[230] Although the Federal Circuit did not explicitly adopt a deference framework for its analysis, the majority did find that the text, nature, and legislative history supported the Patent Office's interpretation that an expanded panel has the authority to grant a rehearing and decide the case.

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[227] The legislative history supports giving broad discretion to the Director to define who may act as the Board to rehear a case. Ironically, the concept of rehearings as well as the inclusion of the Director and other high ranking officials as members of the Board was added to the Patent Act in 1927, when Congress decided to eliminate the right to appeal adverse Board decisions directly to the Director of the Patent Office. Because the Director could not keep up with the number of appeals, appellate review was removed and rehearing authority vested with the Board. *See infra* notes 270–271 and accompanying text. Nevertheless, the legislative history of the 1927 Act indicated that "the supervisory power of the Commissioner, *as it has existed for a number of decades*, remains unchanged." S. Rep. No. 1313, 69th Cong., 2d Sess. 4 (1927) (emphasis added).

[228] 35 U.S.C. § 3(a)(2)(A) (2012).

[229] In re Alappat, 33 F.3d 1526, 1551 (Fed. Cir. 1994). A plurality concluded that the Patent Act authorized the Director's designation procedures, while three other judges found the Director's designation practices did not constitute a clear violation of the Patent Act. Subsequent to *Alappat*, the Director delegated to the Chief Judge of PTAB the power to order rehearing before an expanded panel and to select who sits on those panels. SOP 1, *supra* note 214, at 2. The Patent Office has also provided more guidance as to when an expanded panel should be utilized and what may drive the selection of additional panel members. The PTAB's Standard Operating Procedures suggests that expanded panels should be utilized when, among other things, a proceeding involves "an issue of exceptional importance" or is "necessary to secure and maintain uniformity of the Board's decisions," *id.* at 3, and directs the Chief Judge to consider "technical or legal expertise" when choosing additional panel members. *Id.*

[230] The near-identical language in the Patent Act associated with convening panels of BPAI and PTAB suggests that *Alappat*'s reasoning would apply to PTAB as well. *Compare* 35 U.S.C. § 7 (2010) ("Each appeal and interference shall be heard by at least three members of the Board of Appeals and Interferences, who shall be designed by the Commissioner. Only the Board of Patent Appeals and Interferences has the authority to grant rehearings"), *with* 35 U.S.C. § 6(c) (2017) ("Each appeal, derivation proceeding, post-grant review, and inter partes review shall be heard by at least three members of the Patent Trial and Appeal Board, who shall be designated by the Director. Only the Patent Trial and Appeal Board may grant rehearings.").

2. Constitutional Due Process Concerns

Given that the Director's designation procedures are arguably consistent with the Patent Act, does the Director's selection of panel members based on their willingness to vote a certain way deprive an aggrieved party of due process? Unlike the statutory authority question, no court has considered whether the Director's designation procedures violate due process.[231]

Patents appear to constitute the type of property that is protected by the Fifth Amendment Due Process Clause. The Patent Act mandates that "if on . . . examination it appears that the applicant [for a patent] is entitled to a patent under the law, the Director shall issue a patent therefor."[232] Given that courts recognize due process protection for statutory entitlements, it is not surprising that the Federal Circuit has treated due process requirements as applying to the invalidation of patents in post-issuance proceedings.[233]

Due process guarantees "an impartial and disinterested tribunal."[234] This basic tenet applies to the adjudicative bodies of agencies as well as to courts.[235] Nevertheless, courts have recognized that the blend of investigative and adjudicative functions often found in administrative agencies requires a more relaxed approach as to what qualifies as an "impartial" decision maker in an agency's adjudicative body than in a federal court.[236] A violation of due process does not require proof of actual impartiality but instead only "an unconstitutional 'potential for bias.'"[237]

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[231] The Federal Circuit declined to address whether Director's designation practices of Board members violated due process in *In re Alappat*. 33 F.3d 1526, at 1536.

[232] 35 U.S.C. § 131.

[233] Patlex Corp. v. Mossinghoff, 758 F.2d 594, 598–99 (Fed. Cir. 1985) (holding that "[i]t is beyond reasonable debate that patents are property" protected by the Fifth Amendment's Due Process Clause"). The Federal Circuit has also found that due process requirements apply to pre-issuance examination of patents. In re Baxter, 656 F.2d 679, 687 (Fed. Cir. 1981) (finding a "clear infringement of Baxter's procedural due process rights" in the Patent Office's rejection of claims).

[234] Marshall v. Jerrico, Inc., 446 U.S. 238, 247–49 (1980).

[235] Withrow v. Larkin, 421 U.S. 35, 46–47 (1975).

[236] *Id.*; *see also id.* at 47 ("The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.")

