



Testimony

Before the Subcommittee on Courts,
Intellectual Property, and the Internet,
Committee on the Judiciary,
House of Representatives

For Release on Delivery
Expected at 10 a.m. ET
Thursday, July 21, 2022

PATENT TRIAL AND APPEAL BOARD

Preliminary Observations on Oversight of Judicial Decision-making

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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.

July 2022

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.

Chairman Johnson, Ranking Member Issa, and Members of the Subcommittee:

I am pleased to be here to discuss our ongoing work on the U.S. Patent and Trademark Office's (USPTO) Patent Trial and Appeal Board (PTAB) and the independence of its judges.

Since its formation in 2012, PTAB, an adjudicative body within USPTO, has offered an alternative to the federal courts for settling certain patent disputes.¹ USPTO directors—in conjunction with PTAB management—have introduced a number of oversight practices since then to assure quality and reliability in judicial decision-making. In 2021, however, a ruling by the U.S. Supreme Court (*United States v. Arthrex, Inc.*) clarified that a Senate-confirmed political appointee—namely a USPTO director—must be able to review certain final decisions rendered by the administrative patent judges (judges).²

The plurality opinion in *Arthrex* was critical of USPTO directors' use of oversight practices that exist outside of the evidentiary record, stating that their use leaves the parties “with neither an impartial decision by a panel of experts nor a transparent decision for which a politically accountable officer must take responsibility.” According to reports by the Congressional Research Service, the ability to protect valid patents and challenge or reverse invalid patents is critical to fostering innovation.³ Without protection of ideas, businesses and individuals would not reap

¹Congress created PTAB within USPTO under the 2011 Leahy-Smith America Invents Act (AIA) Pub. L. No. 112-29, § 7, 125 Stat. 284, 313-15 (2011). Section 7(e) set the effective date for the establishment of PTAB as 1 year after enactment of the act (enactment was Sept. 16, 2011). PTAB replaced the Board of Patent Appeals and Interferences, which had been the adjudicative body in the USPTO for patent appeals and interferences.

²Inferior officers' work is directed and supervised at some level by others appointed by Presidential nomination with the advice and consent of the Senate. In *United States v. Arthrex, Inc.*, the Supreme Court ruled that directors of the USPTO could review judges' decisions unilaterally and severed a statutory provision of the AIA to the extent that it prevents Director Review of certain final decisions. Note that we are referring to the USPTO director generally and not referring to the current sitting director unless otherwise stated.

³Richards, Kevin T. “Patent Law: A Handbook for Congress.” Congressional Research Service: Report, (September 2020): 1-30.

Thomas, John R. “Inter Partes Review of Patents: Innovation Issues.” Congressional Research Service: Report (July 2017): 1-25.
<https://crsreports.congress.gov/product/pdf/R/R44905>

the full benefits of their inventions and could focus less on research and development.⁴

My statement today is based on our ongoing examination of the practices used to oversee decision-making at PTAB. This statement provides preliminary observations on (1) practices used to oversee the decision-making process at PTAB, (2) the judges' perspectives on how, if at all, oversight practices have affected their deliberations and decisions, and (3) the perspectives of selected stakeholders and judges regarding the external transparency of oversight practices.

As part of our ongoing work, we obtained and analyzed agency policies, procedures, and guidance, and also reviewed applicable laws and regulations. Within the USPTO, we interviewed the current director and PTAB management officials, namely the Chief Judge, Deputy Chief Judge, Vice Chief Judges, Senior Lead Judges, and Lead Judges, as well as non-management judges.⁵ We also interviewed various stakeholders including former PTAB judges and former management officials, representatives of patent owners, petitioners, and patent applicants, professional associations, and intellectual property experts.⁶ We also conducted a web-based survey of PTAB judges from January 18, 2022 through February 23, 2022, soliciting their perspectives on and experiences with oversight practices exercised by PTAB management and USPTO directors. We sent the survey to all 234 judges serving as non-management judges or lead judges as of September 2021, and 204

⁴"Why is Intellectual Property Important?," STOPfakes.gov, The International Trade Administration (ITA), U.S. Department of Commerce, last modified on July 7, 2016, <https://www.stopfakes.gov/article?id=Why-is-Intellectual-Property-Important>

⁵We interviewed 12 judges who were either non-management or lead judges. In this report, we use "some" to mean two to five judges we interviewed supported the statement, "many" to mean six to seven judges, and "most" to mean more than eight judges. In cases where one judge we interviewed supported the statement, we say one judge we interviewed. In cases where we use multiple data sources (e.g. interviews and survey data), we do not use a modifier and indicate the sources used to support the statement. For example, "judges we surveyed and interviewed stated."

⁶We interviewed 23 stakeholder individuals or groups. In this report we use "some" to mean less than nine but more than one stakeholder supported the statement, "many" to mean nine to 13 stakeholders, and "most" to mean more than 13 stakeholders. The petitioner is the party filing a petition requesting that an AIA trial be instituted to hear challenges to issued patents.

(87 percent) of them responded.⁷ The survey results provide the perspectives of the judges who responded to the survey and may not be representative of those who did not respond.⁸ Over 70 percent of judges provided responses to at least one of the four open-ended questions we conducted content analysis on from our survey. We analyzed the comments judges provided to specific questions to identify key themes using two independent coders. We did this by placing similar comments into one or more categories. We report results from our analysis by counting the number of comments assigned to each category, after identifying and resolving differences between coders.⁹ Views expressed in the survey are those of the judges' at the time of the survey and may not be representative of all judges' views on given topics.

We are conducting the work upon which this statement is based in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

⁷Judges who serve as PTAB's executive management—the Chief Judge, Deputy Chief Judge, Vice Chief Judges, and Senior Lead Judges—were not included in this survey as the survey focused on management oversight. Because we surveyed all judges and lead judges, the survey did not involve sampling errors. To minimize errors arising from differences in how questions might be interpreted and to reduce variability in responses that should be qualitatively the same, we sent our survey to two subject matter experts for review and conducted pretests with six judges. An independent survey specialist within GAO also reviewed a draft of the survey prior to its administration. We conducted an analysis of our survey results to identify potential sources of nonresponse bias by examining the percentage of judges who did and did not respond to our survey by various characteristics—including time at PTAB, location, and content specialization. There was no discernable gap for these characteristics between judges who did or did not respond.

