

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

OIL STATES ENERGY SERVICES, LLC,)
) Petitioner,)
) v.) No. 16-712
GREENE'S ENERGY GROUP, LLC, ET AL.,)
) Respondents.)

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OIL STATES ENERGY SERVICES, LLC,)
Petitioner,)
v.) No. 16-712
GREENE'S ENERGY GROUP, LLC, ET AL.,)
Respondents.)
- - - - -
Washington, D.C.
Monday, November 27, 2017

The above-entitled matter came on for oral
argument before the Supreme Court of the United
States at 10:05 a.m.

APPEARANCES:
ALLYSON N. HO, Dallas, Texas; on
behalf of the Petitioner
CHRISTOPHER M. KISE, Tallahassee, Florida; on
behalf of Respondent Greene's Energy Group, LLC
MALCOLM L. STEWART, Deputy Solicitor General,
Department of Justice, Washington, D.C.;
on behalf of the Federal Respondent

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case Number 16-712, Oil States Energy Services versus Greene's Energy Group.

Ms. Ho.

ORAL ARGUMENT OF ALLYSON N. HO
ON BEHALF OF THE PETITIONER

MS. HO: Mr. Chief Justice, and may it please the Court:

For 400 years, courts have adjudicated disputes between private parties about the validity of patents. Six years ago, Congress transferred this judicial power to an executive branch tribunal that is unusual because of five features.

First, it exercises the judicial power; second, in disputes between private parties; third, over private rights; fourth, without both Article III supervision and consent; and, fifth, about questions adjudicated in courts for 400 years.

JUSTICE GINSBURG: Ms. Ho, you outlined your position, but there must be some

1 means by which the Patent Office can correct
2 the errors that it's made, like missing prior
3 art that would be preclusive.

4 So, do you recognize any error
5 correction mechanism as within Article III?

6 MS. HO: Yes, certainly, Justice
7 Ginsburg. And -- and our position -- our
8 position is not that the PTO is precluded from
9 error correction. It simply can't do it
10 through this adjudication.

11 So, for example, we believe ex parte
12 reexams, which are fundamentally examinational
13 and not adjudicational in nature, are perfectly
14 consistent with Article III.

15 JUSTICE GINSBURG: But your brief
16 wasn't clear on that. You -- you recognize a
17 difference between reexamination, but you
18 didn't take a position on -- on whether that
19 would be permissible, but now you are? The
20 reexamination procedure would be all right?

21 MS. HO: Yes, ex -- ex parte
22 reexaminational -- reexamination --

23 JUSTICE KAGAN: What about inter
24 partes reexamination?

25 MS. HO: I think inter partes

1 reexamination presents a closer case, but it is
2 still fundamentally examinational. I think in
3 the government brief that we cite on page 13 of
4 our reply, where the government itself draws a
5 line between both ex parte and inter partes
6 reexamination and says these are fundamentally
7 examinational.

8 CHIEF JUSTICE ROBERTS: Could you --

9 MS. HO: And that distinguishes us --

10 CHIEF JUSTICE ROBERTS: Could you
11 review for me what you mean by examinational?

12 MS. HO: Certainly. When we -- when I
13 -- I think what the government means by
14 examinational and what we mean by examinational
15 is that that is fundamentally a proceeding
16 between the Patent and Trade Office, between
17 the government and the Patent Owner, between
18 the private -- the private party.

19 CHIEF JUSTICE ROBERTS: But it's one,
20 I suppose, in which anybody can participate?
21 In other words, including the person alleging
22 infringement or the person challenging the
23 grant of the patent?

24 MS. HO: Not with respect to -- with
25 -- with respect to -- I think that's a

1 fundamental difference. With respect to ex
2 parte reexam, the only role for the third party
3 is to request, and then at that point, the
4 third party drops out.

5 Even with respect to inter partes
6 reexam, where Congress gave the third party
7 more -- more participatory rights, the third
8 party bears no burden of production or
9 persuasion. It is still fundamentally a matter
10 between the PTO and the Patent --

11 JUSTICE KAGAN: But I thought --

12 JUSTICE SOTOMAYOR: I'm sorry, there
13 is always inherent a burden of -- of -- of
14 production. You can't write the PTO and say:
15 I think this patent's invalid, period. You
16 have to supply them with a reason for doing
17 what they're doing.

18 So, why is that reason any different
19 than actively participating and pointing the
20 PTO in the right direction? What is so
21 fundamentally Article III that changes this
22 process into an Article III violation?

23 MS. HO: Certainly, Justice --

24 JUSTICE SOTOMAYOR: Both of them are
25 just informing the PTO of the nature of its

1 error and giving it an opportunity to correct
2 its error.

3 MS. HO: I think the fundamental
4 difference -- which is that I think the -- why
5 the -- the government itself has referred to
6 inter partes reexam as -- as adjudicational, is
7 it is -- it is initiated by the third party and
8 the third party actually prosecutes that
9 proceeding.

10 It is deciding a cause between the
11 patent owner --

12 JUSTICE SOTOMAYOR: Well, not quite,
13 because under the rules, if the third party
14 settles with the patent owner, the PTO can
15 still continue the action, can still decide the
16 question, can still participate on appeal.

17 So it is a public issue that is being
18 litigated or discussed or adjudicated, so isn't
19 that quite different than a normal
20 adjudication?

21 MS. HO: I -- I don't believe so, Your
22 Honor. And -- and -- and let me -- let me push
23 back a little bit on -- on when you say that --
24 that the -- the PTO may -- may continue to
25 conduct the proceedings.

1 Both the statute and the regulations
2 provide that the PTAB may dismiss the case,
3 which its public guidance says is -- is its
4 preference, or it may proceed to final written
5 decision.

6 And we've located only four instances
7 where the PTAB, even after settlement, has
8 proceeded to final written decision. And in
9 every case, it has informed the parties that it
10 has already decided the case. So --

11 JUSTICE GINSBURG: But in -- in your
12 -- in your brief, you said if the parties
13 settle, the PTO can't go on. That was -- that
14 was an error, wasn't it, in --

15 MS. HO: Well, I believe what we did
16 was we -- we -- we quoted the statute, which
17 says it -- it can -- its preference is to
18 settle, or it may proceed -- it may proceed to
19 final written -- written decision.

20 And we've -- again, we've located only
21 four times when the PTO has -- PTAB has done
22 that. And, again, it's already reached its
23 decision.

24 JUSTICE SOTOMAYOR: If this is a
25 private right, as you claim, what does it

1 matter in terms of whether the process is
2 adjudicatory or not?

3 If I own something, which is what your
4 basic position, I understand, is, that this is
5 a personal right, how can a government agency
6 take that right away without due process of law
7 at all? Isn't that the whole idea of Article
8 III, that only a court can adjudicate that
9 issue?

10 MS. HO: I think I would say, Justice
11 Sotomayor, your -- it -- in terms of -- of
12 matters that have been adjudicated
13 traditionally in courts, over -- between
14 private parties over -- over private rights, I
15 think this Court's cases have established a
16 baseline where those matters -- Article III
17 vests those matters in Article III courts.

18 At the same time, this Court's cases
19 have recognized narrow exceptions, where public
20 rights, as distinct from private rights, are at
21 issue, where Article III does not require that
22 those rights be vested, the decisions of those
23 rights --

24 JUSTICE KENNEDY: Just to examine
25 public rights, could Congress say -- let's

1 hypothesize going forward -- that we will grant
2 you a patent on the condition that you agree to
3 this procedure; otherwise, we don't give you
4 the patent. Could Congress do that?

5 MS. HO: No, for -- for two reasons.
6 First, we believe that would be an
7 unconstitutional condition, so that Congress
8 cannot condition the exercise of a right or a
9 property or benefit of -- of any sort, to the
10 extent that doing so would -- would conflict
11 with another article of the -- of the
12 Constitution.