[237] Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 881 (2009) ("The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"). *See also* Barnett, *supra* note 52, at 1672 ("Because of the difficulty in determining an adjudicator's

When considering the impartiality of administrative tribunals, courts have focused on when a decision maker's prior involvement or financial interest in a case will compromise neutrality violating due process.[238] In contrast, case law on permissible agency-head designation procedures is relatively sparse.

One exception is the Sixth Circuit's opinion in *Utica Packing Co. v. Block*.[239] In *Utica*, the U.S. Department of Agriculture (USDA) brought a complaint concerning meat inspection services from Utica Packing Company before an ALJ who decided against Utica.[240] Utica appealed the ALJ's decision within the USDA, and on appeal the judicial officer affirmed.[241] After the Sixth Circuit reversed and remanded the case back to the agency, the judicial officer reluctantly dismissed the case.[242] The judicial officer was then removed from the case by the Secretary of Agriculture—who "violently disagreed" with his decision—and was replaced by another who had no legal or scientific background to hear the case.[243] A petition for reconsideration was subsequently presented to the new judicial officer who ruled against Utica.[244]

On appeal, the Sixth Circuit found that the Secretary's replacement of the judicial officer violated due process.[245] The court refused to accept the argument that the Secretary, having delegated to the judicial officer the original authority to resolve certain matters, could reappropriate that power at will based on disagreement with the judicial officer's conclusions.[246] Instead, the court held, "[t]here is no guarantee of fairness when the one who appoints a judge has the power to remove the judge before the end of proceedings for rendering a decision which displeases

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subjective state of mind, due process mostly concerns itself with appearances of partiality.").

[238] The Supreme Court's inquiry, however, has been rather limited. Consider, for instance, *Schweiker v. McClure*, 456 U.S. 188 (1982), the Court's leading decision in this area. The *Schweiker* Court considered whether administrative judges appointed by insurance carriers to review denials of Medicare payments by the carriers themselves were, "for reasons of psychology, institutional loyalty, or carrier coercion, . . . reluctant to differ with carrier determinations." The Court found that the administrative judge's connection to insurers by itself was not meaningful because the federal government, not the carriers, paid the claims and the administrative judge's salaries. The Court held that the presumption of an adjudicator's impartiality had not been overcome because "generalized assumptions of possible interest" were insufficient.

[239] Utica Packing Co. v. Block, 781 F.2d 71 (6th Cir. 1986).

[240] *Id.* at 73.

[241] *Id.*

[242] *Id.* at 74.

[243] *Id.* The Secretary also assigned a new legal advisor whose immediate supervisor had participated in the removal of the original Judicial Officer and also "supervised the division responsible for the prosecution of Utica." *Id.*

[244] *Id.* at 74–75.

[245] *Utica*, 781 F.2d at 78.

[246] *Id.*

the appointer."[247] The court concluded: "All notions of judicial impartiality would be abandoned if such a procedure were permitted."[248]

It is important to note the unusual nature of the adjudicative scheme at issue in *Utica*. Under statutory authority, the Secretary had delegated final decision-making authority over these types of USDA adjudications to the judicial officer.[249] In other words, the Secretary originally had final decision-making authority under the statute. Therefore, the Secretary could have reached the substantive conclusion achieved via removal of the judicial officer but for subdelegating by regulation such final decision-making authority to the judicial officer. The Sixth Circuit's finding of a due process violation thus turns on the Secretary's voluntary delegation of final authority to another agency official, such that "the Secretary's efforts to change the result by the methods described in this opinion cannot be permitted to succeed."[250]

Under the reasoning set forth in *Utica*, there is at least a colorable argument that the Director's designation procedures raise substantial due process concerns. "Because the neutrality of a panel selected to produce a particular result might be questioned," John Golden has argued, "constitutional constraints of due process . . . might limit that directorial power over rehearings so that this power is in fact narrower than the statute facially allows."[251] Similar to the Secretary of Agriculture in *Utica*, the Director in effect removes the original panel before the end of the proceedings when she designates an expanded panel that she hopes will arrive at a different substantive outcome. Although the Director does not technically replace any judge, the practical effect of adding a sufficient number of new members to reverse the original panel decision is functionally equivalent to the Secretary of Agriculture's removal of the judicial officer in *Utica*.

Indeed, in some ways, the Director's panel-stacking antics are more procedurally offensive than the Secretary's "manipulation of a judicial, or quasi-judicial, system" in *Utica*.[252] After all, at least Congress had vested final decision-making authority in the Secretary, and the Secretary had

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[247] *Id.*

[248] *Id.*

[249] *Id.* at 72 (citing 7 C.F.R. § 2.35 (1985)).

[250] *Id.* at 79.