⁸When reporting survey data from closed-ended questions in this report, we use “some” to mean less than 40 percent of judges who responded to that question support the statement, “many” to mean 40 to 60 percent, and “most” to mean more than 60 percent. Of note, each question in the survey had a different number of respondents due to skip patterns. When calculating the denominator, we included those who responded and those who saw the question but chose not to respond. We excluded those who did not see the question at all due to the skip pattern.

⁹When reporting results from one of the four open-ended survey questions we analyzed, we use “some” to indicate less than 40 percent of judges who responded to the question supported the statement, “many” to mean 40-60 percent, and “most” to indicate more than 60 percent of judges who responded supported the statement.

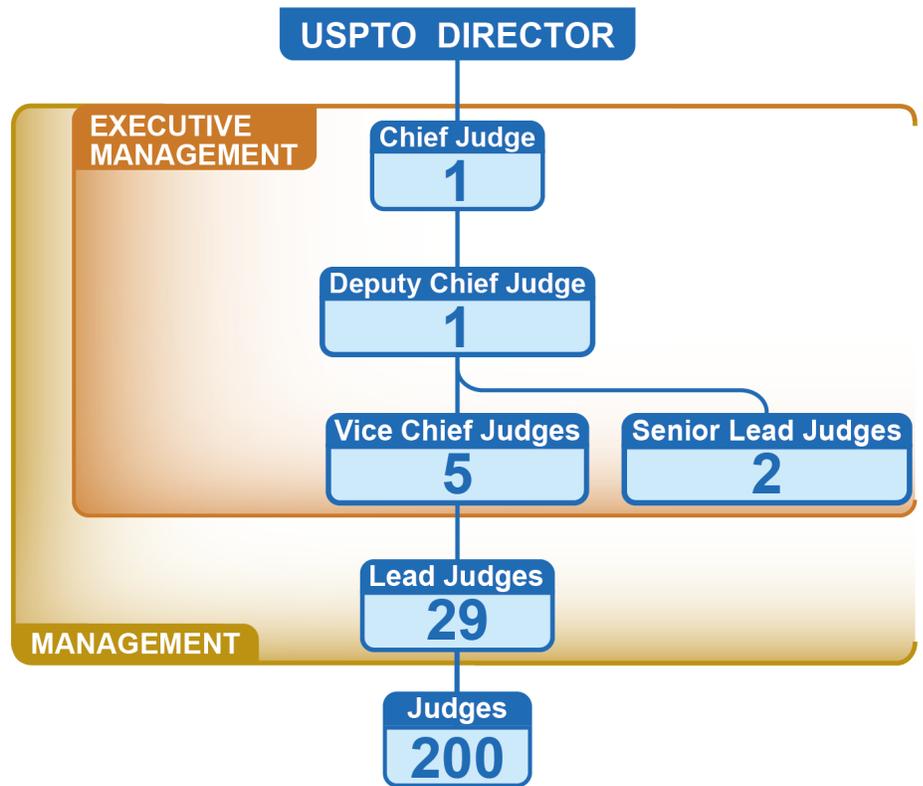
Background

Within the USPTO, PTAB is the adjudicative body that hears appeals from patent applicants who received adverse decisions from patent examiners (called ex parte appeals) and which conducts trials that permit parties to challenge the validity of issued patents.¹⁰ PTAB was established by the Leahy-Smith America Invents Act (AIA), passed on September 16, 2011.¹¹ The structure and processes at PTAB for AIA proceedings are intended to allow parties to resolve patent disputes in a manner that is more timely and less expensive than through the federal courts. PTAB is largely composed of judges, who are required by statute to have competent legal and scientific expertise. In practice, PTAB judges have expertise in various patent technology areas, which may not be available from judges in the federal court system. PTAB executive management consists of the Chief Judge, the Deputy Chief Judge, five Vice Chief Judges, and two Senior Lead Judges. Reporting to the Vice Chief Judges are 29 Lead Judges who work on cases and supervise the 200 non-management judges (see Figure 1). The non-management judges perform the majority of case management and write decisions.

¹⁰If an applicant for a patent has their patent application rejected twice, or the patent examiner has issued a final rejection, the applicant can appeal and seek review of the rejection by PTAB. PTAB reviews the appeal and issues a decision, and will either affirm or reverse, in part or whole, the patent examiner's rejection.

¹¹PTAB replaced the Board of Patent Appeals and Interferences, which was composed of around 80 administrative patent judges. In addition to hearing ex-parte appeals from patent applicants, the Board of Patent Appeals and Interferences also handled interference proceedings. Interference proceedings determine which of two or more competing applications claiming the same invention should be awarded a patent by establishing which applicant was the first to invent the claimed subject matter. Following its establishment, PTAB inherited the existing docket of the Board of Patent Appeals and Interferences, but interference proceedings are not available for patents with an effective filing date on or after March 16, 2013. Congress also tasked PTAB with the additional responsibilities of administering AIA proceedings.

Figure 1: Patent Trial and Appeal Board (PTAB) Organization Structure



Source: GAO analysis of USPTO data. | GAO-22-106121

Note: These numbers were provided by USPTO as of June 21, 2022. According to PTAB management officials, the Chief Judge reports to the Deputy Director, but the USPTO Director has the authority to oversee board activities and delegate oversight to PTAB management.

