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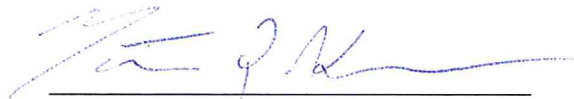
VALIDITY AND CONSTITUTIONALITY OF *INTER PARTE* REVIEWS BEFORE  
THE U.S. SUPREME COURT

BY

HELEN KATHRYN EMMONS KELLY

THESIS APPROVED:

  
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THE U.S. SUPREME COURT

BY

HELEN KATHRYN EMMONS KELLY

Submitted to the Faculty of the Graduate School of  
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in partial fulfillment of the requirements for the degree of

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## ABSTRACT

For 400 years, courts have adjudicated disputes between private parties about the validity of patents. Inventors apply for patents to an administrative agency. Patent examiners review the application to determine whether or not an idea is valid to have a patent issued. Patent examiners are people and sometimes errors are made. An administrative agency must have an administrative avenue to review a potential error. Six years ago, Congress created a review with the implementation of *inter parte* reviews. An argument before the U.S. Supreme Court looks at whether or not *Inter partes* review violate Article III of the U.S. Constitution. A case analysis of *Oil States v. Green's Energy Group, et al.* will show that more likely than not correcting an error of an administrative agency is not in violation of one's constitutional right to a jury. Permitting the U.S. Patent and Trademark Office to correct its own errors in light of subsequent clarifications in the law allows for an efficient course-correction that improves the quality of individual patents and benefits the patent system generally.

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## 1. Introduction

Patents are necessary because they provide incentives to individuals and business by recognizing their creativity and offering the possibility of reward for the invention. These innovations and creative endeavors are elements that drive the U.S. economy with economic growth. Anyone can apply for a patent. The United States Patent and Trademark Office has PTO examiners whom are to review the applications and determine whether or not it may be granted. Anyone can challenge the validity of the patent by filing a request for an *ex parte* reexamination or *inter parte* review. The *inter parte* review is a proceeding before an executive agency tribunal. The U.S. Supreme Court heard oral arguments on November 27, 2017 in *Oil States Energy Services, LLC v. Green's Energy Group, LLC* to determine whether or not this particular administrative proceeding should take place in the Article III federal courts rather than the Article I tribunal.

## **2. The Court and Administrative Law**

The U.S. government is founded on the Constitution. All of our laws enacted by Congress and signed by the president must have a foundation of the Constitution.

Administrative Law in the Political System addresses how administrative law applies to public administration and the differences faced through the decades. Governmental administrators and agencies are to assist the president in regulating the day to day needs of public policy as written by Congress. The judicial branch clarifies the law when necessary.

Kent Warren explains in *Administrative Law in Political System* there are three basic public agencies: 1) independent regulatory commissions; 2) quasi-independent regulatory agencies and 3) executive departments. Independent regulatory commissions were created due to Congress attempting to deal with demands to regulating social order activities (Warren, 2011). They were structured so as to prevent political pressures from the agencies. They are usually made up of 5-7 members and appointed by the president with Senate consent. Quasi-independent regulatory agencies are much like independent regulatory commissions however except for the fact they have vast adjudicative powers. Executive departments were created to assist the president in implementing the public policy enacted by Congress. The United States Patent and Trademark Office is an agency within the U.S. Department of Commerce.

In order to regulate public administrators use four regulatory practices methods: 1) licensing and granting permissions; 2) rate-setting and price control; 3) establishing and enforcing public interest standards and 4) punishing. Depending on what type of agency they are regulating will depend on which method is best for success. The

United States Patent and Trademark Office is the federal administrative agency which grants and regulates patents and registers trademarks<sup>1</sup>.

The founding fathers provided the judicial power of the United States to be in one Supreme Court with lower courts as ordained and established by Congress. Article III courts are made up of the U.S. Supreme Court and inferior courts created by Congress in the form of the 13 United States Court of Appeals and the 91 United States District Courts. Congress has given these inferior courts a broad range of original and appellate jurisdiction (Pfander, 2004). The Inferior Tribunal Clause of Article I provides for Congress to “constitute tribunals inferior” to the Supreme Court and to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the government of the United States, or in any Department or Officer thereof.”<sup>2</sup> The Article I courts typically handle disputes within specialized practice areas.