[251] John M. Golden, *Working Without* Chevron*: The PTO as Prime Mover*, 65 DUKE L.J. 1657, 1643–64 (2016); *accord* Richard A Epstein, *The Supreme Court Tackles Patent Reform: Further Reflections on the* Oil States *Case after Oral Argument Before the Supreme Court*, 19 FED. SOC'Y REV. 88, 92 (2018) (The notion of due process—which traditionally involves a trial before a neutral panel under fixed and determinate rules—is mocked when the PTAB is allowed to stack a panel with sympathetic judges, contrary to the practice of every other court."). *But see* Benjamin & Rai, *supra* note 198, at 1588 ("[W]e are skeptical that interpreting the statute to give the agency head the effective ability to review decisions poses a due process concern.").

[252] *Utica*, 781 F.2d at 78.

merely delegated that authority via regulation to a judicial officer. The AIA, by contrast, did not grant any final decision-making authority to the Director, such that her manipulation of the agency's processes to secure a different outcome seem even less fair as to the losing party's rights. It seems reasonable to conclude that *Utica* would compel the same result in the PTAB context, at least in the Sixth Circuit where *Utica* remains binding precedent.

That said, it does seem counterintuitive to conclude that it offends constitutional due process for the head of an agency to impose her policy preference when the "standard federal model" for agency adjudication contemplates that the head of the agency has final decision-making authority.[253] Indeed, the APA expressly contemplates de novo agency-head review of ALJ decisions for APA-governed formal adjudications,[254] and the vast majority of Type B adjudications also provide for agency-head review.[255] This standard federal model embraces the principle that agency adjudication should ultimately be controlled by a political appointee who can help shape agency policy via adjudication and has at least some degree of political accountability when doing so.

So why are there no constitutional concerns raised when an agency head reverses an ALJ's decision? In many ways, the Director's ability to stack the panel with like-minded members is functionally equivalent to an agency head's ability to reverse an ALJ's decision on factual or legal determinations. If the Director is unhappy with the initial PTAB decision, she expands the panel to help ensure that the adjudicatory board's decision aligns with her policy preferences just as an agency head who is unhappy with an ALJ's decision reverses the decision on appellate review. In both scenarios, there is an initial decision (by either a three-judge panel or an ALJ) and a second opinion that reverses (by an expanded panel or an agency head) that delineates the reasons for the reversal, including the policy preferences of the agency.

One answer may be that, unlike the traditional appellate review model, the expanded panel model of the PTAB arguably strips the adjudicatory board of its impartial nature and runs afoul of the requirement that the decisional function in administrative adjudication "cannot be performed by one who has not considered evidence or argument . . . . The one who decides must hear."[256] While it is true that individual PTAB members decide the case without agency leadership directing administrative patent judges to vote a certain way, the ability of the Director to stack the panel to ensure the outcome of the PTAB decision as a whole is arguably predetermined and hence impartial. Put differently, given that the expanded panel members are being selected to reverse the original three-member decision puts the outcome improperly

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[253] Levin, *supra* note 42, at 412.
[254] 5 U.S.C. § 557(b) (2012); *see also supra* Part I.A.
[255] *See supra* Part I.B.
[256] Morgan v. United States, 298 U.S. 468, 481 (1936).

before the consideration of evidence and argument.[257] This theory, to be sure, stretches constitutional due process beyond existing precedent and could arguably be invoked whenever an agency head reverses an ALJ.

Perhaps the answer lies in the fact that Congress expressly grants final decision-making authority to agency heads in most agency adjudication contexts, but it has not done so in the PTAB context (and in *Utica* the Secretary had delegated away that authority by regulation).[258] It would be odd for constitutional due process to turn on the scope of statutory authority granted to an agency. After all, Congress cannot cure a constitutional due process violation by granting the agency authority to violate the Constitution. Yet it nevertheless seems grossly unfair for an agency official who lacks substantive authority to gain such authority by rigging the adjudicative process. That type of procedural concern seemed to be the motivating the Sixth Circuit in *Utica*.

Even if the Director's panel-stacking practice falls short of an actual due process violation, Congress's decision not to grant the Director final decision-making authority may still limit the Director's ability to engage in panel stacking on rehearing in order to secure a desired outcome that is contrary to the original panel's determination. After all, if a statute is susceptible to more than one reasonable interpretation, the modern doctrine of constitutional avoidance commands courts to construe the statute to avoid an interpretation that raises serious constitutional questions—even if the interpretation at issue is not actually unconstitutional.[259] The existence of serious constitutional questions,

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[257] This due process theory would also implicate agency leadership designation of the original three-member panel. Designating the original three panel members appears to be well within the powers granted to the Director by the Patent Act. While agency officials deny that any three-member panels are hand selected by the Director, there would be no way of knowing if this occurs and if it does how frequently.