The AIA also established new proceedings at PTAB, referred to as AIA proceedings (or AIA trials), that allow individuals or parties to challenge the validity of issued patents. There are currently two main types of AIA proceedings—post-grant review and *inter partes* review:¹²

- Post-grant reviews must be filed within 9 months of the grant or reissuance of a patent. A third party can file a petition to challenge a

¹²Other types of AIA proceedings include covered business method patent reviews and derivations. Covered business method patent reviews were phased out on September 16, 2020, but pending cases may still be reviewed under the Interim Director Review process. We reported on covered business methods patent reviews in [GAO-18-320, U.S. Patent and Trademark Office: Assessment of the Covered Business Method Patent Review Program](#), issued March 13, 2018.

patent's validity on several statutory grounds including subject matter eligibility, novelty, non-obviousness, and clarity.¹³

- *Inter partes* review, which is the most common AIA proceeding, can be filed to challenge a patent 9 months after the issue date and for the life of the patent. However, the challenge is limited to a set of grounds (novelty or non-obviousness), and on a limited set of acceptable prior art (previously issued patents and printed publications).

Following the submission of a petition to challenge a patent and the Chief Judge or his or her delegate's assignment of the panel of judges to the case, the panel decides whether the petition has met the standard for instituting a trial, referred to as a decision on institution.¹⁴ Following the decision on institution, the panel proceeds to the trial phase, reviews the case, and ultimately issues a final decision on the case.¹⁵ Any judge on a panel may provide a written dissent or concurrence in response to a final majority decision.¹⁶ PTAB is generally required to issue final written

¹³35 U.S.C. § 321(b) permits a petitioner to request post-grant review on any ground that could be raised under 35 U.S.C. § 282(b)(2) or (3). This includes a failure to meet the conditions necessary for patentability, codified in 35 U.S.C. §§ 101-03, as well as a failure to comply with certain requirements of 35 U.S.C. §112, related to the patent specification.

¹⁴The USPTO director has statutory authority to designate panels, which is delegated to the PTAB Chief Judge 35 U.S.C. § 6(c). The policy for paneling is available publicly on the USPTO's website as Standard Operating Procedure 1 (SOP 1), Revision 15, published in September 2018.

Inter partes review has a lower standard for initiating review, "reasonable likelihood that the petitioner would prevail" than post-grant review. Post grant review has a higher standard to initiate, more likely than not that the petitioner would prevail. The deadline for the institution decision is 3 months from the filing of the patent owner's preliminary response.

¹⁵In most cases, three administrative patent judges are assigned to a panel. Typically one judge is primarily responsible for the case and will do a significant portion of the writing and case management, in consultation with the other two judges. Any of the three judges may draft written work, and in all circumstances all judges on the panel provide input on written products, except in rare circumstances where fewer than all three judges are available and there is no statutory requirement for a three judge panel.

¹⁶A concurrence is a separate opinion written by a judge who agrees with the final decision made by the majority of panel members, but may have a different rationale for the decision. A dissent is a separate opinion written by a judge who disagrees with the final decision made by the majority of panel members, and explains the disagreement. As of May 7, 2009, PTAB judges were no longer automatically awarded work credit for authoring dissents or concurrences. Instead, judges must request credit for time spent authoring dissents or concurrences. According to PTAB management officials, the policy change was implemented due to the variability in time spent on concurrences and dissents and not to dissuade judges from authoring separate opinions.

decisions on AIA proceedings within 1 year of the date that the trial is instituted.¹⁷ Following its establishment in 2012, PTAB experienced a rise in AIA proceedings and a backlog of ex-parte appeals of rejected patent applications. According to PTAB data, the number of AIA petitions filed rose from 562 in fiscal year 2013 to 1,489 in fiscal year 2014, and has remained above 1,400 per year through fiscal year 2021.¹⁸ This rise in AIA caseloads and the inventory of pending ex parte appeals cases required PTAB to conduct large hiring initiatives to bring on more judges.

On June 21, 2021, the Supreme Court issued *United States v. Arthrex, Inc.*, which addressed whether the decisional authority exercised by the administrative patent judges was consistent with the Appointment's Clause of the U.S. Constitution. The Court considered whether these judges should be considered "principal officers" who must be appointed by the President with the Senate's advice and consent, or, as the U.S. government argued, whether they are "inferior officers" who can be appointed by the Secretary of Commerce. The Court held that the unreviewable authority wielded by judges during the *inter partes* review process is incompatible with their appointment by the Secretary to an inferior office.¹⁹ To remedy this problem, the Court provided that the USPTO director may review final written decisions and, upon review, issue the agency's final decision. In response, USPTO instituted an Interim Director Review consistent with *Arthrex*.²⁰

PTAB Has Various Practices in Place to Oversee Judicial Decision-making

Over the years, USPTO directors in consultation with PTAB management have introduced various oversight practices to manage an increasing number of judges and the evolving nature of patent law and policy. These practices have included review of the judges' work both before and after decisions are issued. Below is a partial description of this oversight as it has been practiced prior to any changes that were implemented by the USPTO's announcement of a new interim process, referred to as the interim process for PTAB decision circulation and internal PTAB review, which includes the Circulation Judge Pool, which replaced the AIA

¹⁷In some cases, the timeline for an AIA trial may be extended up to 6 months for good cause.

¹⁸Number of AIA petitions filed include *inter partes* reviews, post grant reviews, and covered business method patent reviews, and exclude derivations.

¹⁹This decision specifically only applied to *inter partes* review proceedings and did not address other types of post-issuance proceedings.

²⁰Prior to this decision, under the AIA no presidentially appointed officer—such as a USPTO director—had sufficient power to unilaterally review PTAB final written decisions.

Review Committee on May 26, 2022. We will further review this interim process as part of our ongoing work. Previously, three forms of oversight were exercised prior to the issuance of a decision, and two could be exercised following the issuance of a decision.

Along with the formal oversight practices outlined below, USPTO directors have exercised oversight through agency policy, memos, and other written guidance, through which the USPTO director, via PTAB management, can provide direction on how to interpret certain areas of law, policy, or precedent that judge panels are required to follow.²¹

Pre-issuance

- **AIA Review Committee (ARC):** ARC was a group of volunteer judges who conducted pre-issuance peer review of all AIA draft institution and final written decisions.²² ARC judges provided comments and edits that were optional for judge panels to consider, and addressed substantive issues such as inconsistencies with USPTO policy and precedent, statutes, and case law, and editorial issues such as spelling, grammar, and structure. ARC could also consult with PTAB management while conducting a review, and could flag decisions for further pre-issuance review by management. ARC review was initiated informally in 2013 and was instituted officially as agency policy in 2019.²³ Policy on ARC was not publicly available prior to May 2022.