13 JUSTICE KENNEDY: What --

14 MS. HO: So, for example -- yes, Your
15 Honor.

16 JUSTICE KENNEDY: What's your closest
17 case for that? Not Crowell versus Benson, that
18 doesn't quite work.

19 MS. HO: I think -- I think, perhaps
20 -- I think, perhaps our -- our closest case to
21 that might be Northern Pipeline or maybe one of
22 the bankruptcy cases --

23 JUSTICE KENNEDY: I --

24 MS. HO: -- where even -- even -- even
25 the fact that Congress had recognized -- had

1 said that it's permissible for -- for these
2 rights to be adjudicated in an Article III
3 court. This Court still, in Stern, held that
4 Article III prevented the -- those
5 adjudications may not --

6 JUSTICE KENNEDY: But -- but Congress
7 didn't create the right in Stern, so that's
8 quite distinguished.

9 Let me ask you this, it's a basic
10 question -- patent lawyers would probably know
11 the answer. Could Congress say that we are
12 reducing the life of all patents by 10 years?

13 MS. HO: Yes, I think that would --
14 that -- that goes to the limited times
15 requirement in Congress that this Court doesn't
16 --

17 JUSTICE KENNEDY: Well, then that --
18 doesn't that show that the patent owner has
19 limited expectations as to the scope and the
20 validity of the property right that he holds?

21 MS. HO: No, Your Honor, I don't -- I
22 don't think the limited times requirement,
23 which is the Article I, Section 8 requirement,
24 I don't think that goes to whether Congress
25 could, by statute, withdraw the adjudication of

1 disputes that have been adjudicated in courts
2 for centuries, could withdraw those cases and
3 put them in a non-Article III tribunal.

4 Again --

5 CHIEF JUSTICE ROBERTS: What is --
6 what is the relationship between your position
7 and the takings clause? The government can
8 certainly diminish the value of your property
9 rights quite extensively when it comes up with
10 new -- new regulation.

11 You have a lot that you think you
12 could have built a mansion on, and then the
13 government passes a law and you can only build
14 a shed on it and -- and yet we often say -- or
15 give the government a lot of leeway in saying
16 that -- that they don't have to pay
17 compensation.

18 So, if the government can restrict
19 your property right in real property to that
20 extent, why can't it do so with respect to
21 patent rights?

22 MS. HO: And I think the fundamental
23 difference there, Mr. Chief Justice, in terms
24 of -- of -- of takings and due process, which
25 we haven't advanced arguments about, and

1 Article III, which is really focused on the
2 exercise of the judicial power, and it has
3 really two components.

4 It has the component that is directed
5 toward the individual rights guarantee, so the
6 guarantee of litigants to impartial
7 decision-makers and at the same time at the
8 structural protections, the checks and balances
9 protections that protect the -- the judicial
10 integrity.

11 So I think the difference here is that
12 when Congress -- and certainly individual
13 rights are at stake when the government takes
14 property that belongs to one person for a
15 public use and doesn't pay just compensation.

16 But I think, in the Article III
17 context, where Congress is taking a category of
18 cases that have been adjudicated in courts for
19 centuries and removes those cases -- withdraws
20 those cases to a non-Article III tribunal, that
21 impacts not only the individual rights
22 guarantees that Article III does --

23 JUSTICE GINSBURG: But for a very
24 limited purpose, for the purpose of determining
25 whether -- it's not a duplication of an

1 infringement action. It's -- it's a narrow
2 kind of reexamination that the -- it's only for
3 the prior art, right? And there are other
4 restrictions.

5 So it's -- it's not -- it is geared to
6 be an error correction mechanism and not a
7 substitute for litigation.

8 MS. HO: Several points to that, that
9 -- Justice Ginsburg, you're absolutely correct
10 that the grounds are under sections 102 and 103
11 novelty and non-obviousness with respect to
12 prior art.

13 Even if that were narrow, I think this
14 Court has said that it's no more permissible
15 for Congress to -- to kind of nibble around the
16 edges, as opposed to a wholesale transfer, but
17 even so, here, setting aside that those two
18 areas of novelty and obviousness make up about
19 60 percent of the patent validity challenges in
20 the district courts, the estoppel provisions
21 provide that, in the 80 percent of cases, in
22 80 percent of inter partes reviews, those
23 proceedings are taking place with concurrent
24 district court litigation.

25 So, if in those cases, if in the IPR

1 the patent holder wins, then the -- the claims
2 of the patent are canceled and the patent --
3 the challenger goes into the district court and
4 says the action is moot -- the infringement
5 action is moot.

6 JUSTICE KAGAN: So -- I'm sorry.

7 JUSTICE GORSUCH: Ms. -- Ms. Ho, we
8 have a number of cases that have arguably
9 addressed this issue already, like McCormick,
10 for example, in which this Court said the only
11 authority competent to set a patent aside or to
12 annul it or to correct it for any reason
13 whatever is vested in the courts of the United
14 States. We have cases -- and American Bell is
15 another one. We have that wonderful quote from
16 Justice Story indicating that any correction to
17 a patent has to go to a court.

18 The United States takes the position,
19 as I understand it, that some of those
20 decisions are purely statutory interpretation.

21 What's your reading of those cases?

22 MS. HO: So our reading of those
23 cases, particularly McCormick, is they are
24 constitutional. We don't need this Court to go
25 that far for us -- us to prevail. It's enough

1 in this case for the Court to hold --

2 JUSTICE GORSUCH: Why is your reading
3 that they're constitutional, if you could help
4 me with that?

5 MS. HO: Certainly. We believe -- we
6 believe they're constitutional in McCormick
7 because this Court wasn't -- didn't reach that
8 decision sort of in the absence of statutory
9 authority, but in the face of it.

10 There was, at that time, statutory
11 authority in a different procedure, albeit, for
12 the --

13 JUSTICE SOTOMAYOR: Ms. Ho, I'm sorry,
14 I thought in McCormick, that -- why did the
15 Court even bother looking at the statute? What
16 it did, I understood, was look at the statute
17 and say the statute basically defines the issue
18 of a new patent being issued as one -- before
19 the old patent expires.

20 And so they were really doing a
21 statutory analysis of whether or not, by that
22 process, the old patent was expired, and they
23 were saying, no, if you want it to expire now,
24 you have to go to court, because there's no
25 statutory authority for doing it currently.

1 So I'm not quite sure how -- how you
2 get to the constitutional holding.

3 MS. HO: I -- I think how we -- how we
4 get to the constitutional holding, Your Honor,
5 is that there was, at that time, there -- there
6 -- there was another statute in play that would
7 have -- would have permitted the -- the -- the
8 -- the cancellation. So it wasn't -- it's not
9 that the Court -- there wasn't any statutory
10 authority. It wasn't simply a statutory
11 holding.

12 It's certainly true that the Court
13 didn't refer to Article -- Article III. It
14 didn't -- didn't refer to that.

15 JUSTICE SOTOMAYOR: It's certainly
16 true that it didn't refer to that other statute
17 either.

18 MS. HO: I --

19 JUSTICE KAGAN: Ms. Ho --

20 MS. HO: Yes, Your Honor.

21 JUSTICE KAGAN: -- can I -- can I take
22 you back to this question of where you would
23 draw the line --

24 MS. HO: Yes.

25 JUSTICE KAGAN: -- between ex parte

1 and inter partes reexamination on the one hand
2 and this? Because, as I understand what you
3 would permit, those proceedings too can be
4 initiated by a third party -- you know, can be
5 at the request of a third party, and -- and
6 those -- in those proceedings too, the third
7 party can participate in some way, can file a
8 reply to the patentee's statement, can make
9 known its views.

10 So what's the line? Where would you
11 -- what are the procedures that are here that
12 you think make this essentially adjudicatory
13 that are not in those other proceedings?

14 MS. HO: Certainly. I think how we --
15 we would define an adjudication as it's where a
16 tribunal is hearing and deciding a cause
17 between two private -- two private parties.

18 So in -- in -- in both IP reexam and
19 ex parte reexam, as Your -- as Your Honor said,
20 the third party essentially falls out after
21 making the request, is able to comment. The
22 Patent Office is not --

23 JUSTICE KAGAN: Well, I didn't say
24 they fall out. There are opportunities for it
25 to make known its views as to what --

1 MS. HO: Certainly.

2 JUSTICE KAGAN: So what is it? Is it
3 discovery? Is it -- is it participation in the
4 hearing? I mean, I just want to ground this in
5 something.

6 MS. HO: Yes. I think -- I think
7 certainly the existence of -- of discovery, of
8 a hearing, all of these things show that what
9 you have here is -- is trial -- is trial-like.