While the Constitution does not go into great detail the duties of the judicial branch, it has influenced the administrative state and contributed to the growth. In *Munn v. Illinois*, 94 U.S. 113 (1876) the court determined public agencies can regulate private property, more specifically the state railroads. The court clarified even further a year later with *Peik v. Chicago and Northwestern Railway Co.*, 94 U.S. 164 (1877) when it allowed the regulation on the national level (Warren, 2011, p. 42). The concept that anything affecting public interest would need some form of regulation by the government, opened up the way for additional agencies. Administrative law represents

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<sup>1</sup> 35 U.S.C. 1 (a)

<sup>2</sup> U.S. Const. art I, § 8, cl. 9, cl.18.

procedural due process rather than substantive due process. Administrative law is unique when compared to civil and criminal law.

In *Chevron U.S.A. vs. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984) the court finally developed a test for determining whether to give deference to an administrative agency's interpretation of a statute. This was necessary since the U.S. Constitution did not set any express limits on how much federal authority could be delegated by the government to its agencies. *Chevron*, states that if the statute in question is ambiguous but clear cut then the agency has to go with that language and those instructions. If, however, a statute is ambiguous and vague, the agency is given the latitude of acting in a reasonable interpretation of that statute, the courts are generally going to defer to the agency's expertise in trying to meet the needs of that statute. So unless an agency goes beyond a reasonable interpretation of a particular law, the courts are going to essentially defer to the agency's interpretation and allow for that type of delegation to take place. Since *Chevron* the Court has not had to overrule many discretionary agency decisions. However when they have it has been for clear signs of discretionary abuse (Warren, 2011, p. 337).

### 3. Constitutional Foundation of the Patent

In Article 1, Section 8, Clause 8 of the U.S. Constitution the founding fathers created the US Patent Office and charged it with the purpose “to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”. A patent is an exclusive right granted for an invention. This invention can be a product or process that provides a new way of doing something. Patents provide patent owners with protection for a specific period of time (USPTO, 2017). Patents are protected by the Constitution as property rights. In *McCormick Harvesting Mach. Co. v. C. Aultman & Co.*, 169 U.S. 606, 608-09 (1898) the Court determined “[i]t has become the property of the patentee, and as such is entitled to the same legal protection as other property.” The Constitution in Article III<sup>3</sup> provides property owners, therefore patent owners with a right to a jury.

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<sup>3</sup> U.S. Const. art. III § 2, amend.

#### **4. United States Patent and Trademark Office**

President George Washington signed The U.S. Patent Act on April 10, 1790. Thomas Jefferson, Henry Knox and Edmund Randolph were the first board members to the Patent Board in addition to serving as Secretary of State, Secretary of War and Attorney General in Washington's cabinet. Samuel Hopkins was issued the first patent for a process of making potash, an ingredient used in fertilizer. The patent was signed by President George Washington in July 1790 (USPTO, 2017).

The Patent Act of 1790 allowed persons to apply for a patent with a 14-year term of exclusive rights to their inventions without any extension. Two of the three patent board members were needed to give consent for a patent. They were the same board members who served as patent examiners. The act was repealed and replaced in 1793 with another Patent Act. The Patent Act of 1793 defines a patent as "any new and useful art, machine, manufacture or composition of matter and any new and useful improvement on any art, machine, manufacture or composition of matter" (Patent Act of 1793). This definition has remained unchanged. The other significant change was the patent application became more of a registration system than an approval system (Purvis, 2013).

The next revision was the Patent Act of 1836. This revision had significant changes. It first created an official Patent Office thereby removing the duties of patents from the Secretary of State. Instead the position of Commissioner of Patents was created. In an effort to improve the quality of patents granted, application process was changed and information on newly granted patents were to be made publicly accessible at libraries throughout the country. Meeting the desires of inventors, a possible

extension of 7 years of protection was added to the original 14 year term. The other major change was the removal of only US citizen applying for US patents was removed (Patent Act of 1836). On December 15, 1836 a fire broke out in the Patent Office destroying virtually all patents. Reconstruction of the records was authorized by the Patent Act of 1837. Inventors who had letters showing patents previously issued were able to resubmit in order to rebuild patent library. Inventors were also required to submit two (2) copies of everything (Patent Act of 1837).