[258] In light of the fact that the Director lacks statutory final decision-making authority over PTAB decisions, perhaps the Director's use of panel stacking to in effect obtain final decision-making authority violates the APA. After all, the APA commands courts to invalidate agency actions that are, *inter alia*, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitation," or "in excess of statutory jurisdiction, authority, or limitation." 5 U.S.C. § 706. The problem with such an APA argument is that, as discussed in Part IV.B.1, the Director's panel-stacking and rehearing practices seem quite consistent with the Patent Act, as amended by the AIA.

[259] *See, e.g.*, Jones v. United States, 526 U.S. 227, 239 (1999) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter." (quoting United States ex rel. Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909))); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such

without more, is sufficient to eliminate a plausible interpretation. That is because the canon of constitutional avoidance "is not a method of adjudicating constitutional questions by other means," but "instead a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."[260] Although the Supreme Court has not been consistent in its approach, it has on occasion held that constitutional avoidance trumps *Chevron* deference, such that an agency cannot advance an otherwise reasonable interpretation of a statute if such interpretation raises serious constitutional questions.[261]

As detailed in Part IV.B.1, the Patent Act says nothing about who may act as the PTAB that votes to rehear a case. The Director has interpreted her statutory authority to designate the members of a PTAB panel[262] to include the ability to add members to an existing panel after the panel's initial decision. The Director does this in order to have enough votes on the panel to grant rehearing and then reach a different substantive outcome. We concluded in Part IV.B.1 that the Director's position is permissible in light of the statutory text, structure, and purpose. Indeed, the legislative history seems to confirm the Director's position.[263] But if the Director's position nevertheless raises serious constitutional questions, a court may well interpret the statute to prohibit the Director's interpretation. Indeed, as noted in the Introduction, at oral argument last year in *Oil States*, Chief Justice Roberts raised due process concerns with respect to the Patent Office Director's panel-stacking and rehearing procedures.[264]

To avoid constitutional due process concerns, perhaps the Patent Act's grant of authority to the Director to designate panel members should be limited so as to prohibit strategic panel stacking. That could include requiring that the rehearing vote is limited to the original three-judge panel or, conversely, include the whole PTAB membership. In sum, even

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problems unless such construction is plainly contrary to the intent of Congress." (citing NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 499-501, 504 (1979))).

[260] Clark v. Martinez, 543 U.S. 371, 381 (2005).

[261] *See, e.g.*, *DeBartolo*, 485 U.S. at 568 ("Even if [the agency's] construction of the Act were thought to be a permissible one, we are quite sure that in light of the traditional rule followed in *Catholic Bishop*, we must independently inquire whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to [the Act]."). *See generally* Christopher J. Walker, *Avoiding Normative Canons in the Review of Administrative Interpretations of Law: A* Brand X *Doctrine of Constitutional Avoidance*, 64 ADMIN. L. REV. 139, 144 (2012) (exploring the interaction between constitutional avoidance and *Chevron* deference and arguing that constitutional avoidance should not trump *Chevron* deference).

[262] 35 U.S.C. § 6(c) (2012).

[263] *See supra* note 227.

[264] Transcript of Oral Argument at 45, Oil States Energy Servs., LLC v. Greene's Energy Grp., No. 16–712 (2017).

if one is not fully persuaded that the Director's approach to panel-stacking offends due process, the Director's approach could be precluded by the existence of serious constitutional questions as to the agency's statutory interpretation.[265]

C. Alternative Mechanisms for Increased Agency-Head Control of PTAB Adjudication

The Director's designation practices raise serious constitutional questions, and at least under Sixth Circuit precedent would likely be unconstitutional on due process grounds. But even if the constitutional (and constitutional avoidance) arguments ultimately fail, that does not mean the practices are otherwise fair as a matter of administrative justice. As Justice Scalia has famously quipped, "A lot of stuff that's stupid is not unconstitutional."[266] Indeed, in the Article III context, scholars have noted that "the random assignment of federal appellate judges to panels has become a 'hallmark' of the system."[267] If random assignment is a hallmark of Article III adjudication, it is all the more important in the agency adjudication context, especially in the context of agency adjudication of private rights. Agency adjudications are already outside of Article III guarantee of life tenure and salary protections for adjudicators, and the Roberts Court seems interested in formally cabining the powers of non-Article III adjudicators.[268]

In addition to these fairness and process concerns, we have serious doubts whether panel-stacking in practice is an adequate substitute for

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[265] Such an approach where the administrative patent judges have final decision-making authority may well raise a different constitutional concern. *See* Gary Lawson, *Appointments and Illegal Adjudication: The AIA Through a Constitutional Lens*, GEO. MASON L. REV. (forthcoming 2018) (arguing that administrative patent judges are unconstitutional because they have final decision-making authority—and thus are principal officers under the Constitution—yet have not been appointed by the President with advice and consent of the Senate), https://ssrn.com/abstract=3105511.