10 JUSTICE KAGAN: But what -- what's the
11 most that the government could do, do you
12 think?

13 MS. HO: The --

14 JUSTICE KAGAN: You know, what's the
15 -- what are the -- how many of these things do
16 you have to take away before you have a
17 constitutional system?

18 MS. HO: I think -- I think,
19 fundamentally, an adjudication, an exercise of
20 the judicial power -- and one reason we know it
21 in this case is because it simply has taken a
22 category of cases out and put it into the
23 tribunal, but I think hearing and deciding a
24 cause between two private parties that results
25 -- that results in a -- in a final binding

1 judgment.

2 JUSTICE BREYER: It would be like if
3 the airlines loses your umbrella, for example,
4 and the CAB used to say, you go to the CAB, you
5 complain, they lost my umbrella. The airline
6 says, no, we didn't. Oh, that was
7 unconstitutional?

8 MS. HO: No, Your Honor, the --

9 JUSTICE BREYER: By the way, there was
10 judicial review.

11 MS. HO: I --

12 JUSTICE BREYER. As there is here.
13 And, by the way, it didn't say that your
14 rights, when you fly on an airplane or truck or
15 some other thing regulated, it didn't say as it
16 does here, subject to the provisions of this
17 title, the matter, your umbrella, or in this
18 case patents, shall be private property.
19 Uh-huh. So you have a statute that says you
20 only get the private property if, in fact, you
21 survive the provisions of the title, of which
22 this is one.

23 And, in addition to that, I thought
24 it's the most common thing in the world that
25 agencies decide all kinds of matters through

1 adjudicatory-type procedures often involving
2 private parties. So what's special about this
3 one --

4 MS. HO: To --

5 JUSTICE BREYER: -- or do you want to
6 say it isn't special and all the agency
7 proceedings are unlawful?

8 MS. HO: It --

9 JUSTICE BREYER: Because a lot of them
10 would fit the definition, I think, that you
11 propose.

12 MS. HO: Let me -- let me -- let me
13 begin with -- with your last -- your last
14 question, Justice Breyer.

15 I don't think that invalidating IPR
16 would affect these, for the fundamental reason
17 that in virtually -- virtually all truly
18 administrative adjudications, those are between
19 the government as -- as -- as the enforcer.

20 JUSTICE BREYER: You could have -- is
21 an airline the government? Is a trucking
22 company the government? Is a utility,
23 electricity company or a natural gas company,
24 the government?

25 MS. HO: In the vast -- in the vast

1 majority of administrative adjudications, it is
2 -- it is the government, or those proceedings
3 are acting as a permissible adjunct to the
4 district court.

5 JUSTICE KAGAN: Well, one
6 understanding of this, Ms. Ho, is that this is
7 the government in a real sense. It's the
8 government trying to figure out whether it made
9 a mistake by granting the patent, which the
10 government sometimes does and knows it
11 sometimes does, but the government wants to put
12 in place a set of procedures that will actually
13 increase the government's accuracy in figuring
14 out whether it made a mistake.

15 And that involves listening to a third
16 party that has some interest in the proceeding.
17 So it seems a little bit odd to say, sure, the
18 government can reexamine this, the government
19 can allow a third party to request it, can
20 allow the third party to do some things, but
21 there's some line that falls short of what the
22 government thinks are the procedures that
23 enable the greatest accuracy.

24 So why -- why would we do that?

25 MS. HO: Certainly, Your Honor. And I

1 think to be clear, we're not -- we're certainly
2 not contesting the proposition that adversarial
3 testing can't be a very beneficial proceeding
4 for arriving at the truth.

5 But it -- it's useful and it's helpful
6 when Article III protections -- if it's an
7 adjudication between private parties over
8 private rights, adversarial testing also
9 requires Article III protections, a neutral
10 decision-maker, not subject to -- to the -- to
11 the -- to having to curry favor with the
12 executive, which is the situation that -- that
13 we have here.

14 JUSTICE ALITO: Well, to ask you --

15 JUSTICE GORSUCH: Why not -- why not,
16 though, Ms. Ho, just simply say the question is
17 whether there's a private right involved? In
18 answering Justice Kagan's questions and Justice
19 Breyer's questions, you struggled with how much
20 of an adjudication does an inquisitorial
21 process have to have before it becomes an
22 adjudication. Why does that matter at all?

23 If -- if you really want to stake your
24 ground and think McCormick's right, why not
25 just say anytime a private right is taken by

1 anyone, it has to be through an Article III
2 forum?

3 MS. HO: In large measure, Justice
4 Gorsuch, because of several -- in several of
5 this Court's cases, in Schor, for example,
6 in Providence --

7 JUSTICE GORSUCH: Schor is about the
8 line between public and private rights. You
9 can stake your ground and simply say this is a
10 private right.

11 MS. HO: We certainly do stake our
12 ground on that it's a private right. We think
13 this Court held -- has held as much already in
14 Horne.

15 JUSTICE GORSUCH: But then you -- but
16 then you --

17 JUSTICE ALITO: Well, suppose --
18 suppose that Congress had included inter partes
19 review in the Patent Act of 1790. Would you
20 make -- would you make the same argument?
21 Would you still say it's a private right?

22 MS. HO: Yes, we would, because even
23 in -- even in -- in 1790, Your Honor, there
24 would still be a 200-year history of these
25 rights being adjudicated in -- in courts -- in

1 courts at all.

2 JUSTICE ALITO: But you think Congress
3 was under an obligation to create the patent
4 system, a constitutional obligation to do it?

5 MS. HO: No, we don't.

6 JUSTICE ALITO: So could it do it
7 subject to the -- grant these monopolies,
8 subject to this limitation?

9 MS. HO: I think there are any number
10 of ways that Congress could certainly
11 permissibly condition a grant on -- of a
12 patent. What it can't do is exert an
13 unconstitutional condition on it, either under
14 takings or due process or Article III.

15 JUSTICE SOTOMAYOR: So is your -- is
16 your position that somehow at the founding in
17 1789, given the replete English history of the
18 Crown and the Privy Council sidestepping --
19 sidestepping any judicial adjudication of
20 validity, that in 1789 the founders intended to
21 change that system as radically as to say, no,
22 we're not going to permit either the
23 legislature -- the legislature to change the
24 terms of a patent grant?

25 MS. HO: The way I would respond, Your

1 Honor, I think with respect to the history, I
2 think the history here is very strong that at
3 -- certainly, at the time of the founding and
4 for centuries before, that English courts at
5 law, this was precisely -- this wasn't just the
6 stuff that was decided in the -- in the courts
7 at Westminster in 1789 were those proceedings.

8 JUSTICE SOTOMAYOR: Your amici -- your
9 strongest amici says that it had waned, the
10 Privy Council's adjudications had waned over
11 time and that they could only find 10 times
12 over a 20-year period preceding 1789 in which
13 the Privy Council had acted. But the fact that
14 it waned didn't mean it was eliminated, and it
15 didn't mean that the Privy Council or the Crown
16 thought that it no longer had those rights.

17 MS. HO: Respectfully, Your Honor, I
18 believe that it did. The -- the Privy Council
19 revoked its last patent in -- in any -- any
20 case, ordinary or otherwise, in -- in 1779.
21 And that was only after -- it was a national
22 security case in which -- which the Privy
23 Council had told the patent holder that the
24 proper thing to do was to go to a court at law.
25 And the patent holder refused to do it. And it

1 actually involved cannons. And so, with the --
2 with the American Revolutionary War in the
3 offing, that was the very last time that the
4 Privy Council revoked a patent. And, in fact
5 --

6 JUSTICE GINSBURG: Who -- who grant --
7 who granted the patent in -- way back in
8 1787 -- 1789? Who granted the patent?

9 MS. HO: Who granted? It would
10 have -- in England, it would have come -- it
11 would have come from -- from the Crown,
12 according to --

13 JUSTICE KENNEDY: And was it subject
14 to findings about novelty, non-obviousness?

15 MS. HO: Yes, it absolutely was, and
16 in -- in disputes between --

17 JUSTICE KENNEDY: Was that statutory,
18 or was that just the custom?

19 MS. HO: Well, the statute of
20 monopolies in 1624 referred to that the
21 validity of patents should be decided as at
22 common law. And at common law, issues of
23 novelty, precisely the issue here, was a
24 question of fact and disputed facts were
25 resolved by -- by juries.