Since 1790 the Secretary of State was in charge of the patents. In 1849 an administrative change occurred when the Patent Office was transferred to Department of the Interior. In 1925 it was reorganized again and reported to the Department of Commerce (Patent and Trademark Office Society (U.S.), 2003). A major revision came with the Patent Act of 1952 which is still currently enforced today (Purvis, 2013).

On September 16, 2011 the *Leahy-Smith America Invents Act* (AIA) was passed into law by Congress.<sup>4</sup> The passage of the AIA is the largest and most sweeping changes to the patent laws since the U.S. Patent Act of 1952.<sup>5</sup> It took Congress nine years to find what it believed to be “harmonized U.S. patent laws” (Ojemen, 2016) The AIA made changes to patent litigation including a new post-grant Patent and Trademark Office procedure<sup>6</sup>, *inter parte* review or (IPR).

The USPTO falls within the Department of Commerce. Currently, Joseph Matal serves as Under Secretary of Commerce for Intellectual Property and Director of the

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<sup>4</sup> Leahy-Smith America Invents Act (AIA), Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified in scattered sections of 35 U.S.C.).

<sup>5</sup> U.S. Patent Act of 1952, Pub. L. No. 82-593, 66 Stat. 792 (1952) (codified in scattered sections of 35 U.S.C.).

<sup>6</sup> 35 U.S.C § 257 (2011) (corresponds to AIA § 12(a)).

USPTO. He provides leadership and oversight to one of the largest intellectual property offices in the world, with over 12,000 employees and an annual budget of over \$3 billion. Mr. Matal also serves as the principal advisor to the President, through the Secretary of Commerce, on domestic and international intellectual property policy matters (USPTO, 2017). See Figure 1 for an organizational chart of the USPTO.

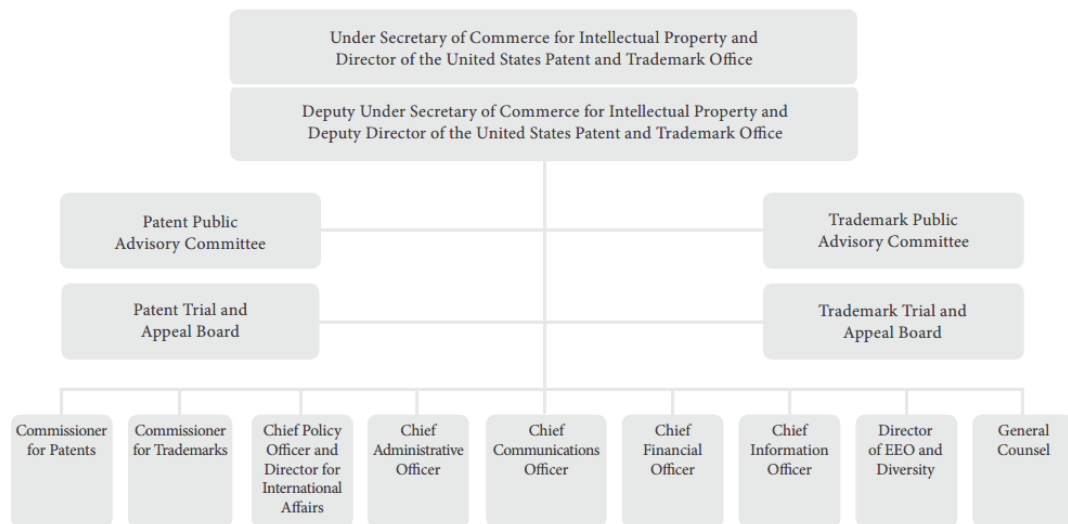


Figure 1. United States Patent and Trademark Office Organizational Chart  
Source: (U.S. Patent & Trademark Office, 2016)

The Office of the Under Secretary oversees all offices within the USPTO, ensuring the agency achieves strategic and management goals, including quality, timeliness, cost-effectiveness, and transparency. The Public Advisory Committees advise the Under Secretary of Commerce for Intellectual Property and Director of the USPTO on the management of the patent and the trademark operations. The Public Advisory Committees consist of citizens of the United States chosen to represent the interests of the diverse users of the USPTO. The Office of Patents of the USPTO examines applications and grants patents on inventions when applicants are entitled to them; it publishes and disseminates patent information, records assignments of patents,



maintains search files of U.S. and foreign patents and maintains a search room for public use in examining issued patents and records (USPTO, 2017).