[266] Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), http://nymag.com/news/features/antonin-scalia-2013-10/.

[267] Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 216 n.4 (1999). *But see* Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1 (2015) (calling into question the empirical assumption of random assignment).

[268] For instance, this Term the Court decided to consider whether patent adjudication could occur outside of an Article III court and a civil jury, *see* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 137 S. Ct. 2239 (2017), and Chief Justice Roberts, writing for the Court in *Stern v. Marshall*, 564 U.S. 462, 489 n.6 (2011), significantly limited the reach of *Crowell v. Benson*, 285 U.S. 22 (1932), and related precedents concerning non-Article III adjudication of private rights. *See Stern*, 564 U.S. at 506 (Breyer, J., concurring) ("My disagreement with the majority's conclusion stems in part from my disagreement about the way in which it interprets, or at least emphasizes, certain precedents" concerning non-Article III adjudication.).

actual agency-head review. Although the Patent Director has utilized panel stacking on occasion, she has not done so regularly as to effectively advance the policy objectives of agency-head review outlined in Part IV.A. Concerns about the adequacy of panel stacking as a substitute for agency-head review are arguably greater after oral argument in *Oil States*, during which the Chief Justice voiced serious concerns about the practice. We would not at all be surprised if the Patent Director ceased to utilize this practice in light of the judicial pushback.

In light of these practical, constitutional, and fairness concerns, are there other mechanisms the Patent Office could utilize to align PTAB decisions with its policy preferences consistently? This subpart explores this question and suggests three main alternatives.

1. Grant Agency Leadership Final Decision-Making Authority

Perhaps the most direct route to increase the Director's control over adjudicative outcomes would be through the creation of Director review of PTAB decisions.[269] Interestingly, the Director possessed such authority with respect to PTAB's predecessor until 1927, when Congress abolished the right to appeal the adjudicatory board's decision to the Director out of workload concerns.[270] In lieu of a guaranteed right of appeal to the Director, the 1927 Act created the blueprint for PTAB's rehearing structure and reconstituted the Patent Office's adjudicatory tribunal's membership to include the Director and other high-ranking officials.[271] Given the increased popularity of PTAB, mandated Director review of all PTAB decisions would likely overwhelm the agency head. As a result, the Director's jurisdiction over PTAB appeal should be discretionary. By allowing the Director to review only those cases that she deems necessary to align adjudicative outcomes with her policy preferences consistently, her administrative burden will be minimized while still allowing her sufficient policy control.

Congress could also consider creating an intermediate appellate board or a judicial office system that may be further subject to discretionary review by the Director (or some other high-level political appointee who serves in the Director's place). Providing an intermediate level of review before discretionary Director evaluation could help to lessen the demands on the Director by facilitating the identification of cases in which consistency and policy input are most necessary. The Director would also

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[269] At that time the Director was referred to as the Commissioner. The passage of the American Inventors Protection Act of 1999 (AIPA) reorganized the Patent Office and elevated the position of the agency head of the Patent Office from Commissioner to Director. Pub. L. No. 106–113, sec. 4713, §3(a)(1), 113 Stat. 1501, 1501A–575 to –I578 (codified as amended at 35 U.S.C. § 3(a)(1)).

[270] P.J. Federico, *Evolution of Patent Office Appeals*, 22 J. PAT. OFF. SOC'Y 838, 857 (1940).

[271] The 1927 change was technically directed towards patent rejections. In 1939 the internal appeal in interference cases was abolished. Act of Aug. 5, 1939, 53 Stat. 1212.

benefit from all cases being summarized and analyzed by two levels of decision makers, freeing her to focus more on the policy issues and consistency of PTAB decisions. To further sharpen the Director's involvement as to policy or novel legal issues, Congress could require the intermediate appellate board to certify policy questions to the Director, like it has with the Federal Communications Commission.[272] This certification process could occur after requiring a public notice and comment period, providing further input for the Director to consider in making the policy or novel legal decision.

Of course, the drawback of granting agency leadership direct review authority over PTAB is that it would require congressional action. While this is likely the most straightforward way to proceed, the rest of this Part considers alternative mechanisms to increase homogeneity and consistency in PTAB outcomes that would not require an additional statutory grant of authority to the agency.