1 JUSTICE GINSBURG: And the king
2 couldn't say I made a mistake?

3 MS. HO: Well, the statute of
4 monopolies in 1624 said the validity of a
5 patent should be decided at common law. We
6 don't disagree that the Privy Council revoked
7 patents after it, but it did so pursuant to --
8 to -- to -- to proceedings and not simply as a
9 -- as a matter of grace.

10 And if I may reserve time for
11 rebuttal.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 MS. HO: Thank you.

15 CHIEF JUSTICE ROBERTS: Mr. Kise.

16 ORAL ARGUMENT OF CHRISTOPHER M. KISE
17 ON BEHALF OF RESPONDENT GREENE'S ENERGY GROUP, LLC

18 MR. KISE: Mr. Chief Justice, and may
19 it please the Court:

20 IPR, inter partes review, comports
21 with both Article III and the Seventh Amendment
22 for at least the following three reasons:
23 First, inter partes review simply reexamines
24 the propriety of the original grant of a
25 patent, engaging in the same type of

1 patentability analysis entrusted by Congress to
2 the executive since 1790.

3 The process itself is not inherently
4 judicial, and it does not involve the exercise
5 of the judicial power.

6 Next, inter partes review does not
7 extinguish, in the language of the question
8 presented, private property rights. To the
9 extent standards of patentability were not met
10 initially, the patent simply should not have
11 issued.

12 And, finally, although we don't
13 believe, respectfully, the Court need reach
14 this question, inter partes review satisfies
15 any test under any of the courts' public law
16 cases.

17 JUSTICE BREYER: You at some point --
18 I mean, what I've wondered as I've read this is
19 -- suppose that just what you say happens, with
20 that all we're doing is reexamining the patent
21 and the statute provides it, but suppose that
22 the patent has been in existence without
23 anybody reexamining it for 10 years and,
24 moreover, the company's invested \$40 billion in
25 developing it. And then suddenly somebody

1 comes in and says: Oh, oh, we -- we want it
2 reexamined, not in court but by the Patent
3 Office.

4 Now, that seems perhaps that it would
5 be a problem or not?

6 MR. KISE: I -- I don't think so,
7 respectfully, Justice Breyer, and here's why.

8 JUSTICE BREYER: Fifteen years?

9 MR. KISE: I don't know that the
10 timeline --

11 JUSTICE BREYER: Thirty? Everybody --
12 I don't know how long they last, but, you know,
13 they --

14 MR. KISE: Well --

15 JUSTICE BREYER: -- some lasted a long
16 time.

17 MR. KISE: Respectfully, I don't think
18 that it -- it matters, certainly not
19 constitutionally, but -- but -- but even in the
20 structure of the -- of the patent statute --
21 the patent scheme that's been created by
22 Congress.

23 Congress established certain
24 patentability criteria that need be met, and
25 all patents are taken --

1 JUSTICE BREYER: Everybody's dead, by
2 the way, who actually knows about the original
3 article written in Danish, that --

4 (Laughter.)

5 JUSTICE BREYER: -- nobody found
6 except this one guy who happens to be sued for
7 infringement.

8 MR. KISE: All patents are taken
9 subject to these patentability standards.

10 JUSTICE BREYER: Yes, but I'm just
11 saying can it be anything? Can it be anything
12 at all where you're going to re -- do people
13 gain a kind of vested interest or right after
14 enough time goes by and they rely on it
15 sufficiently so that it now becomes what?

16 MR. KISE: I -- I --

17 JUSTICE BREYER: Is there something in
18 the Constitution that protects a person after a
19 long period of time and much reliance from a
20 reexamination at a time where much of the
21 evidence will have disappeared?

22 MR. KISE: Respectfully, Your Honor, I
23 -- I would say no, because --

24 JUSTICE KAGAN: Well, here is --

25 CHIEF JUSTICE ROBERTS: I understood

1 --

2 JUSTICE KAGAN: -- how about -- how
3 about if there were no judicial review at all?

4 MR. KISE: Well, I think, if there
5 were no judicial review at all, that presents a
6 different question.

7 JUSTICE KAGAN: Yes. Then you would
8 have to say yes, right?

9 MR. KISE: Well, I -- I don't know
10 that I would have to say yes because we're
11 still talking about a patentability
12 determination that's being made by the
13 executive branch. This is an executive
14 adjudication. And adjudications are not
15 themselves inherently judicial.

16 CHIEF JUSTICE ROBERTS: So your --
17 your position, it strikes me, is simply that
18 you've got to take the bitter with the sweet.
19 If you want the sweet of having a patent,
20 you've got to take the bitter that the
21 government might reevaluate it at some
22 subsequent point.

23 MR. KISE: Yes -- yes, Mr. Chief
24 Justice.

25 CHIEF JUSTICE ROBERTS: Well, haven't

1 our cases rejected that -- that proposition?
2 I'm thinking of the public employment cases,
3 the welfare benefits cases. We've said you --
4 you cannot put someone in that position. You
5 cannot say, if you take public employment, we
6 can terminate you in a way that's inconsistent
7 with due process.

8 MR. KISE: I -- I don't think,
9 respectfully, Mr. Chief Justice, this is
10 inconsistent with due process. I also think
11 that the scheme itself is set up so that these
12 rights are taken subject to the power of
13 Congress to determine patentability.

14 I mean --

15 CHIEF JUSTICE ROBERTS: What about --
16 in terms of due process anyway, what about this
17 business -- and maybe it's in the Petitioner's
18 brief, that the commissioner can change the --
19 the panels if she doesn't agree with the
20 direction they're going, that she can add new
21 judges to the panel so that they'll -- in other
22 words, it's a -- the panel itself -- and I
23 think constitutionally this may be fine, is --
24 is a tool of the executive activity, rather
25 than something involving some -- anything

1 resembling a determination of rights?

2 MR. KISE: Well, Mr. Chief Justice,
3 the -- the panel packing, if you will,
4 mentioned by Petitioner in the briefs, I don't
5 believe -- and -- and I'll leave it to the
6 government to -- to have the exact
7 statistics -- precise statistics, but I don't
8 believe that that's taken place more than one
9 or two times, and I don't believe it's taken
10 place with respect --

11 JUSTICE KENNEDY: Well, suppose it
12 were rampant.

13 MR. KISE: Well, if it were rampant,
14 then I think what this Court said in *Cuozzo*,
15 that -- that was written, that the -- the
16 shenanigans point, if you will, that the
17 Administrative Procedures Act and other
18 provisions of the Constitution would deal with
19 infirmities in a particular case on an
20 as-applied basis, but I don't think that the --
21 the potential for there to be mischief afoot --

22 JUSTICE SOTOMAYOR: That -- that was
23 what troubled me deeply about you telling
24 Justice Kagan that, without judicial review,
25 that this would be adequate. I mean, for me,

1 this -- what saves this, even a patent
2 invalidity finding, can be appealed to a court.

3 There's deference with respect to
4 factual matters, but there is de novo review as
5 to legal matters. So how can you argue that
6 the -- the Crown, the executive, the PTO, here
7 has unfettered discretion to take away that
8 which it's granted?

9 MR. KISE: Justice Sotomayor, I did
10 not mean to imply that -- that there is
11 unfettered discretion. What -- what I --

12 JUSTICE SOTOMAYOR: Well, that's what
13 you're saying because, without judicial review,
14 how -- what else is it?

15 MR. KISE: No, I think with respect to
16 this process there is judicial review.

17 JUSTICE GORSUCH: Well, now, counsel,
18 there's only judicial review if somebody
19 appeals. This isn't like an adjunct to the
20 district court, like a magistrate judge or --
21 or a bankruptcy judge, and I didn't -- I didn't
22 see any argument in your brief under Crowell or
23 something like that that this is really an
24 Article III adjunct.

25 I -- I -- I saw an argument that this

1 stands alone, fine, in the executive branch and
2 that there's, in fact, a self-executing
3 judgment issued by the director that, if not
4 appealed, has all the force of law of an
5 Article III court.