## **5. Patent Trial and Appeal Board**

The Patent Trial and Appeal Board (PTAB) is created by statute, and includes statutory members and Administrative Patent Judges. The PTAB is charged with rendering decisions on: appeals from adverse examiner decisions, post-issuance challenges to patents, and interferences. The Trademark Trial and Appeal Board (TTAB) hears and decides adversary proceedings involving: oppositions to the registration of trademarks, petitions to cancel trademark registrations and proceedings involving applications for concurrent use registrations of trademarks. The Board also decides appeals taken from the trademark examining attorneys' refusals to allow registration of trademarks (USPTO, 2015).

Administrative patent judges are appointed by the Secretary of Commerce (Dutra, 2011). As of 2015, the Patent Trial and Appeal Board (PTAB) tripled in size due in large part to the AIA. The Board in 2015 had more than 300 people serving in positions to issue decisions which came before the Board (Patent Trial and Appeal Board, 2015).

The two Vice Chief Judges manage divisions made up of judges and patent attorneys. These divisions are managed by a Lead Administrative Patent Judge. The judges may work exclusively on appeals or on both trials and appeals. A judge's docket may have several technical disciplines (Patent Trial and Appeal Board, 2015). The Board Operations Division serves as the executive branch of the Board with over 75 staff members. The five branches in this division are: (1) the IT Systems & Services Branch, (2) the Executive Support Services Branch, (3) the Case Management Branch consisting of hearing operations and paralegal operations, (4) the Data Analysis &

Process Improvement Branch, and (5) the Administrative Management Branch. Each branch has a branch chief (Patent Trial and Appeal Board, 2015). See Figure 2 for an organizational chart of the PTAB.

