SUPREME COURT
OF THE UNITED STATES

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OIL STATES ENERGY SERVICES, LLC,)

Petitioner,)

v.) No. 16-712

GREENE'S ENERGY GROUP, LLC, ET AL.,)

Respondents.)

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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

C O N T E N T S

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

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

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

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

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

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

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

JUSTICE KAGAN: What about inter partes reexamination?

MS. HO: I think inter partes

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

CHIEF JUSTICE ROBERTS: Could you --

MS. HO: And that distinguishes us --

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

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

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

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

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

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

JUSTICE KAGAN: But I thought --

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

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

MS. HO: Certainly, Justice --

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

error and giving it an opportunity to correct its error.

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

It is deciding a cause between the patent owner --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE KENNEDY: What --

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

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

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

JUSTICE KENNEDY: I --

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

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

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

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

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

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

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

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

Again --

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

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

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

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

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

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

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

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

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

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

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

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

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

So, if in those cases, if in the IPR

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

JUSTICE KAGAN: So -- I'm sorry.

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

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

What's your reading of those cases?

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

in this case for the Court to hold --

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

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

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

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

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

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

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

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

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

MS. HO: I --

JUSTICE KAGAN: Ms. Ho --

MS. HO: Yes, Your Honor.

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

MS. HO: Yes.

JUSTICE KAGAN: -- between ex parte

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

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

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

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

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

MS. HO: Certainly.

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

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

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

MS. HO: The --

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

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

judgment.

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

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

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

MS. HO: I --

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

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

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

MS. HO: To --

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

MS. HO: It --

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

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

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

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

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

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

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

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

So why -- why would we do that?

MS. HO: Certainly, Your Honor. And I

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

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

JUSTICE ALITO: Well, to ask you --

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

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

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

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

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

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

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

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

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

courts at all.

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

MS. HO: No, we don't.

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

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

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

MS. HO: The way I would respond, Your

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

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

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

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

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

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

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

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

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

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

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

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

And if I may reserve time for rebuttal.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MS. HO: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Kise.

ORAL ARGUMENT OF CHRISTOPHER M. KISE

ON BEHALF OF RESPONDENT GREENE'S ENERGY GROUP, LLC

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

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

patentability analysis entrusted by Congress to the executive since 1790.

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

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

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

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

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

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

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

JUSTICE BREYER: Fifteen years?

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

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

MR. KISE: Well --

JUSTICE BREYER: -- some lasted a long time.

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

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

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

(Laughter.)

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

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

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

MR. KISE: I -- I --

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

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

JUSTICE KAGAN: Well, here is --

CHIEF JUSTICE ROBERTS: I understood

--

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Well, haven't

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

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

I mean --

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

resembling a determination of rights?

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

JUSTICE KENNEDY: Well, suppose it were rampant.

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

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

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

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

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

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

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

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

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

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

MR. KISE: Well --

JUSTICE GORSUCH: Did I miss something?

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

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

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

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

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

this is --

JUSTICE GORSUCH: It is a different structure, yes.

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

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

MR. KISE: I think that there is --

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE GORSUCH: Yeah.

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

public --

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

CHIEF JUSTICE ROBERTS: Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE FEDERAL RESPONDENT

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

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

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

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

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

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

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

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

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

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

MR. STEWART: Well --

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

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

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

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

JUSTICE GORSUCH: So is the answer yes?

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

JUSTICE GORSUCH: So -- so --

CHIEF JUSTICE ROBERTS: So --

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

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

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

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

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

MR. STEWART: It changed --

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

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

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

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

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

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

The second thing --

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

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

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

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

initial --

CHIEF JUSTICE ROBERTS: The chief judge?

MR. STEWART: The chief judge of the PTAB.

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

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

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

MR. STEWART: Okay.

(Laughter.)

JUSTICE GINSBURG: You mean an ALJ?

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

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

(Laughter.)

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

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

CHIEF JUSTICE ROBERTS: How did that case come out?

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

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

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

rendering the land patent invalid on its terms.

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

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

JUSTICE GORSUCH: Under your theory?

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

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

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

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

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

MR. STEWART: I --

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

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

JUSTICE GORSUCH: Exactly.

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

JUSTICE GORSUCH: Exactly.

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

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

variations on that theme, what's unfair.

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

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

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

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

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

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

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

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

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

MR. STEWART: The -- the interference --

JUSTICE GORSUCH: Yeah.

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

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

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

MR. STEWART: The --

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

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

JUSTICE GORSUCH: All right. Fair enough.

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

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

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

This is --

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

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

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

In other words, as Justice Breyer

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

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

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

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

sometimes yes, sometimes no.

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

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

MR. STEWART: I -- I --

JUSTICE BREYER: What do you think?

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

JUSTICE GINSBURG: Is -- is there no --

JUSTICE KAGAN: Well, Mr. Stewart --

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

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

Now, obviously --

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

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

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

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

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

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

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

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

think it's important.

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

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

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

convincing evidence.

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

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

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

JUSTICE SOTOMAYOR: So, in your

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

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

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

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

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

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

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

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

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

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

MR. STEWART: Well --

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

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

When the PTO --

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

MR. STEWART: Well --

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

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

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

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

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

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

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

If there are no further questions.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. STEWART: Thank you.

CHIEF JUSTICE ROBERTS: Ms. Ho, four minutes.

REBUTTAL ARGUMENT OF ALLYSON N. HO

ON BEHALF OF THE PETITIONER

MS. HO: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If there are no further questions.

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

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

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

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

Thank you, Your Honor.

JUSTICE KAGAN: Well, if I could just --

MS. HO: Oh, yes.

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

So how is that different?

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

CHIEF JUSTICE ROBERTS: Go ahead.

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

action and that is prosecuting that action.

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MS. HO: Thank you.

CHIEF JUSTICE ROBERTS: The case is submitted.

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

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