6 MR. KISE: Well --

7 JUSTICE GORSUCH: Did I miss
8 something?

9 MR. KISE: No, Your Honor. It -- it
10 -- it is subject to the Article III review.
11 It's subject to review in the federal circuit
12 --

13 JUSTICE GORSUCH: If somebody takes
14 review, but if not, it -- it's binding, right?

15 MR. KISE: Well, I think that would be
16 true with respect to any -- even in the
17 original examination process. I mean --

18 JUSTICE GORSUCH: Well, it's not true
19 with respect to magistrate judges or anything
20 like that. You have an absolute, you know,
21 opportunity -- the district judge has to put
22 its imprimatur on it before it has -- as an
23 adjunct of the district court.

24 MR. KISE: No, Your Honor, because I
25 -- this is a different structure. This is --

1 this is --

2 JUSTICE GORSUCH: It is a different
3 structure, yes.

4 MR. KISE: It is because it's the same
5 patentability determination that's made during
6 the original examination process.

7 JUSTICE GORSUCH: Do you think it
8 would work if -- if we had land patents subject
9 to the same circumstances, that they could be
10 reexamined at any time over hundreds of years,
11 even after the farmer had sold the land to the
12 developer who built the houses and that the
13 land patent could be revoked by the government,
14 by bureaucracy, I suppose, in the Department of
15 Interior?

16 MR. KISE: I think that there is --

17 JUSTICE GORSUCH: But, that it is
18 subject to packing by a director who's unhappy
19 with the results?

20 MR. KISE: There's a fundamental
21 distinction between -- respectfully, between
22 land patents which -- which grant fee-simple
23 title to the holder and an invention patent.

24 JUSTICE GORSUCH: A monopoly in the
25 use of land. What's -- what's the difference

1 between -- operative difference, other than
2 obviously one isn't land?

3 MR. KISE: Well, one is -- one is --
4 one is -- is a core fundamental right, to
5 borrow the -- the expressions of the court,
6 it's more of a Lockean interest, it's a
7 fundamental right. It's a property interest.

8 JUSTICE GORSUCH: Isn't that question
9 begging about what's a private right? Isn't
10 that the very question this Court has to
11 decide?

12 MR. KISE: Respectfully, as I began, I
13 don't believe that the Court does need to
14 decide it because this is an executive
15 adjudication, but to the extent the Court looks
16 to those factors, I think under -- under almost
17 any test the Court has established, we -- we
18 have a right that derives solely from and
19 depends solely on a federal statute.

20 There are no common law antecedents.
21 The Petitioner has not disputed that. There --
22 it -- the cases in this Court establish that
23 patent law in the United States is statutory.

24 The adjudication implicates a
25 paramount public purpose. The grant of a

1 patent is -- is the grant of a monopoly, but
2 it's a grant -- it's granted for the purposes
3 of the sovereign. It is not granted for the
4 purposes of the inventor. It benefits the
5 inventor, certainly, but the paramount public
6 purpose that is embedded in every patent is the
7 advancement of the progress of science --

8 JUSTICE GORSUCH: Fair -- fair enough,
9 when it's -- when it's granted, but once it's
10 granted, there's an abundance of law going back
11 400 years. Justice Story says it. I mean, you
12 know, this is not new idea, that once it's
13 granted, it's a private right belonging to the
14 inventor.

15 Justice Story said it is a property
16 that has -- an inventions of a property which
17 is often of very great value, in which the law
18 intended to give him, the inventor, absolute
19 enjoyment.

20 JUSTICE KENNEDY: That -- and that's
21 the -- that's the constitutional provision.

22 JUSTICE GORSUCH: Yeah.

23 JUSTICE KENNEDY: Securing for limited
24 times authors and inventors the exclusive
25 right, securing to them, not securing to the

1 public --

2 MR. KISE: But -- but those cases were
3 decided, first of all, as -- as -- as the
4 discussion earlier revealed, they were decided
5 on a statutory basis. There was no undertaking
6 by the Court to determine that,
7 constitutionally, Congress could not establish
8 the structure that they have in an inter partes
9 review.

10 JUSTICE GINSBURG: I think Ms. Ho
11 conceded that there can be an examination --
12 reexamination. Some of the questions raised in
13 the last few minutes suggest they accord no --
14 no reexamination, it's a private right, it
15 can't be taken away.

16 But Ms. Ho, I think, wisely,
17 recognized that the reexamination procedure
18 between the government is okay. But -- but the
19 problem here is it looks too much like a court
20 proceeding.

21 MR. KISE: May I respond, Mr. Chief
22 Justice?

23 Justice Ginsburg, what you're hearing
24 from the Petitioner is a process versus power
25 argument. The quarrel is with the process.

1 The Petitioner has conceded that the power
2 exists, the power of revocation, even though
3 there are -- there are citations in the brief
4 that -- that make that argument seem -- their
5 argument inconsistent, this is a process versus
6 power argument.

7 And in this Court, a unanimous Court
8 in *Cuozzo* determined -- they looked at these
9 same factors and determined that this is not an
10 adjudication, that this is an executive branch
11 action and, therefore -- because the purpose of
12 it is to reexamine the patent.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 MR. KISE: Thank you, Mr. Chief
16 Justice.

17 CHIEF JUSTICE ROBERTS: Mr. Stewart.

18 ORAL ARGUMENT OF MALCOLM L. STEWART
19 ON BEHALF OF THE FEDERAL RESPONDENT

20 MR. STEWART: Mr. Chief Justice, and
21 may it please the Court:

22 Petitioner and some of the questions
23 from this Court have identified two potential
24 challenges to the inter partes review
25 procedure.

1 The first is that this can't be done
2 by executive branch officials because the
3 effect of patent cancellation is to take away a
4 private property interest.

5 The second -- and this is Petitioner's
6 argument -- is that this can't be done in the
7 way that it's being done because the PTAB is
8 using adversarial procedures.

9 JUSTICE GORSUCH: Mr. -- Mr. Stewart,
10 could you address the Chief Justice's question,
11 which I'm also stuck on, the bitter and the
12 sweet, to the -- to what extent could the
13 executive condition patents on, say, you have
14 no takings rights later or you -- you take it
15 subject to whatever conditions in terms of its
16 withdrawal that we wish to impose.

17 MR. STEWART: Well, I think if at the
18 --

19 JUSTICE GORSUCH: Including --
20 including maybe -- and, arguably, I
21 understand -- the condition that we will stack
22 the deck with judges whom we like --
23 administrative judges we like?

24 MR. STEWART: Well, I think if at the
25 time of patent issuance the statute provided

1 that the patent could be taken away for any
2 otherwise appropriate governmental reason, that
3 would be a constitutional scheme. Congress had
4 no obligation to create --

5 JUSTICE GORSUCH: So the answer to
6 Justice Breyer's question then, if there are
7 all these reliance interests and \$40 million or
8 billion dollars spent, that would just be
9 you're out of luck --

10 MR. STEWART: Well --

11 JUSTICE GORSUCH: -- take the bitter
12 with the sweet?

13 MR. STEWART: -- let me address
14 directly the Chief Justice's question.

15 JUSTICE GORSUCH: Can you answer that
16 -- answer that question?

17 MR. STEWART: It has always been part
18 of the scheme that the patent could be
19 reexamined and not -- not by an administrative
20 agency but at least by a court at any time
21 while the patent remained in force, to
22 determine whether the patentee was qualified
23 for a patent in the first place. So --

24 JUSTICE GORSUCH: So is the answer
25 yes?

1 MR. STEWART: The answer is that the
2 patentee never had any expectation that, having
3 been granted a patent, its validity --

4 JUSTICE GORSUCH: So -- so --

5 CHIEF JUSTICE ROBERTS: So --

6 JUSTICE GORSUCH: -- I take it the
7 answer is yes?

8 MR. STEWART: The answer is yes
9 because the rule from the start was you get the
10 patent, but it is not immune from --

11 CHIEF JUSTICE ROBERTS: Well, how can
12 -- how does that work since this patent was
13 issued before there was inter partes review,
14 before the America Invents Act?