On May 26, 2022, the newly-appointed USPTO director announced that ARC was being replaced by a Circulation Judge Pool in accordance with a new interim peer review practice for PTAB decision circulation and internal PTAB review. According to interim guidance provided by USPTO, this practice, which is in use but has not yet been formalized through rulemaking, will function similarly to ARC and extends pre-issuance peer review from just AIA decisions to other

²¹The Director is responsible for providing policy direction and management supervision for the agency 35 U.S.C. § 3(a)(2)(A).

²²ARC applied only to AIA decisions, ex-parte appeals were not subject to review by ARC. PTAB executive management selected judges to serve as committee members in consultation with the lead judges of the volunteers. Each ARC member served a 1 year term.

²³The internal USPTO policy document for ARC was created in response to a recommendation from [GAO-18-320](#), *U.S. Patent and Trademark Office: Assessment of the Covered Business Method Patent Review Program*, issued March 13, 2018.

PTAB decisions, including some ex-parte decisions.²⁴ USPTO plans to issue a request for public comment on this practice, but a date for the comment period has not been set.

- **Management Review:** Management Review is a process in which PTAB management conducts pre-issuance review and provides comments on select decisions drafted by judge panels.²⁵ According to PTAB management officials, Management Review was required for PTAB decisions that contain important issues of interest such as new legal or policy areas and areas of inconsistency with other PTAB decisions or USPTO guidance.²⁶ PTAB management provided an “issues of interest” checklist to all judges that identified current legal or policy issues that were important to internal or external stakeholders, including the USPTO director at the time.²⁷ During Management Review, PTAB management could consult with the director, the director’s delegate, or senior management in USPTO for guidance, such as the Solicitors Office according to policy. Management Review began informally in 2017 and was officially documented in agency policy in 2019.²⁸ Policy on Management Review was not publicly available prior to May 2022.

²⁴According to interim guidance provided by USPTO, decisions that will require pre-issuance Circulation Judge Pool review include all AIA institution decisions; AIA final written decisions; AIA decisions on rehearing; decisions on remand from the Federal Circuit; *inter partes* reexamination appeal decisions; and certain categories of ex parte appeals, ex parte reexamination appeals, and reissue appeals decisions as designated by PTAB management. PTAB judges may also, at their discretion, choose to submit other types of decisions for review.

²⁵Any PTAB decision can undergo management review, including AIA proceedings and ex parte appeals.

²⁶Judges may also submit other draft decisions for management review that are not related to these identified issues of interest. According to PTAB management officials, under the new interim practice for PTAB decision circulation and internal PTAB review, Management Review is no longer required and is only conducted at the request of a panel member.

²⁷This checklist was used as an optional tool for judges to notify management of an upcoming decision. PTAB management provided updates to this checklist as needed, in consultation with the USPTO director.

²⁸According to PTAB management officials, the Chief Judge began reviewing AIA decisions prior to 2017, but the process of Management Review as we describe it was not in place until 2017. The policy document for Management Review was created in response to a recommendation from [GAO-18-320](#), U.S. Patent and Trademark Office: *Assessment of the Covered Business Method Patent Review Program*, issued March 13, 2018.

According to PTAB management officials, generally it is optional for judges to accept comments provided during Management Review. However, in certain cases in the past, it may have been mandatory for judges to adopt comments.²⁹ For example, if a draft decision did not follow USPTO policy or guidance issued by the director on how to interpret a certain legal issue or precedent, PTAB management would provide corrections to the panel to incorporate this guidance. PTAB management noted that in rare circumstances where a draft decision did not follow applicable USPTO policy and precedent, statutes, or case law, or instances where judges refused to adopt mandatory management review comments, it could affect judge's performance review ratings.³⁰ The potential impact of mandatory management review comments on judge performance reviews was not explicitly stated in USPTO policy.³¹

- **Panel Changes and Expansions:** USPTO directors, via PTAB management, have exercised oversight at PTAB by conducting changes and expansions of the three judge panels.³² The Chief Judge, or a delegate, may conduct panel changes for a variety of reasons before or during a case. USPTO policy states that panel changes may be conducted at the request of a judge, or at the

²⁹According to PTAB management officials, the new interim practice for PTAB decision circulation and internal PTAB review makes clear that if a panel member requests pre-issuance management review, all comments are optional.

³⁰Established pursuant to 5 U.S.C. Chapter 43 and the USPTO's Performance Appraisal System, judges receive yearly performance reviews and are rated under the four elements of quality, production, supporting the mission of PTAB, and professional interactions. The quality element requires that judges follow all applicable USPTO issued policy and precedent, statutes, and case law when deciding cases. Although this is not a formal oversight practice, judges' responses to other forms of oversight can have an impact on their performance reviews.

³¹USPTO policy stated that comments provided during ARC review did not have an impact on judges' performance reviews, but did not address the potential impact of comments provided during Management Review on judges' performance reviews.

³²The USPTO director has statutory authority to designate panels, which is delegated to the PTAB Chief Judge 35 U.S.C. § 6(c). The policy for paneling is available publicly on the USPTO's website as Standard Operating Procedure 1 (SOP 1), Revision 15, published in September 2018. According to PTAB management officials, the use of paneling as a form of oversight is rare. On June 9, 2022 the current USPTO Director told us that she does not plan to use paneling as a form of oversight.

discretion of PTAB management.³³According to PTAB management officials, panel changes were rarely used for oversight. In rare cases in the past, management officials reported having used them to remove judges that did not agree with a decision or had decided not to follow agency policy, statutes, or case law.³⁴ PTAB management also noted that if a judge did not agree with mandatory Management Review edits they could ask to be removed from the case.

In the past, PTAB management had also conducted panel expansions where they assigned more than three judges to a single case in order to establish binding agency authority and maintain uniformity across decisions that addressed similar policy or procedural issues.³⁵

According to PTAB management officials, panel expansions were rare and are no longer used.

