



Interim process for PTAB decision circulation and internal PTAB review

On July 20, 2022, the United States Patent and Trademark Office (USPTO) issued a Request for Comment (RFC) on [Director review, Precedential Opinion Panel \(POP\) review, and internal circulation and review of Patent Trial and Appeal Board \(PTAB\) decisions](https://web.archive.org/web/20220728235751/https://www.federalregister.gov/documents/2022/07/20/2022-15475/request-for-comments-on-director-review-precedential-opinion-panel-review-and-internal-circulation) (<https://web.archive.org/web/20220728235751/https://www.federalregister.gov/documents/2022/07/20/2022-15475/request-for-comments-on-director-review-precedential-opinion-panel-review-and-internal-circulation>).

Until these processes are formalized, this page shares the PTAB's interim process for decision circulation. This interim process, which is based on decision circulation processes used by the Federal Circuit, is an evolution of the PTAB's prior process, which is described below for context. Notably, the interim process makes clear that the Director is not involved, pre-issuance, in directing or otherwise influencing panel decisions, and the PTAB panel has final authority and responsibility for the content of a decision.

It is important for a robust and reliable patent system that the PTAB maintain a consistent and clear approach to substantive areas of patent law and PTAB specific procedures. To further the USPTO's goals of promoting innovation through consistent, clear, and open decision-making, the PTAB is using the following interim internal review process until the USPTO receives stakeholder feedback and operationally formalizes the process.

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▼ 1. Interim process for PTAB decision circulation and internal PTAB review

The PTAB follows a decision circulation process, circulating certain categories of PTAB draft decisions, listed below, to a pool of non-management peer judges (the "Circulation Judge Pool") prior to issuance. These decisions include all AIA institution decisions; AIA final written decisions; AIA decisions on rehearing; decisions on remand from the Federal Circuit; inter partes reexamination appeal decisions; and certain categories of ex parte appeal, ex parte reexamination appeal, and reissue appeal decisions as designated by PTAB management. If judges believe other opinions warrant circulation, they may, at their option, circulate other types of decisions for review.

The Circulation Judge Pool (CJP) comprises a representative group of at least eight non-management PTAB judges, who collectively have technical/scientific backgrounds and legal experience representative of the PTAB judges as a whole. Each decision reviewed by the CJP is reviewed by at least two CJP judges. The CJP is open to any PTAB judge. Each judge on the CJP typically serves a one-year term. Volunteers are solicited periodically, and final selections are made by the PTAB Executive Management in consultation with the Lead Judges of the volunteers. Judges are chosen to serve on the CJP so as to contribute to a balanced committee in which members have diverse technical backgrounds and professional experiences.

The CJP is modeled after both the Federal Circuit's [previous office of the Senior Technical Assistant](https://web.archive.org/web/20220728235751/https://cafc.uscourts.gov/wp-content/uploads/RulesProceduresAndForms/InternalOperatingProcedures/IOPs-Redline-03012022.pdf) (<https://web.archive.org/web/20220728235751/https://cafc.uscourts.gov/wp-content/uploads/RulesProceduresAndForms/InternalOperatingProcedures/IOPs-Redline-03012022.pdf>) (STA), and the [Federal Circuit's 10-day circulation process for precedential decisions](https://web.archive.org/web/20220728235751/https://cafc.uscourts.gov/wp-content/uploads/RulesProceduresAndForms/InternalOperatingProcedures/IOPs-03012022.pdf) (<https://web.archive.org/web/20220728235751/https://cafc.uscourts.gov/wp-content/uploads/RulesProceduresAndForms/InternalOperatingProcedures/IOPs-03012022.pdf>). The STA provided information on potential conflicts between a panel-approved precedential opinion and any other prior opinions of the court or other relevant precedents. The Federal Circuit's 10-day circulation process provides non-panel members with an opportunity to review a precedential decision prior to issuance. Unlike the Federal Circuit's 10-day circulation process according to which a non-panel member may not only provide input and feedback on a decision but may also hold a decision pending a request for an en banc poll, the CJP review process does not include an option to hold a decision. And, because circulation of draft decisions to all non-panel PTAB judges would be unwieldy given the number of PTAB judges, the CJP is chosen to be representative of the entire PTAB.