15 MR. STEWART: There was ex parte
16 reexamination. There was the possibility of
17 judicial proceedings in which patent validity
18 could be called into question. Take --

19 CHIEF JUSTICE ROBERTS: Well, but
20 there was -- I mean, inter partes review
21 changed those things. It is something
22 different.

23 MR. STEWART: It changed --

24 CHIEF JUSTICE ROBERTS: Including
25 particularly with respect to the procedures.

1 MR. STEWART: Well, to go directly to
2 your question about public employees, because I
3 think it is a good analogy, the Court has said
4 that if a public employee has tenure
5 protection, a guarantee that he or she can be
6 fired only for cause, then the employee has a
7 property right in this job --

8 CHIEF JUSTICE ROBERTS: Well, sure.
9 That's just defining what the sweet is. But I
10 -- it sounds to me like your position is if the
11 government says you're hired for this job and
12 if we terminate you, you know, we'll flip a
13 coin and decide whether or not you get to stay
14 or not.

15 MR. STEWART: No, first, the
16 procedures still have to be fair. They have to
17 comport with due process to determine whether
18 you, in fact, committed the acts that would
19 justify a termination for cause.

20 But I want to make two points about
21 that. The first is, even though the firing
22 would have to comply with the Due Process
23 Clause, there's no rule that it could only be
24 done by an Article III court. Executive branch
25 officials make decisions all the time that

1 tenured federal employees should be fired
2 because they have done things that justify
3 their termination for cause. The federal
4 government has to use fair procedures when it
5 makes that decision. It's subject to judicial
6 review. But the decision can be made in the
7 first instance by executive branch officials.

8 The second thing --

9 CHIEF JUSTICE ROBERTS: Does it
10 comport to due process to change the
11 composition of the adjudicatory body halfway
12 through the proceeding?

13 MR. STEWART: This has been done on
14 three occasions. It's been done at the
15 institution stage.

16 CHIEF JUSTICE ROBERTS: So I'll
17 rephrase the question. Was it illegal under
18 those three occasions?

19 MR. STEWART: I don't think it was
20 illegal. It had functional similarities to a
21 court of appeals granting rehearing en banc
22 because the full court doesn't like the initial
23 panel decision. I think it was less extreme
24 than that. My understanding of the cases is
25 that the chief judge was concerned that the

1 initial --

2 CHIEF JUSTICE ROBERTS: The chief
3 judge?

4 MR. STEWART: The chief judge of the
5 PTAB.

6 CHIEF JUSTICE ROBERTS: You're talking
7 about the executive employee?

8 MR. STEWART: An executive branch
9 official. The chief judge of the PTAB --

10 CHIEF JUSTICE ROBERTS: When we say
11 "judge," we usually mean something else.

12 MR. STEWART: Okay.

13 (Laughter.)

14 JUSTICE GINSBURG: You mean an ALJ?

15 JUSTICE KAGAN: No, no, no. There are
16 administrative law judges all over this
17 country, aren't there?

18 MR. STEWART: I'm sorry? The --

19 (Laughter.)

20 MR. STEWART: The -- the chief judge,
21 as I understand these situations, was concerned
22 that the panel as initially composed was likely
23 to diverge from general PTAB precedent with
24 respect to a matter that bore on the
25 institution decision, and so the chief judge

1 expanded the panel. It's not clear whether the
2 chief judge picked judges that he had a
3 particular reason to think would be sympathetic
4 to a particular view or --

5 CHIEF JUSTICE ROBERTS: How did that
6 case come out?

7 MR. STEWART: I -- I don't know how
8 the institution decisions came out. This has
9 not been done at the merits stage, if you will,
10 when patentability was actually being -- being
11 determined. But our primary point would be
12 that if there's a constitutional flaw in that
13 procedure, then a person who is actually harmed
14 by its use in a particular case --

15 JUSTICE GORSUCH: Mr. Stewart, let's
16 say we had a land patent. Let's say the land
17 patent said it becomes invalid if anybody in --
18 uses the land in an improper way, in violation
19 of an environmental law, labor law, you choose.

20 Let's say the land then gets developed
21 and turns into a housing development outside
22 of, I don't know, Philadelphia. And it turns
23 out, though, that a great-grandfather who owned
24 the land originally back when it was a farm,
25 indeed violated a labor or environmental law,

1 rendering the land patent invalid on its terms.

2 Could -- couldn't the Bureau of Land
3 Management, for example, or some other
4 department, Interior, official just pull back
5 the patent?

6 MR. STEWART: Well, the Court said in
7 some of the 19th-century cases that --

8 JUSTICE GORSUCH: Under your theory?

9 MR. STEWART: -- with respect to land
10 patents that transferred fee simple title,
11 executive branch officials couldn't do that.

12 I think it's unclear from the
13 decisions whether they were constitutional
14 holdings, but we'll accept for purposes of this
15 case that that was --

16 JUSTICE GORSUCH: Well, you dispute
17 that they're constitutional holdings in your
18 brief.

19 MR. STEWART: We dispute -- we dispute
20 the --

21 JUSTICE GORSUCH: So, presumably,
22 there's nothing to prohibit the scheme I've
23 just described in the government's position,
24 correct?

25 MR. STEWART: I --

1 JUSTICE GORSUCH: It's a yes-or-no
2 answer I'm looking for.

3 MR. STEWART: I would not concede the
4 invalidity of that proceeding.

5 JUSTICE GORSUCH: Exactly.

6 MR. STEWART: But -- but I don't think
7 that --

8 JUSTICE GORSUCH: Exactly.

9 MR. STEWART: I don't think that the
10 position we're asserting in this case has any
11 necessary implications --

12 JUSTICE BREYER: Okay. Is -- is it
13 possible? You started out and you said this
14 boils down to two different theories, and you
15 -- I didn't get the second. In my mind -- and
16 I'd like you to say whatever you want on any of
17 them -- but as to the first, there is -- and
18 the Chief did raise this kind of thing, is
19 there a kind of what Brandeis said in Crowell
20 was a due process problem? Is there a problem
21 of: it's unfair to hold these people to the
22 new statute because they got their patent
23 before the statute was enacted? That's one.
24 That's a practical thing, and much of the
25 questioning has been around that, different

1 variations on that theme, what's unfair.

2 The second is formal. That's the
3 public versus private right theory. And the
4 best, or at least most recent, articulation of
5 that is in the Chief Justice's opinion in
6 Stern.

7 And the third is a vested right
8 theory, which had great popularity in the 19th
9 century and might have moved Justice Story but
10 in fact has happily sunk from sight. Now, is
11 that -- have I missed some basic theory, and is
12 there anything you want to say about those?

13 MR. STEWART: Let -- let me address
14 those in turn. As to the first one, the idea
15 does the patentee have some expectation that
16 the patent can't be taken away in this manner
17 because IPR didn't exist when this particular
18 patent was granted? As I said before, it's
19 always been part of the system that, at least
20 in court and sometimes administratively,
21 patents could be reexamined so long as they
22 remained in force to see whether they complied
23 with the initial conditions of patentability.
24 This is not a case in which Congress has
25 changed the substantive rules.

1 And to return to the Chief Justice's
2 hypothetical about public employment, if the
3 executive branch --

4 JUSTICE SOTOMAYOR: Sorry, that only
5 existed as of 1981, correct?

6 MR. STEWART: Well, there -- there
7 were more sporadic instances, and we've
8 discussed them in our brief, in connection with
9 reissuance of patents, in connection with
10 interference proceedings. In some fairly
11 idiosyncratic situations, there could be
12 cancellation without judicial involvement, but
13 you're right, it was only in --

14 JUSTICE GORSUCH: Those were four --
15 four cases, I believe, right? And involve
16 foreign -- foreign patent applicants, right?

17 MR. STEWART: Well, the -- the reissue
18 wouldn't --

19 JUSTICE GORSUCH: No, not the
20 reissuance. The invalidity.

21 MR. STEWART: The -- the interference
22 --

23 JUSTICE GORSUCH: Yeah.

24 MR. STEWART: -- wouldn't necessarily
25 involve patent applicants. You could have a

1 reissue -- an interference proceeding whenever
2 a new patent applicant said I was actually the
3 first inventor and somebody else has gotten the
4 patent who shouldn't have gotten it.