Post-issuance

- **Interim Director Review:** Interim Director Review was established to formalize the USPTO director's authority to review PTAB decisions, consistent with the *Arthrex* Supreme Court decision. Interim Director Review initiates post-issuance review and rehearing from the USPTO director on final PTAB decisions that may contain errors of fact or law, new legal or policy issues, or inconsistencies with PTAB procedures, guidance, or decisions. Interim Director Review was first initiated on June 29, 2021 and interim guidance is publicly available on the USPTO website. The director can choose to initiate a review of any final written or institution decision, or a party to a PTAB proceeding can request review of any final written decision. Only parties to AIA proceedings, including inter partes and post-grant review cases, are

³³When panel changes are conducted during a case, parties to the proceeding are notified of the change by a panel change order, which identifies the new panel member(s), as well as one of three categories to indicate why the change was made. These categories are recusal, unavailability, and deadlines. Recusal is when a judge recuses themselves from a case when they identify potential conflicts of interest. Unavailability may include situations where a judge has leave or a personal emergency, has a detail assignment inside or outside USPTO, is reassigned to a different case, or has departed from the agency. Deadlines may be used when a judge is reassigned when they have a workload that renders them unable to complete work products by required deadlines.

³⁴In these situations, PTAB management told us that parties in the proceedings would be informed that the reason for the panel change was because the judge was unavailable.

³⁵35 U.S.C. §6(c) requires at least 3 members on a panel. A former member of PTAB told us that panel expansions were previously used to address issues like same-party joinder, which was a recurring issue in PTAB cases and allowed an individual or party to file a second *inter partes review* petition and join it with another previously submitted petition. PTAB conducted panel expansions to ensure that all panels consistently addressed whether same-party joinder was allowed to occur.

eligible to request review.³⁶ The director makes the final decision on whether to initiate review. For this review, the director rehears the case without deference to the panel decision and issues a final decision to resolve any legal, policy, or factual issues. On April 22, 2022, USPTO officials announced that they plan to conduct a public request for comment on interim Director Review, but a date for this comment period has not yet been set.

- **Precedential and Informative Decisions:** To establish consistency and create norms across cases, some decisions issued at PTAB are designated as precedential or informative with the approval of the USPTO director.³⁷ Precedential decisions have binding authority in subsequent matters involving similar facts, policy, or issues, that PTAB judges are required to apply when deciding cases. Informative decisions set norms that should be followed in most cases, absent justification by a panel, but are not binding on PTAB judges.³⁸

³⁶According to PTAB management, ex parte appeals are currently not eligible for Interim Director Review.

³⁷USPTO has two practices for designating decisions as precedential or informative, known as Precedential Opinion Panel (POP) review and ratification. These practices were established on September 20, 2018 and are detailed publicly on USPTO's website in Standard Operating Procedure 2 (SOP 2).

USPTO policy states that the USPTO director has an interest in creating binding norms for fair and efficient PTAB proceedings, and to establish consistency across decisions under the AIA. Precedential decisions are designated to establish binding agency authority concerning major policy or procedural issues, such as addressing constitutional questions, issues regarding statutes, rules, and regulations, or binding or precedential case law.

³⁸Decisions may be designated as informative to provide PTAB norms on recurring issues, to provide guidance on board rules and practices, and to provide guidance on issues that the board has not yet addressed, among other reasons. For example, in 2020 PTAB designated *Curt G. Joa, Inc. v. Fameccanica.data S.P.A.*, as informative to provide guidance to judges on how to address the use of confidential information during oral hearings.

Judges Reported That Oversight Affected Their Independence and Reported Pressure to Change or Modify Aspects of their Decisions

Agency Policies and Management Review Influenced Decision-making, According to Judges

Most judges we surveyed noted that oversight from previous USPTO directors and PTAB management has generally increased over time, with some variation in that level under different directors.³⁹ Judges we interviewed and surveyed asserted that some prior USPTO directors—and subsequently PTAB management—have been hands-off while others have been very involved in oversight of PTAB decisions.⁴⁰ While some judges we interviewed acknowledged the need for some oversight to promote consistency across decisions, judges we interviewed and surveyed maintained that the increased use of oversight practices—such as Management Review—has had an effect on their decision-making.

The majority of judges (75 percent) we surveyed responded that the oversight practiced by USPTO directors and PTAB management has had an effect on their independence, with nearly a quarter of these respondents reporting that these practices have had a large effect on their independence (see Table 1).

³⁹Survey responses from judges reflect their perspectives as of February 2022 and are not inclusive of changes in agency procedure or policy that occurred after this date. Of the 143 judges who provided written responses in the survey about how, if at all, their experience with or perception of USPTO director and PTAB management oversight changed in their time at PTAB, 84 judges (59 percent) noted oversight had increased. The average tenure of judges who completed our survey is 10 years.

⁴⁰Many of the central oversight practices—including the introduction and formalization of Management Review, the Precedential decision process for designating decisions as precedential, the codification of panel changes and expansions, the formalization of ARC review, and the creation of interim procedures for Director Review and the process for PTAB decision circulation and internal PTAB review, which includes the Circulation Judge Pool—were created, formalized, or both, in the last 5 years, according to PTAB documentation and interviews with PTAB management officials.

Table 1: How much of an effect, if at all, do the oversight practices used by US Patent and Trademark Office directors and Patent Trial and Appeal Board (PTAB) management have on your independence as a judge?

Effect size	Number of judges	Percent
A large effect	48	24%
A moderate effect	39	19%
A small effect	66	32%
No effect at all	31	15%
Unsure	20	10%
Total	204	100%

Source: GAO survey of PTAB judges | GAO-22-106121

Note. Percentages in this table were rounded to the nearest whole percent.