2. Increased Reliance of Rulemaking

The Patent Office could increase its reliance on rulemaking. Admittedly, the Patent Office's rulemaking authority is relatively circumscribed. Historically, the agency's primary grant of rulemaking authority gives the Patent Office the ability to make rules that "govern the conduct of proceeding in the Office."[273] The Federal Circuit has repeatedly interpreted this grant as primarily enabling the Patent Office to make rules on a variety of procedural matters.[274] However, the Patent Office was recently granted additional rulemaking authority in the AIA with the creation of the PTAB proceedings.[275] The Supreme Court has interpreted this new rulemaking authority to include both procedural and substantive components, although the grant falls short of enabling the agency to promulgate rules on the core patentability standards such as novelty.[276] Thus, the Patent Office could more fully embrace its rulemaking authority to consistency align PTAB decisions with the agency's policy preference, although not to the extent of agencies that possess broader substantive rulemaking authority.

Other agencies have followed this path. For instance, the Social Security Administration (SSA), which makes hundreds of thousands of disability determinations each year, has relied heavily on rulemaking to

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[272] Adjudicatory Re-regulation Proposals, 41 Fed. Reg. 14,866 (1976).

[273] 35 U.S.C. § 2(b)(2)(A) (2006).

[274] Merck & Co. v. Kessler, 80 F.3d 1543, 1549–50 (Fed. Cir. 1996)

[275] 35 U.S.C. § 316(a)(4) (2012) (granting the Patent Office the authority to issue "regulations . . . establishing and governing inter partes review under this chapter.").

[276] Cuozzo Speed Tech. v. Lee, 136 S. Ct. 2131, 2135 (2016) (noting that the agency's new rulemaking authority over PTAB proceedings "is not limited to procedural regulations").

develop policy and guide its ALJs and hearing officers.[277] Nevertheless, even though the Patent Office may benefit by relying more heavily on rulemaking to announce agency policy, the agency will likely still need some additional review of PTAB determinations to bring homogeneity to its outcomes. For example, while the SSA utilizes rulemaking to cabin ALJ decision making, the SSA also relies on two other mechanisms to bring uniformity and consistency to ALJs determinations: (1) its Appellate Council, which serves as a review board to ALJs decisions, and (2) Social Security Rulings, in which the agency head designates certain adjudications as precedential.[278] Moreover, legislative challenges and procedural requirements associated with rulemaking are nontrivial. The costs associated with rulemaking could be so prohibitive that the Patent Office may not be able to rely solely on rulemaking to align PTAB outcomes with the agency's policy preferences consistently.[279]

Finally, it is important to acknowledge that the Supreme Court has made clear that an agency's choice of policymaking mechanism falls within the ambit of the agency's discretion. The Court has noted there is "a very definite place for the case-by-case evolution of statutory standards,"[280] and "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."[281] Besides financial considerations, there are a number of reasons why the Patent Office may want to proceed with adjudication rather than legislative rule. In particular, the agency may need to act quickly to clarify the law, and rulemaking may be too time-consuming.[282] Thus, although the Patent Office would likely benefit from increasing its reliance on legislative rules, the Agency may have legitimate reasons to rely on mechanisms outside of rulemaking to bring homogeneity to PTAB determinations.

3. Modifying the Process by which PTAB Decisions Are Designated as Precedential

How could the Director of the Patent Office ensure that adjudicative outcomes consistently follow agency policy preferences without relying solely on rulemaking authority? One promising alternative is through an

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[277] Charles H. Koch Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FL. ST. U. L. REV. 199, 267–68 (1990).

[278] *Id.*

[279] *See, e.g.*, JERRY L. MASHAW, RICHARD A. MERRILL, & PETER M. SHANE, ADMINISTRATIVE LAW THE AMERICAN PUBLIC LAW SYSTEM CASES AND MATERIALS 617–20 (6th ed. 2009) (describing institutional impediments to rulemaking).

[280] SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

[281] *Id.*

[282] *See, e.g.*, Magill, *supra* note 9, at 1396–97 (exploring factors that influence whether an agency chooses adjudication or rulemaking to make policy). *See also* Aaron Nielson, *Beyond* Seminole Rock, 105 GEO. L.J. 943, 972–82 (2017) (arguing against adjudication as a substitute to rulemaking for agency policymaking).

increased reliance on designating PTAB determinations as precedential. This pathway would likely require the Agency to modify the process by which PTAB decisions are designated precedential to give the Director or the Chief Administrative Patent Judge (CAPJ) greater control over this determination. Because precedential opinions are binding in all future cases before the PTAB until they are superseded by later binding authority, the Director could use the precedential-designation process to better align PTAB outcomes with the agency's policy preferences.

Since the new adjudicative procedures have come to fruition, the PTAB has issued over fifteen hundred written decisions, but *only thirteen* have been designated precedential.[283] This seems like an alarmingly low number given the number of novel legal questions the PTAB has faced since the passage of the AIA. The lack of precedential decisions is likely due, at least in part, to the Patent Office's cumbersome process for designating an opinion as precedential—a process that seems to be an artifact of when the Patent Office's adjudicatory tribunal constituted much smaller membership.