The goal of the CJP review is to provide helpful feedback on decisions prior to issuance. For each reviewed PTAB decision, the CJP provides the panel with information regarding potential conflicts or inconsistencies with relevant authority, including Director-written guidance and other USPTO policy. The CJP also provides the panel with information regarding potential inconsistencies with other PTAB decisions and suggestions for improved readability and stylistic consistency.

The panel has final authority and responsibility for the content of a decision, and determines whether and how to incorporate feedback from the CJP. Judges are required to apply pertinent statutes, binding case law, as well as written guidance issued by the Director or the Director's delegate that is applicable to PTAB proceedings. There is no unwritten guidance applicable to PTAB proceedings that judges are required to apply. As has been customary, where judges on a panel have additional or dissenting views, they may express them in concurring or dissenting opinions as they deem appropriate. Such views are an important part of the judicial process. They may be impactful to the Director in deciding which decisions to review.

Based on its review, the CJP identifies notable draft decisions (such as decisions that address issues of first impression, that appear inconsistent with USPTO policy, or that involve areas where policy clarification may be needed) to PTAB Executive Management. PTAB Executive Management may discuss decisions after issuance with the Director and/or the Director Review Advisory Committee for consideration for Director-initiated review. PTAB Executive Management may also discuss decisions after issuance with the Screening Committee for consideration of review by the Precedential Opinion Panel (POP), as outlined by [Standard Operating Procedure 2](https://web.archive.org/web/20220728235751/https://www.uspto.gov/sites/default/files/documents/SOP2%20R10%20FINAL.pdf) (<https://web.archive.org/web/20220728235751/https://www.uspto.gov/sites/default/files/documents/SOP2%20R10%20FINAL.pdf>).

The CJP has periodic meetings with PTAB Executive Management to discuss potentially conflicting panel decisions and general areas for potential policy clarification. PTAB Executive Management may discuss these issues with the Director for the purpose of considering whether to issue new or updated policies through regulation, precedential or informative decisions, and/or a Director guidance memorandum.

Although the Director has oversight of rules, policies and procedures, the Director is not involved, pre-issuance, in directing or otherwise influencing any panel decisions. Pursuant to [Standard Operating Procedure 1](#) ([/web/20220728235751/https://www.uspto.gov/sites/default/files/documents/SOP%201%20R15%20FINAL.pdf](#)), the Director has delegated the authority to assign judges to panels to the Chief Judge of the PTAB and those to whom the Chief Judge further delegates that authority. The Director is not involved in directing or otherwise influencing the paneling for any proceeding before the PTAB.

Any panel member, at their sole discretion, may also optionally consult with one or more members of PTAB management (i.e., PTAB Executive Management and Lead Judges) regarding a decision prior to issuance. Adoption of any suggestions provided by PTAB management based on such consultation is optional. As with the CJP's feedback, the panel has final authority and responsibility for the content of a decision, and determines whether and how to incorporate feedback from PTAB management. Unless consulted by a panel member, PTAB management does not make suggestions to the panel on any pre-issuance decisions, either directly or indirectly through the CJP.

Additionally, as required by [Standard Operating Procedure 9](#) ([/web/20220728235751/https://www.uspto.gov/sites/default/files/documents/sop_9_%20procedure_for_decisions_remanded_from_the_federal_circuit.pdf](#)) for handling decisions on cases remanded from the Federal Circuit, panels are required to meet with the Chief Judge, Deputy Chief Judge, and/or delegate to discuss issues presented by the Federal Circuit's decision, as well as the expected procedure for preparing a remand decision. A panel may elect, at its own discretion, to satisfy this process by sending an email to the assigned delegate (or Deputy Chief Judge if no delegate has been designated) with the required information. If a remand meeting is conducted, any suggestions provided by the Chief Judge, Deputy Chief Judge, or delegate are optional. The panel has final authority and responsibility for the content of a decision, and determines whether and how to incorporate any feedback.

No member of the CJP will participate in the review of a PTAB decision if that member has a conflict of interest. Additionally, CJP members will follow the guidance on conflicts of interest set forth in the PTAB's [Standard Operating Procedure 1](#) ([https://web.archive.org/web/20220728235751/https://www.uspto.gov/sites/default/files/documents/SOP%201%20R15%20FINAL.pdf](#)) and will recuse themselves from any discussion or analysis involving cases or related cases on which they are paneled. In the event of a conflict of interest, the member(s) will notify the other members of the CJP that a conflict exists and will not participate in the discussion of the conflicted matter.