U.S. Patent and Trade Office (USPTO) Subject Matter Eligibility Guidance

35 U.S.C. § 101 provides the statutory foundation for the types of inventions that are eligible to be patented. In 2019, the USPTO issued Revised Patent Subject Matter Eligibility Guidance, which provides the USPTO’s interpretation of this statute and revises the procedures examiners and Patent Trial and Appeal Board (PTAB) judges use for determining patent eligibility. This guidance is intended to provide additional clarity on relevant case law but possibly broadens the types of inventions that are patentable beyond the case law, according to some judges we surveyed.

Source: GAO analysis of USPTO documents and survey of PTAB judges.

Many judges we surveyed said director-created policy and guidance had an effect on their ability to decide cases independently.⁴¹ While a purpose of Management Review, for example, is to enforce the use of the director-created policy or guidance, many judges we interviewed noted that policy based on the director’s interpretation of case law sometimes differed from the interpretations of PTAB judges. For example, some judges thought USPTO’s guidance on subject matter eligibility was inconsistent with relevant case law (see sidebar). Sixty judges (30 percent) we surveyed responded that, in their opinion, the PTAB 2019 Revised Patent Subject Matter Eligibility Guidance creates new tests for evaluating whether an invention is eligible that are not supported or established by the applicable case law. Sixty-three judges (31 percent) responded that it did not create new tests and 80 judges (39 percent) had no opinion. One judge stated that, “the guidance memos from the director, the precedential decisions, the Management Review process, and the AIA review process significantly limit the panel to write as we see fit. We are obliged to follow the guidance memos as if they are applicable law,” while

⁴¹Of the 119 judges who provided written responses in the survey about what factors, if any, affects their ability to decide cases based solely on the facts of the case and applicable laws, 30 judges (25 percent) identified director-created policies, 31 judges (26 percent) identified precedential or POP decisions, 32 judges (27 percent) identified management review as factors affecting their independence. Judges could identify multiple factors affecting their ability to decide cases. According to the USPTO website, there are over 100 precedential decisions and almost 200 informative decisions that guide judges’ decision-making:

<https://www.uspto.gov/patents/ptab/decisions-and-opinions/precedential>

<https://www.uspto.gov/patents/ptab/decisions-and-opinions/informative-opinions-0>. The Director is responsible for providing policy direction and management supervision for the agency. 35 U.S.C. § 3(a)(2)(A).

another judge stated that “Management Review is by far the most significant factor” affecting their independence.

Example of Management Oversight Using Agency Guidance

A Patent Trial and Appeal Board (PTAB) decision designated precedential in 2020, outlines several factors that a PTAB judge should consider when deciding whether to deny institution of an *inter partes* review petition if there is a potentially parallel district court proceeding. However, some judges we interviewed told us that comments received during Management Review, influenced or dictated which factors should be given more weight thus driving the judges’ decision on instituting an *inter partes* review.

Source: GAO analysis of PTAB documents and PTAB judge interviews.

Some judges we interviewed pointed to the increased amount of oversight and guidance as contributing to a sense of pressure that has extended beyond the cases in which USPTO directors or PTAB management have a direct role. We found that the majority of judges we surveyed who reported working on AIA proceedings indicated they have felt pressure to change or modify an aspect of their decision in an AIA proceeding based upon the Management Review process and about a third of judges we surveyed who reported working on ex-parte appeals felt this pressure based upon Management Review for decisions in ex-parte appeals (see Table 2).

Table 2: Have you ever felt any pressure to change or modify an aspect of your decision due to Management Review for America Invents Act (AIA) proceedings or ex-parte appeals?

	AIA proceedings	Ex parte appeals
Yes	67% (95)	34% (42)
No	33% (47)	65% (81)
No Response	0% (0)	1% (1)
Total	100% (142)	100% (124)

Source: GAO survey of PTAB judges | GAO-22-106121

Note. Percentages in this table were rounded to the nearest whole percent. The number of judges for each response is included in parentheses.

Judges who responded they have felt pressure in AIA proceedings and/or ex-parte appeals noted that they felt it in a variety of situations or from different individuals—including PTAB management, USPTO directors, and other judges. Judges we surveyed and interviewed noted feeling pressure from fellow judges on their panel to follow comments from management or ARC members, as well as pressure not to file a dissent or concurrence. One judge noted that judges can be seen as “difficult” if they push back when panels are already on very tight statutory deadlines. Some judges we interviewed noted that they relent to the other panel

members at times to prevent potentially poor ratings from their peers in their performance review.⁴²

Some judges we interviewed told us that while such oversight typically has not influenced the merits of the case (i.e., issues of a patent's novelty for example), there can be pressure on discretionary areas driven by agency policy or guidance—and this can affect the judges' decision to institute an AIA trial (see sidebar). Moreover, some judges we interviewed clarified that USPTO directors or PTAB management only intercede in cases with high visibility or cases in which a director has issued guidance or policy. For example, one judge stated that, "if the case involves an issue that the public is interested in [...] then the case is scrutinized by management and the panel has very little, if any, freedom to make decisions."

On the other hand, some judges we interviewed noted lasting effects on the culture of PTAB from former directors or PTAB management who have at times interceded or applied pressure to judges. Some judges we interviewed noted that while they personally have not been on a case in which management or a director directly interfered, they have heard about certain cases that were alleged to have negative consequences for judges who pushed back on management's revisions. They stated that they have, therefore, then felt pressure as to how they render their own decisions, irrespective of management's involvement. Some judges we interviewed responded that to avoid attention from management, they self-edit their decisions prior to review. A judge stated that, "[Management Review's] very existence [...] creates a preemptive chilling effect: consideration of management's wishes is at least a factor in all panel deliberations, and is sometimes the dominant factor." Another judge noted that while director-created policy or management's enforcement of policy may only affect, for example, one out of every 15 cases, the pressure from those interactions leaves a "bad taste" that permeates into decision-making on other cases.

⁴²As a part of the performance appraisal review process for judges, lead judges may survey other judges about their experiences while paneled with the judge being reviewed. These peer review survey results may be used as a part of the judge's rating, although according to PTAB management officials, peer feedback alone does not dictate a particular rating.