The Patent Office has promulgated guidelines that outline this process. The process begins with a nomination of an opinion, which can occur by any member of PTAB (including the Director), any interested party, or member of the public.[284] The CAPJ receives the nominations and each PTAB member may vote and comment in writing as to whether the opinion should be designated as precedential.[285] Only those PTAB opinions that receive approval from the CAPJ, the Director, and the majority of administrative patent judges may be designated as precedential. As a result, the Director has veto authority, as no opinion may be designated as precedential without her consent.[286]

The current guidelines do not grant the Director the authority to designate an opinion precedential without the consensus of the CAPJ and the majority of APJs (the latter number now close to three hundred). Modifying this process to give agency leadership the authority to designate decisions as precedential without the voting majority of APJs would greatly enhance the Director's ability to align PTAB outcomes with the agency's policy preferences consistently. The Patent Office may elect

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[283] U.S. PATENT & TRADEMARK OFFICE, PATENT TRIAL BOARD AND APPEAL BOARD STATISTICS (2017), https://www.uspto.gov/sites/default/files/documents/AIA%20Statistics_March2017.pdf; *List of Precedential Decisions of the Patent Trial and Appeal Board*, USPTO, https://www.uspto.gov/patents-application-process/appealing-patent-decisions/decisions-and-opinions/precedential (last modified Feb. 2, 2018).

[284] PATENT TRIAL AND APPEAL BD., STANDARD OPERATING PROCEDURE 2 (REV. 9): PUBLICATION OF OPINIONS AND DESIGNATION OF OPINIONS AS PRECEDENTIAL, INFORMATIVE, AND ROUTINE (2014). The public or any interested party must nominate an opinion for precedential status within 60 days of the opinion's issuance. *Id.*

[285] *Id.*

[286] *Id.*

to keep the comment period and even voting by APJs, which could provide agency leadership with valuable information in determining whether an opinion should be designated as precedential.

An agency-wide survey of precedential designation procedures suggests there is wide variety in the administrate state but evidence that agencies with high volume of adjudications rely more unilaterally on agency leadership to make precedential determinations. For instance, some adjudicative bodies, such as the National Labor Relations Board and the Environmental Appeal Board, do not provide any designation for its decisions.[287] Other agencies, like the Patent Office, designate decisions as precedential and typically utilize a process that includes a majority vote by board members. However, these adjudicative bodies generally comprise substantially fewer members than PTAB. Take, for example, the Board of Immigration Appeals (BIA), which has seventeen members.[288] The BIA, like the Patent Office, requires a majority-vote of permanent board members to designate an opinion as precedential.[289] Moreover, unlike the Patent Office, the Attorney General can review BIA decisions directly; thus, there is arguably less need to utilize precedential designation to control BIA decision making.[290]

Perhaps most instructive is the designation practices of other agencies that adjudicate a high volume of cases. Here again, the Social Security Administration is illustrative. While the Patent Office comprises an initial decision made by a patent examiner followed by review by the PTAB, the SSA comprises three stages of intra-agency review: the initial determination by a hearing officer, an appeal to an ALJ, and a subsequent appeal of the ALJ's decision to the Appellate Council.[291] Unlike PTAB, the Appellate Council does not designate its opinions as precedential (or any other status). Instead, the SSA has adopted a practice of issuing Social Security Rulings, which designate adjudications at any level as precedential and internally binding on all components of the SSA.[292]

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[287] *See* NLRB, Cases and Decisions, NLRB, https://www.nlrb.gov/cases-decisions (last visited Feb. 24, 2018); EAB Decisions, U.S. EPA, https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Board+Decisions?OpenPage (last updated Feb. 23, 2018).

[288] *See supra* note 173 and accompanying text.

[289] 8. C.F.R. § 1003.1(g) (2017) ("By majority vote of the permanent Board members, selected decisions of the Board rendered by a three-member panel or by the Board en banc may be designated to serve as precedents in all proceedings involving the same issue or issues.").

[290] *Id.* § 1003.1(h).

[291] Koch & Koplow, *supra* note 277, at 219–24.

[292] 20 C.F.R. § 402.35(b)(1) (2017) ("We publish Social Security Rulings in the FEDERAL REGISTER under the authority of the Commissioner of Social Security. They are binding on all components of the Social Security Administration. These rulings represent precedent final opinions and orders and statements of policy and interpretations that we have adopted."). There has been some controversy as to whether these rulings bind SAA ALJs. *See* Koch & Koplow, *supra* note 277, at 232–33.