In determining whether an Administrative Patent Judge (including a member of the CJP), statutory PTAB member, or any other USPTO employee has a conflict of interest and therefore cannot participate in the PTAB process for a particular case, the USPTO follows the guidance set forth in the United States Department of Commerce's [Summary of Ethics Rules](#) ([https://web.archive.org/web/20220728235751/https://ogc.commerce.gov/page/ethics-rules](#)).

▼ 2. Previous process for PTAB decision circulation and internal PTAB review

As mentioned, the interim decision circulation process is an evolution of PTAB's previous process for decision circulation. This previous process is described here for context. Previously, the USPTO used two primary internal review mechanisms for promoting consistency across PTAB decisions: peer review of AIA decisions prior to issuance and PTAB management review of decisions addressing USPTO policy prior to issuance.

Peer review of AIA decisions

The USPTO used a committee of non-management PTAB judges called the AIA Review Committee (ARC), to review AIA institution decisions, final written decisions, and decisions granting rehearing prior to issuance. As with the interim CJP, ARC provided the PTAB panel with information regarding potential conflicts or inconsistencies with relevant authority. ARC also provided the PTAB panel with information regarding potential inconsistencies with other PTAB decisions and suggestions for improved readability and stylistic consistency. As with the interim CJP, ARC's comments were suggestions and were not binding on the panel. ARC did not review ex parte appeal decisions or reexamination appeal decisions.

PTAB management review for adherence with USPTO policy

The USPTO also used an internal review process in which one or more members of PTAB management, e.g., at the direction of and/or in consultation with the Director, reviewed decisions for consistent application of, and adherence with, USPTO policy, applicable statutes, and binding case law, prior to issuance. For example, PTAB management reviewed AIA institution decisions for consistent application of PTAB precedent regarding discretionary issues. PTAB management also reviewed decisions addressing other issues, such as applicant admitted prior art and motions to amend. Additionally, PTAB management reviewed ex parte appeal decisions for adherence with the [2019 Revised Patent Subject Matter Eligibility Guidance](#) ([https://web.archive.org/web/20220728235751/https://www.govinfo.gov/content/pkg/FR-2019-01-07/pdf/2018-28282.pdf](#)). PTAB panels considered PTAB management feedback prior to issuance.

▼ 3. What are the benefits of the interim process?

The interim process is modeled after the [Federal Circuit's 10-day circulation process](#) ([https://web.archive.org/web/20220728235751/https://cafc.uscourts.gov/wp-content/uploads/RulesProceduresAndForms/InternalOperatingProcedures/IOPs-03012022.pdf](#)) and [previous STA circulation process](#) ([https://web.archive.org/web/20220728235751/https://cafc.uscourts.gov/wp-content/uploads/RulesProceduresAndForms/InternalOperatingProcedures/IOPs-Redline-03012022.pdf](#)) to promote decision consistency and clarity.

The interim process promotes open decision-making by reinforcing that adoption of all CJP and requested PTAB management feedback is optional, that members of PTAB management do not provide feedback on decisions pre-issuance unless they are a panel member or a panel member requests such feedback, and that the PTAB panel has final authority and responsibility for the content of a decision. Additionally, the process provides a mechanism by which

the Director may be made aware of decisions to consider for Director-initiated review or POP review, and of areas to consider for issuing new, or modified, USPTO policy to promote a strong intellectual property system. The process is also consistent with the [USPTO's interim process for Director review \(https://web.archive.org/web/20220728235751/https://www.uspto.gov/patents/patent-trial-and-appeal-board/interim-process-director-review\)](https://web.archive.org/web/20220728235751/https://www.uspto.gov/patents/patent-trial-and-appeal-board/interim-process-director-review) which provides for Director review of any issue of fact or law in any final written decision issued in a PTAB AIA proceeding including inter partes reviews, post-grant reviews, and covered business method patent reviews.

▼ 4. Questions

If a party has questions regarding the implications of the interim process for a particular proceeding, they can submit case-specific questions (e.g., request a call with the PTAB) to Trials@uspto.gov (<https://web.archive.org/web/20220728235751/mailto:Trials@uspto.gov>).

If a member of the public has a general question regarding the interim process but does not have a case pending before the PTAB, they can submit that question to Trials@uspto.gov (<https://web.archive.org/web/20220728235751/mailto:Trials@uspto.gov>).

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