Judges Reported Feeling Obligated to Accept Management Review Comments

According to judges we surveyed and interviewed, Management Review is a key source of pressure for judges. Sixty-three percent of judges who reported working on AIA proceedings indicated they felt obligated at least half of the time to follow or accept substantive comments or suggestions that ensue from the Management Review process in AIA proceedings. Fifty percent of judges who reported working on ex parte appeals indicated they felt similarly obligated (see Table 3).⁴³

Table 3: How often, if at all, do you feel obligated to follow or accept the substantive comments or suggestions received via Management Review for America Invents Act (AIA) proceedings or ex parte appeals?

	AIA proceedings	Ex parte appeals
All of the time	41% (58)	32% (39)
More than half of the time	21% (30)	15% (18)
About half of the time	1% (2)	3% (4)
Less than half of the time	10% (14)	7% (9)
Never	13% (19)	31% (38)
Unsure	13% (19)	13% (16)
Total	99% (142)	101% (124)

Source: GAO survey of PTAB judges | GAO-22-106121

Note. Percentages in this table were rounded to the nearest whole percent and therefore the total does not add up to 100 percent. The number of judges for each response is included in parentheses.

While many judges we interviewed attributed their sense of obligation to a need to follow directives from their superiors, some reported through interviews that management had occasionally contacted the panel members directly to mandate a change, and indicated, at times, that the panel could be changed to replace the judge that did not make the desired changes.⁴⁴ For example, some judges we interviewed reported a fellow judge was removed from a panel for disagreeing with the intended

⁴³According to PTAB management officials, Management Review comments are discretionary for both draft AIA and ex-parte appeal decisions, except in the unusual situation where comments indicate that a draft decision fails to follow applicable USPTO policy. They added that if management comments are to be treated as mandatory, they will be explicitly stated as such in management's response.

⁴⁴The Federal Circuit decision, *Arthrex, Inc. v. Smith & Nephew, Inc.*, in place between October 2019 and July 2021, removed federal employment protections available under Title 5 of the U.S. Code for PTAB judges, making judges "at will" employees. PTAB management officials stated that while they never took any action under the "at will" regime, the removal of Title 5 protections by the Federal Circuit likely caused some additional perceived "coercion" or concerns from judges.

outcome of the decision, and the decision issued with two judges, as opposed to three. Some judges we interviewed thought that management had removed a number of judges from AIA proceedings for reported noncompliance and that this made judges feel that they must follow management directives or their careers could be affected. There was little distinction among judges as to the potential effect on their performance review for not adhering to Management Review comments on draft decisions for AIA proceedings, with some noting a large or moderate effect on their performance review (33 percent), no effect (27 percent), or some unsure of the effect (31 percent).⁴⁵

Judges Reported Minimal Insight about Certain Management Practices

Some judges we interviewed also reported a lack of clarity about the inner workings of the oversight practices and decision-making within PTAB. While the general process for Management Review was documented in an internal procedural document, some judges described Management Review as a “black box” with little transparency into what happens between the time they submit their draft decision for review and when they receive comments. Many judges we interviewed expressed uncertainty, for example, as to who in management is reviewing the decisions, the timing of reviews, the extent to which judges can converse with management about the comments, what criteria management use in reviews, and what role, if any, USPTO directors play in approving these comments. One judge stated that, “during the Management Review process, several members of the Management Review ‘team’ extensively revised my dissenting opinion, which resulted in a dramatic rewriting, including a wholesale deletion of about the half of the decision. The revisions and/or rewritings were all substantive in nature. Due to the lack of transparency of the process, I never knew who was responsible for the revisions and/or rewritings.”⁴⁶ Additionally, some judges we interviewed

⁴⁵Comparative analysis was not completed between responses for AIA proceedings and ex-parte appeals and therefore no statement can be made about whether these differences are statistically significant. A total of 142 judges responded to this question, with 47 judges (33 percent) responding not following Management Review comments in AIA proceedings had a large or moderate effect on their performance review, 12 judges (9 percent) a small effect, 38 judges (27 percent) no effect, 44 judges (31 percent) were unsure, and one judge (1 percent) did not respond. Note, percentages were rounded to the nearest percent. According to PTAB management officials, in no cases did PTAB management factor into a judge’s performance rating a judge’s failure to adhere to Management Review comments. However, PTAB management officials stated that not following Management Review comments could have an effect if the lead judge felt failure to follow the comments had an effect on the quality of the written decision.

⁴⁶As this was a written response in the survey, there are no further details available on the contents of the deletion or the specifics of the revisions.

were unsure of the extent to which they could have conversations with management about comments deemed “mandatory” or whether they should inform management as to how they are responding to the comments. Some judges we interviewed noted that management comments—including substantive comments—often come shortly before the statutory deadline, which limited time to discuss and negotiate comments.⁴⁷

Most Stakeholders and Some Judges Expressed Concerns about External Transparency of PTAB Decision-making

Many stakeholders we spoke with generally valued PTAB’s ability to resolve patent disputes with specialized patent judges with less time and money than would be required in the federal courts.⁴⁸ While some stakeholders had heard about PTAB oversight practices anecdotally, others were generally unaware of them, particularly the Management Review and ARC processes for which policies had not previously been made publicly available prior to May 2022.⁴⁹ Most stakeholders we interviewed were concerned about what they regarded as a lack of external transparency for how decisions are made within PTAB. Specifically, some stakeholders questioned the extent to which panels could be pressured to reach a particular outcome. Many stakeholders were also concerned regarding the nature and degree of influence that the USPTO directors had on panel decisions. For example, some stakeholders said they were concerned about the extent to which certain decisions were solely those of the three-judge panel or whether USPTO directors played a role in those decisions. Some former judges who were currently representing parties before 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 proceedings, specifically through Management Review.

⁴⁷For the purposes of this report, substantive comments are those that have an effect on a decision’s outcome or rationale for the outcome. Less substantial comments would be comments regarding grammar or formatting which do not have substantial effects on the decision. According to PTAB management officials, judges frequently submit decisions to Management Review close to the statutory deadline.

⁴⁸Stakeholders we interviewed included representatives for patent owners, petitioners and patent applicants, as well as intellectual property experts, professional associations, and former PTAB judges who now bring cases before PTAB.