5 JUSTICE GORSUCH: But the invalidity,
6 it's just those four cases you have, right?

7 MR. STEWART: The --

8 JUSTICE GORSUCH: The foreign -- that
9 period of time when there was a brief statute
10 permitting executive rejection of patents by
11 foreigners?

12 MR. STEWART: I'm -- I'm sorry, I'm
13 not --

14 JUSTICE GORSUCH: All right. Fair
15 enough.

16 MR. STEWART: Yeah, what I was
17 referring to more was the situation where in an
18 interference, the true inventor would -- or the
19 putatively true inventor would say this person
20 shouldn't have gotten the patent because I
21 actually invented it first.

22 But to your -- return to -- to your
23 question, Justice Breyer, and -- and I'd like
24 to -- to go back to the hypothetical about
25 public employment, the -- the individual who is

1 going to be terminated, even though he has for
2 cause protection, has due process rights, has
3 to have fair procedures, I don't think anybody
4 would say that if the executive branch devises
5 more effective ways of monitoring its employees
6 and is better able to detect employees who have
7 committed acts that would trigger termination
8 for cause, that somehow the executive branch is
9 forbidden to apply those to people who got
10 tenure protections before those mechanisms were
11 available.

12 This is --

13 CHIEF JUSTICE ROBERTS: I'd like to
14 just touch on more directly the Schor test for
15 whether something is or is not a public right.
16 And as I understand it, it says five different
17 factors that you consider.

18 JUSTICE BREYER: Now, that's what I
19 meant.

20 CHIEF JUSTICE ROBERTS: Consent, this,
21 this, this, and other things. And I'm
22 wondering if that is a sufficiently stable and
23 predictive test when you're talking about
24 something like a property right?

25 In other words, as Justice Breyer

1 mentioned, people invest in their patents to
2 the tunes of billions of dollars in building
3 the plant that's going to make the product
4 that's -- and all that, and yet when you're
5 deciding -- when they're deciding is this a
6 right that I can securely rely on, they've got
7 to go through these five factors, you know, any
8 one of which can be determinative in a
9 particular case.

10 MR. STEWART: I guess the -- the first
11 thing I would say about cases like Schor and
12 Stern versus Marshall and Northern Pipeline is
13 that they are really directed at a different
14 sort of problem. In -- in each of those
15 canonic -- canonical cases, the adjudicator was
16 being asked to determine whether one party was
17 liable to another for a violation of law.

18 And in each case, the -- the
19 adjudicator was being asked to impose a money
20 damages remedy -- was asked to direct one
21 person to pay money to another, and that's kind
22 of a classic judicial function.

23 And the question was can that be
24 performed by non-Article III federal
25 adjudicators as well? And the answer was

1 sometimes yes, sometimes no.

2 JUSTICE BREYER: So -- so is that --
3 look, the answer -- what I'm thinking, quite
4 seriously, is saying should we leave open,
5 assuming I basically agree with you, but leave
6 open the question of what happens if there has
7 been huge investment?

8 That, I think, is what was dividing --
9 what was worrying Brandeis in Crowell. I -- I
10 think that -- that we don't face it here in
11 this case, and it seems to me it would be
12 properly raised more likely under either a
13 takings clause or the due process clause
14 probably.

15 MR. STEWART: I -- I --

16 JUSTICE BREYER: What do you think?

17 MR. STEWART: I mean, I think, in --
18 in theory, you could reserve it in the sense
19 that no as-applied challenge has been made, but
20 I think to suggest that invalidation of a
21 patent was particularly -- potentially
22 vulnerable on that basis would cause many more
23 problems than it would solve because --

24 JUSTICE GINSBURG: Is -- is there no
25 --

1 JUSTICE KAGAN: Well, Mr. Stewart --

2 JUSTICE GINSBURG: -- is there no
3 limit on the time you can institute an inter
4 partes review? Is -- is it any -- any time at
5 all, or is there a limit on it?

6 MR. STEWART: There's no limit. There
7 -- it applies to any patent issued before, on,
8 or after the date on which the AIA became
9 effective.

10 Now, obviously --

11 JUSTICE GINSBURG: And what -- what
12 happens if an infringement action is started
13 first in court and the alleged infringer then
14 says, I want to go over to the -- to the Patent
15 Office and institute an IPR proceeding?

16 MR. STEWART: The -- the defendant in
17 that case would have a year to do that. If
18 more than a year had gone by after the -- the
19 defendant was sued, IPR would be unavailable
20 under the statute. If the defendant requests
21 an IPR within the one-year period, then the
22 district court has the option whether to stay
23 the infringement action.

24 And my understanding is, more or less,
25 half the time, the district courts will stay

1 the proceedings. I think the idea behind the
2 one-year limit is let's do this, if we're going
3 to do it at all, before the proceedings have
4 been -- have gotten too far along before the
5 district court and the parties have devoted too
6 much work to it.

7 But it's -- it often is the case, as
8 it was in this one, that somebody requests IPR
9 after being sued for infringement.

10 JUSTICE KAGAN: How important, Mr.
11 Stewart, is judicial review here? I mean,
12 would you concede that there's a constitutional
13 problem, either if there's no judicial review
14 at all or if the judicial review were
15 deferential as to matters of law?

16 MR. STEWART: I -- I wouldn't -- I
17 would concede that it would be a constitutional
18 concern. I don't think it would be an Article
19 III concern. I think it would be a due process
20 concern, that the person was being divested of
21 property, potentially, without due process of
22 law.

23 So I -- I'm very happy that we have
24 judicial review. I would like to say something
25 about the standard of review there because I

1 think it's important.

2 As -- as your question points out, the
3 -- the cancellation is not going to deprive the
4 courts of any role in determining whether the
5 patent was actually valid. The effect of the
6 cancellation is simply going to be that the
7 court will defer to the agency under a
8 substantial evidence standard on questions of
9 fact and will review legal issues de novo.

10 And that's a less favorable standard
11 of review for the patentee than would be
12 applied in district court infringement
13 litigation, where the defendant would have to
14 prove invalidity by clear and convincing
15 evidence.

16 But our view is that's a feature and
17 not a bug of the system. That is, we want a
18 standard of review that will take into account
19 what the agency actually thinks. The
20 justification for the clear and convincing
21 evidence standard is the agency is on record,
22 having issued the patent, as thinking that the
23 patent is valid, and, therefore, the -- the
24 court should be not entirely unwilling but
25 reluctant to set that aside, absent clear and

1 convincing evidence.

2 If -- if we can find out that, no, the
3 PTO's current informed view is that the patent
4 is valid, then it's entirely appropriate to
5 have a standard of review that -- that takes
6 that into account. The point that I was making
7 about cases like Stern versus Marshall is those
8 are cases that -- that the jurisdiction, the
9 work of the federal courts is not defined in
10 terms of legal issues that they can resolve.
11 It's defined in terms of types of disputes that
12 they can resolve.

13 And a dispute about whether one party
14 will be required to pay money to another party
15 is a case that's kind of the classic work of
16 Article III courts. And so this Court has
17 grappled and some would say struggled with the
18 question of when is it okay to allow
19 non-Article III federal officials to do that?

20 You don't really need to get to that
21 question because, here, nobody is asking to
22 hold Petitioner liable. The effect of a
23 cancellation is not the Petitioner has to pay
24 money damages.

25 JUSTICE SOTOMAYOR: So, in your

1 judgment, could Congress permit the PTO to
2 adjudicate infringement actions?

3 MR. STEWART: I think that would be
4 much more difficult for two reasons -- much
5 more constitutionally problematic. The first
6 would be an infringement action is a classic
7 instance of one party attempting to hold
8 another party liable.

9 And the ordinary relief at the end of
10 a successful infringement action is money
11 damages. And so that would get the PTO much
12 more out of its usual bailiwick and much more
13 into the business that is usually performed by
14 courts.

15 And the second is there's no
16 historical tradition of non-Article III federal
17 adjudication.

18 JUSTICE SOTOMAYOR: Well, there's no
19 historical tradition here, except the
20 interference actions, up until 1981, of the PTO
21 canceling issued patents.