These Social Security Rulings in effect provide the SSA Commissioner with the ability to designate Appellate Council and ALJ decisions as precedential unilaterally.[293]

Finally, the Patent Act appears to grant the Director legal authority to make precedential determinations independently. Even though the Act itself is silent—both on whether PTAB decisions should carry different designations and on the process that should govern such a determination—the Patent Act provides that "[t]he Director shall be responsible for providing policy direction and management supervision for the Office and for the issuance of patents."[294] This language, coupled with the statutory grant of broad authority to promulgate rules that govern the new adjudicative proceedings before the Patent Office, seems more than sufficient to empower the Director to modify the existing procedure on designating PTAB decisions, including shifting more control to agency leadership.

In sum, streamlining the designation process to enable agency leadership to make this determination more unilaterally should result in increased reliance on precedential designations, improving the alignment of the PTAB's decisions with the agency's policy preferences. Other agencies, especially those that make high volume adjudicative decisions, already enable agency leadership to make precedential determinations unilaterally. In addition, it seems clear that the Patent Act grants the Director the ability to do so. Finally, unlike the current procedure by which the Director can select like-minded APJs to serve on panels, streamlining the process by which PTAB decisions are designated precedential does not raise due process and fairness concerns.[295]

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[293] *Preface*, SOCIAL SECURITY ADMIN., https://www.ssa.gov/OP_Home/rulings/rulings-pref.html (last visited Feb. 24, 2018).

[294] 35 U.S.C. § 3(a)(2)(A) (2012).

[295] Stuart Benjamin and Arti Rai and John Golden have argued that precedential PTAB decisions are the worthiest of receiving *Chevron* deference. Rai & Benjamin, *supra* note 198, at 1584–87; John Golden, Duke L.J. ; *accord* Christopher J. Walker, Chevron *Deference and Patent Exceptionalism*, 65 DUKE L.J. ONLINE 149, 153 (2016). On one hand, having the Director be the sole determiner of precedential status could enhance an argument that legal interpretations of ambiguous terms of the Patent Act announced during PTAB proceeding should warrant *Chevron* deference. To the extent that the PTAB must speak for the agency—that is, the Director—shifting power to agency leadership on the precedential determination further enhances a *Chevron* deference argument. On the other hand, removing APJs from the decision-making process of precedential status could cut against an argument for strong deference. To the extent that a *Chevron* inquiry considers the procedural protections that lead to good decision-making—that is, formal adjudication and rulemaking often warrant *Chevron* deference for this reason—then removing APJs from precedential determination could weaken an argument that legal interpretations of ambiguous terms of the Patent Act announced in precedential PTAB decisions merit strong deference.

CONCLUSION

When the Supreme Court heard oral argument in the constitutional challenge to the PTAB last year, various Justices raised concerns about this novel agency tribunal, including concerns about how the Patent Office Director attempts to overcome her lack of final decision-making authority by stacking panels on rehearing with administrative patent judges who share her substantive inclinations.[296] Attempting to address those concerns, the Deputy Solicitor General referred to the Patent Office Director as the "chief judge." This flummoxed Chief Justice Roberts. He noted that "[w]hen we say 'judge,' we usually mean something else": an Article III federal judge, not an "executive employee."[297] Justice Kagan came to the rescue with a seemingly friendly clarifying question: "There are administrative law judges all over this country, aren't there?"[298]

Justice Kagan's reference to ALJs reflects the lost world of agency adjudication—the formal adjudication set forth in the APA that Professor Kagan no doubt taught in her administrative law classes. Today, however, most formal-like agency adjudication occurs outside of the APA—not before ALJs but a variety of other administrative judges, hearing officers, and other agency personnel. PTAB adjudication is one such example. Within this new world of agency adjudication, PTAB adjudication is not that unusual. But it lacks one critical feature that exists in both the lost and new world of agency adjudication: agency-head final decision-making authority. As we argue in this Article, this deficit at the Patent Office can and should be addressed by internal agency practices, agency rulemaking, or even statutory amendment.

Failure to bring PTAB adjudication within the mainstream of agency adjudication could prove problematic for the future of patent adjudication within the Patent Office. Indeed, if Gary Lawson is correct, the Director's lack of final decision-making authority could raise a separate constitutional problem. Under the current statutory and regulatory scheme, the administrative patent judges, not the Senate-confirmed Patent Office Director, have final decision-making authority. Therefore, Lawson argues, administrative patent judges are principal officers for purposes of the Appointments Clause and must be appointed by the President with advice and consent of the Senate.[299]

In all events, the importance of agency-head final decision-making authority certainly merits further theoretical development and empirical investigation. This Article hopefully motivates that further inquiry and in the process demonstrates how the new world of agency adjudication differs from the lost world contemplated by the Congress that enacted the APA over seven decades ago.

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[296] Transcript of Oral Argument at 45-47, Oil States Energy Servs., LLC v. Greene's Energy Grp., No. 16–712 (2017).

[297] *Id.* at 46.

[298] *Id.*

[299] Lawson, *supra* note 265.