

# GAO Highlights

Highlights of [GAO-22-106121](#), a testimony to the Subcommittee on Courts, Intellectual Property, and the Internet, Committee on the Judiciary, House of Representatives

## Why GAO Did This Study

Since its creation in 2012 by the AIA, PTAB, an adjudicative body within the USPTO, has offered an alternative to the federal courts for settling patent disputes. PTAB judges, working in panels of three, first decide whether to convene a trial to hear the dispute, and then decide whether the patents are valid. However, some participants in PTAB proceedings have raised concerns about whether PTAB management or the USPTO director have used their oversight authority to influence judges' decision-making.

This statement provides preliminary observations on (1) the judges' perspectives on PTAB oversight practices, including the effects on their deliberations and decisions, and (2) selected stakeholders' and judges' perspectives on the public transparency of PTAB proceedings. GAO conducted a survey of all 234 non-management and lead PTAB judges and achieved an 87 percent response rate. GAO also interviewed stakeholders—including parties to PTAB proceedings, and current and former judges—and PTAB officials.

## What GAO Recommends

GAO will complete its review, and make recommendations, as appropriate, in the final report.

View [GAO-22-106121](#). For more information, contact Candice Wright at (202) 512-6888 or [wrightc@gao.gov](mailto:wrightc@gao.gov).

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# PATENT TRIAL AND APPEAL BOARD

## Preliminary Observations on Oversight of Judicial Decision-making

### What GAO Found

GAO's preliminary work has identified concerns among the Patent Trial and Appeal Board (PTAB) judges on the clarity and implementation of oversight practices and policies. Specifically, the majority of judges (75 percent) surveyed by GAO responded that the oversight practiced by U.S. Patent and Trademark Office (USPTO) directors and PTAB management has affected their independence, with nearly a quarter citing a large effect on independence. For example, the majority of judges GAO surveyed reported they experienced pressure to adhere to management comments and to change or modify an aspect of their decision for an America Invents Act (AIA) trial on challenges to the validity of issued patents. However, some judges told GAO that while management oversight has rarely influenced the merits of the case (i.e., issues of patentability), it can influence judges' decisions on whether to institute a trial based on discretionary factors. Such discretionary factors can include, for example, whether the parties have a parallel case pending in the federal courts. Some judges also noted the lack of clarity about who in management reviews the decisions, the timing in which judges receive management's comments, what criteria management uses in its reviews, and what role, if any, USPTO directors play in approving these comments.

### Select Management Practices to Oversee Patent Trial and Appeal Board (PTAB) Decisions

America Invents Act (AIA) Review Committee (ARC)	A group of volunteer judges who conducted pre-issuance peer review of AIA draft decisions. ARC was replaced in May 2022 by the interim Circulation Judge Pool. Under the new interim process, decisions on some appeals of denied patent applications are also reviewed.
Management Review	PTAB management conducts pre-issuance review of selected draft decisions. Prior to changes made in May 2022, these reviews were required for decisions on important issues of interest, such as new legal or policy areas and inconsistency with PTAB decisions or USPTO guidance.
Interim Director Review	These reviews were created in 2021 to formalize the USPTO director's authority to review PTAB decisions. They allow the director to reconsider already issued decisions.

Source: GAO analysis of information from the U.S. Patent and Trademark Office (USPTO) | GAO-22-106121

Stakeholders GAO spoke with generally said they valued PTAB's ability to resolve patent disputes with less time and money than would be required in the federal courts. However, other stakeholders were generally unaware of the methods PTAB management uses to oversee judges' decisions. Some former judges who currently represent parties before the PTAB suggested that outside stakeholders—including parties to the cases—are not likely to know the extent to which directors or PTAB management has influenced or changed an AIA trial, particularly through Management Review. Some judges we surveyed stated that on at least one occasion within their own cases, a director or PTAB management had, without notice to the parties, directly influenced the outcome of a particular AIA proceeding. A judge noted that such information would have provided valuable insight for the public. According to one judge, insight into the differing views and legal reasoning on a case can help parties decide whether to appeal or to request Interim Director Review.