22 MR. STEWART: I guess 1980 is still --
23 it's almost 40 years ago, and -- and I do think
24 it's important to point out -- it's an obvious
25 fact, but it's still important to -- to note

1 that the PTO is very supportive of IPR, but
2 it's not something the agency came up with on
3 its own. This is an act of Congress. It's
4 entitled to judicial respect.

5 Evidently, Congress up until 1980
6 believed that the patent system could function
7 adequately with only sporadic opportunities for
8 administrative reconsideration of issued
9 patents, but during the years since 1980,
10 Congress has made a different judgment. It
11 could have tried to beef up the initial
12 examination process.

13 It decided that the more efficient
14 way, both from the standpoint of patentees as a
15 group and -- and for the public, the more
16 efficient way was to use post-grant examination
17 procedures that could target the particular
18 patents that both were of questionable validity
19 and were of sufficient commercial importance
20 to -- to prompt a motivated --

21 JUSTICE GORSUCH: But, Mr. Stewart, if
22 I understand your answer, an infringement
23 action could be adjudicated by the director so
24 long as money damages were not sought, and that
25 would be fine.

1 MR. STEWART: Well --

2 JUSTICE GORSUCH: So a declaration of
3 non-infringement could be issued by the
4 director, for example, right?

5 MR. STEWART: And -- and it would be
6 -- that -- even that would be harder to defend
7 because infringe -- determining whether one
8 private party's action infringes an existing
9 patent is not part of the PTO's traditional
10 work.

11 When the PTO --

12 JUSTICE GORSUCH: So traditional being
13 more than 40 years but less than 400? Or what
14 --

15 MR. STEWART: Well --

16 JUSTICE GORSUCH: -- what's the --
17 what's the cutoff?

18 MR. STEWART: Well, I mean, since
19 1836, the PTO and its patent -- and its
20 predecessor, the Patent Office, have decided
21 whether patents should be granted. They have
22 determined what, in effect, are questions of
23 validity. Does this person meet the
24 prerequisites for the -- the granting of the
25 patent?

1 The last thing I wanted to say, to --
2 to respond briefly to Petitioner's primary
3 theory, which is that it's the use of
4 adjudicative proceedings, proceedings that look
5 like a trial that renders this infirm. It
6 happens all the time that executive branch
7 agencies get input from private people before
8 making their decisions.

9 We've cited formal rule-making as an
10 example, which in rule-making, of course, can
11 be triggered by a petition from a private
12 party. At congressional hearings, the members
13 of Congress will listen to sworn testimony from
14 witnesses who may express different views, and
15 Congress ultimately decides how to vote.

16 When the Solicitor General is deciding
17 whether to file an amicus brief, we will read
18 the papers that were submitted to this Court.
19 We'll have meetings with the parties that
20 resemble oral arguments.

21 At the end of the day, what makes it
22 unproblematic is that, even though our
23 procedures may resemble the Court's procedures,
24 the decision that we make is the decision to
25 file an amicus brief on behalf of the United

1 States. So long as that's an appropriate
2 exercise of executive branch authority, the
3 fact that we get input from private parties
4 can't render it constitutionally infirm.

5 If there are no further questions.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 MR. STEWART: Thank you.

9 CHIEF JUSTICE ROBERTS: Ms. Ho, four
10 minutes.

11 REBUTTAL ARGUMENT OF ALLYSON N. HO

12 ON BEHALF OF THE PETITIONER

13 MS. HO: Thank you, Your Honor.

14 Three quick points. First, the
15 government has conceded that at least some
16 constitutional rights, I believe due process,
17 cannot be suspended as conditions or subject
18 to, and in our view, Article III is no
19 different.

20 Second, with respect to the colloquy
21 about panel stacking, Article III entitles
22 litigants not to have to worry about precisely
23 that sort of executive influence. That is
24 exactly what this Court -- as this Court put it
25 in Stern, as not to have decision-makers in

1 positions of having to curry favor with the --
2 with the executive.

3 JUSTICE GINSBURG: Wouldn't that be an
4 obvious due process flaw?

5 MS. HO: I -- I would have thought in
6 a case where it happens, it would have been an
7 obvious due process flaw. I think even in
8 cases like ours where it doesn't happen, every
9 -- every administrative judge of the 200 knows
10 that this is something that can happen, that
11 the director, and the director has said, and I
12 quote, that she justifies it, she justified it
13 to exercise -- to make sure her policies, her
14 preferred policies are enforced.

15 JUSTICE GINSBURG: But I think the
16 government has conceded that due process has to
17 be a check on administrative agency
18 adjudications as well as court adjudications.

19 MS. HO: And we certainly -- we
20 certainly don't disagree with that, Justice
21 Ginsburg. Our point is that the existence of
22 it, the existence of the panel stacking shows
23 precisely the danger of judges, of
24 decision-makers, who are subject to executive
25 political influence.

1 And, third, in terms of conditions or
2 subject to --

3 JUSTICE GINSBURG: They're the same
4 people that -- that grant the patent in the
5 first place. They're executive officials.
6 Courts don't grant patents.

7 MS. HO: No. And certainly there is
8 actually -- it is the -- the patent examiners
9 who -- who make the decision to issue. PTAB
10 judges are not -- are not examiners. They are
11 the -- they are the -- the patent -- the patent
12 judges.

13 And with respect to -- to waiver, we
14 know what is required to waive Article III
15 protections, as this Court made clear in
16 Wellness.

17 It is knowing and voluntary consent by
18 both parties, which is absent here. It is
19 Article III supervision, which this Court said
20 in Stern and Atlas Roofing is not satisfied by
21 what this Court called ordinary appeal, which
22 is all that the statute provides litigants in
23 our situation.

24 And I guess finally I would say, in
25 response to the government's argument, you

1 know, this doesn't just -- IPR doesn't just
2 look like a trial. It is a trial. It hears
3 and determines a cause between two private
4 parties that results in a final enforceable
5 judgment.

6 Our objection is not to the use of
7 third parties in any number of government
8 proceedings, any more than we would object to a
9 concerned citizen who calls the police to
10 report a crime.

11 Our objection is to the exercise of
12 the judicial power by an executive branch
13 tribunal in violation of Article III.

14 If there are no further questions.

15 JUSTICE BREYER: I guess the Federal
16 Communications Commission, at least as they
17 used to have it, where a citizen could come in
18 and say I want you to take away the franchise
19 of KPIX, sounds to me as if you've described it
20 perfectly. I guess that would be
21 unconstitutional, too?

22 MS. HO: No, Your Honor. And, in
23 fact, again, in any number -- in the NLRB, in
24 the -- the FTC, the SEC, the CFPB, in all of
25 these agencies what ends up happening is that

1 the government makes the decision to prosecute
2 the action, to prosecute the complaint.

3 It is the government. That is -- that
4 is pure executive action. And under -- under
5 our -- our argument against IPR, none of that
6 would be affected whatsoever by invalidating
7 IPR.

8 Thank you, Your Honor.

9 JUSTICE KAGAN: Well, if I could just
10 --

11 MS. HO: Oh, yes.

12 JUSTICE KAGAN: -- I mean, because
13 there are formal adjudications all over the
14 place in agencies. I mean, for example, the
15 NLRB runs by formal adjudications and, indeed,
16 when they try to make rules, Congress slaps
17 them down and says we want adjudications.

18 So how is that different?

19 MS. HO: Certainly, Your Honor. May I
20 --

21 CHIEF JUSTICE ROBERTS: Go ahead.

22 MS. HO: I think the big difference
23 there is at the NLRB, it is the general
24 counsel, it is the general counsel of the NLRB,
25 it is the government, that is bringing that

1 action and that is prosecuting that action.

2 So you're -- you're right there.

3 There -- I think there is some confusion in
4 terms of adjudication for rule-making purposes,
5 which is the government prosecuting the action
6 and choosing that, in opposed to rule-making,
7 which we're not challenging.

8 Our challenge is to an adjudication in
9 the Article III sense between two private
10 parties, where the government isn't -- isn't
11 engaging in the classic executive action of
12 bringing the action or prosecuting action but
13 is adjudicating, is the decider of the action.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 MS. HO: Thank you.

17 CHIEF JUSTICE ROBERTS: The case is
18 submitted.

19 (Whereupon, at 11:07 a.m., the case was
20 submitted.)

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