⁴⁹Stakeholders we interviewed varied in their awareness of the use of panel changes and the interim Director Review process as oversight practices for USPTO directors and/or PTAB management. Some stakeholders were aware of the POP process and saw this as a main mechanism for oversight on behalf of USPTO directors.

Some of the sitting judges echoed this concern over external transparency of PTAB oversight practices.⁵⁰ For example, some judges 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 or ex-parte appeal (see table 4).

Table 4: Based on your own cases at the Patent Trial and Appeal Board (PTAB), how often, if at all, have US Patent and Trademark Office (USPTO) Directors or PTAB Management directly influenced the outcome of a particular proceeding without notice to the parties?

	USPTO Directors		PTAB Management	
	AIA proceedings	Ex parte appeals	AIA proceedings	Ex parte appeals
On at least one occasion	20% (32)	6% (12)	33% (52)	14% (28)
Never	55% (86)	76% (154)	48% (76)	71% (145)
Unsure	25% (39)	18% (37)	19% (29)	15% (30)
Total	100% (157)	100% (203)	100% (157)	100% (203)

Source: GAO Survey of PTAB judges | GAO-22-106121

Note. Percentages in this table were rounded to the nearest whole percent. The number of judges for each response is included in parentheses.

Some judges we interviewed stated that when PTAB management influenced a decision, there would be no indication of this involvement to the relevant parties. Many judges we interviewed noted in cases where there is pressure from PTAB management to change or modify an aspect of their decision, or when management rewrites parts of decision for the panel, there would be no record that an issued opinion was management’s rather than the three-judge panel. According to a judge, knowing if the judges on the panel, a director or PTAB management have disagreed provides valuable insight for the public into differing views and corresponding rationale for those views. According to one judge, seeing the differing views with supporting legal reasoning can prompt public

⁵⁰Survey responses from judges reflect their perspectives as of February 2022 and are not inclusive of changes in agency procedure or policy that occurred after this date.

debate about which rationale is the most compelling and can help parties decide whether to appeal or to request Director Review.⁵¹

Further, many current judges also noted that without notice to the parties involved, PTAB management can potentially influence outcomes of AIA cases and ex parte appeals by changing the composition of the three judge panel.⁵² Over 80 percent of judges we surveyed reported having experienced a panel change and/or expansion in their time at PTAB for AIA proceedings.⁵³ Although management officials told us that fewer than 1 percent of panel changes are used as an oversight practice, of those judges who had experienced a panel change and/or expansion for AIA proceedings, 20 percent felt the modifications were made to alter or influence the overall outcome of or rationale for the decision in an AIA proceeding.⁵⁴ Parties would have no knowledge about whether management removed a judge from a panel because of the judge's refusal to make changes aligned with agency policy or position, according to some judges we interviewed.⁵⁵ One judge we spoke with described a situation where management expanded a panel to include members of PTAB executive management; however, the names of the management

⁵¹Many judges we interviewed noted there are procedural questions where there might be differing interpretations of the law or precedent between the USPTO director or PTAB management and that of the PTAB judges—such as when to institute a proceeding when there is parallel district court litigation. A judge also noted potential differing interpretations of what constitutes available prior art for *inter partes* review.

⁵²PTAB management officials stated that it is exceptionally rare to use paneling as a vehicle for oversight, and that the Chief Judge had not expanded a panel “to secure and maintain uniformity of the PTAB’s decisions” since before September of 2018, when SOP 1, Revision 15 issued. Moreover, officials stated that panel expansions have not been used for ex-parte appeals since fiscal year 2015.

⁵³Eighty-one percent (127) of 157 judges who responded to this survey question noted this experience for AIA proceedings. For ex-parte appeals, 73 percent (148) of 203 judges who responded to this survey question noted this experience as well. Note these percentages are rounded to the nearest percent. According to PTAB management officials, panel changes occur regularly for reasons outside of oversight including conflicts, workload issues, and judge unavailability.

⁵⁴Of the 127 judges who have experienced a panel change and/or expansion, 20 percent (25) felt the modifications were made to alter or influence the overall outcome or rationale for AIA proceedings. Of the 148 judges who have experience a panel change and/or expansion, 5 percent (8) felt the modifications were made to alter or influence the overall outcome or rationale for ex-parte appeals. Note this percentages are rounded to the nearest percent.

⁵⁵According to PTAB management officials, panel changes for these reasons are rare and that the reason for the panel change would be explained to the parties in the proceeding in panel change orders as ‘unavailability’.

officials never appeared on the final decision, nor were the parties privy to the expansion. A former judge recounted being replaced on a panel, presumably because management wanted a unanimous decision, and this judge was not aware of the replacement until the decision was issued.

In closing, I note that we are continuing our ongoing work about PTAB's practices to oversee judges' decisions. This work includes examining USPTO's recently announced proposed changes to clarify the role of the director and PTAB management in oversight, including the establishment of the interim process for PTAB decision circulation and internal PTAB review, which makes use of a Circulation Judge Pool. USPTO announced the interim process on May 26, 2022, as a means to promote transparency about decision-making within PTAB. Our ongoing work will examine whether the interim process may still leave opportunity for a USPTO director or PTAB management to influence judge's decisions in a way that is not transparent, as similar oversight practices have been used in the past.

Chairman Johnson, Ranking Member Issa and Members of the Subcommittee, this concludes my prepared statement. I would be pleased to respond to any questions that you may have at this time.

GAO Contact and Staff Acknowledgements

If you or your staff have any questions about this statement, please contact Candice N. Wright, Director, Science, Technology Assessment, and Analytics at (202) 512-6888 or WrightC@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. GAO staff who made key contributions to this statement are Rob Marek (Assistant Director), Eleni Orphanides (Analyst-in-Charge), Amanda Anzovino, Sue Bernstein, Jenny Chanley, Caitlin Cusati, Ali Hansen, Patrick Harner, Jill Lacey, Kristen Pinnock, Joe Rando, and Brian Taylor.

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