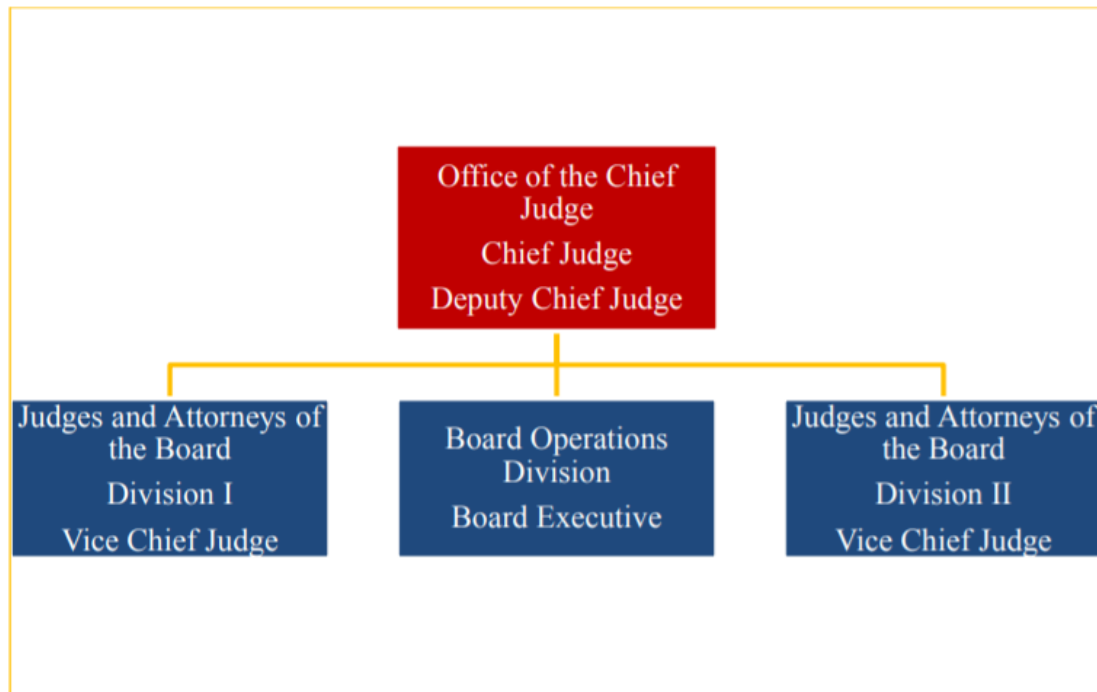


Figure 2. Patent Trial and Appeal Board Organizational Structure  
Source: Organizational Structure and Administrative of the Patent Trial and Appeal Board, (2015)

## 6. The Patent Process

Any person or group of people may file a patent application with the United States Patent and Trademark Office. It is the duty of the patent examiners to examine patent applications pursuant to 35 U.S.C. § 131. Patent examiners are generally graduated scientists and engineers (USPTO, 2015). A patent examiner must read and understand the invention set forth in the specifications listed on the application. They are to determine whether the application is adequate to define the metes and bounds of the claimed invention. Patents have very specific “claims” or definitions which describe exactly each aspect of the invention. Claim terms are given ordinary and customary meaning unless the patent assigns an alternate definition<sup>7</sup>. Per 35 USC § 112(f), means-plus-function claim terms must be construed to cover the corresponding structure described in the specification and equivalents thereof. The construction in § 112(f) also applies where a claim term lacks the word “means,” but the claim term fails to recite sufficiently definite structure, or alternatively recites a function without reciting sufficient structure for performing that function<sup>8</sup>. The examiners must search existing technology for claimed inventions to determine the patentability of the subject patent. The examiner may work with the applicant to identify and analyze all issues in the application and ensure all pertinent procedural steps necessary for obtaining the patent are complied (Purvis, 2013). Innovators can discuss the details of their applications via face-to-face or video conversations with their assigned patent

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<sup>7</sup> *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007); *In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994).

<sup>8</sup> *Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1349 (Fed. Cir. 2015).

examiners or in person at the United States Patent and Trademark Office headquarters in Alexandria Virginia (USPTO, 2017).

One significant impact of the Leahy-Smith America Invents Act in 2011 was the establishment of the *inter parte* review which allows for post-grant proceedings to go directly to a three-judge panel for a decision. *Inter parte Review* (hereinafter “IPR”) is an administrative procedure for challenging the validity of a U.S. patent before the USPTO. The procedure is conducted by the Patent Trial and Appeal Board (PTAB). This is a fast track procedure that allows any petition to challenge the validity of an issued patent (Bui, 2011). The IPR process allows the USPTO to “re-examine an earlier agency decision”<sup>9</sup>. The IPR statute gives the PTAB the ability to decide questions of validity in an adversarial proceeding in the shadow of a district court. The effect of patent invalidation at the PTAB on court proceedings is that “the patentee's cause of action is extinguished and the suit fails.”<sup>10</sup>

The IPR process permits limited discovery and can be much cheaper and faster than district court litigation (Zachariah, 2017). More specifically, IPRs strike a balance between the interests of patent owners and those of the public by creating efficient, but limited, procedures to revisit the initial decision to grant patents. After a patent is issued, any person may request at any time a reexamination of the patent, based upon prior patents or printed publications. If the Patent and Trademark Office determines that there is a “substantial new question of patentability” the second step or the reexamination and such questions are considered.<sup>11</sup> This reexamination was decided by

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<sup>9</sup> *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144 (2016).

<sup>10</sup> *Fresenius USA, Inc. v. Baxter Int'l, Inc.*, 721 F.3d 1330, 1340 (Fed Cir. 2013).

<sup>11</sup> 35 U.S.C § 302 and 303 (2006).

a single PTO examiner (Janicke, 2013). Congress created *ex parte* reexamination when it enacted the Bayh-Dole Act in 1980<sup>12</sup>. *Ex parte* reexamination, like *inter partes* review, permits the Patent Office to review an issued patent at the request of someone other than the patent's owner and, when the necessary findings are made and appellate remedies exhausted, cancel the patent. A patent owner may appeal from *ex parte* reexamination only under section 141.

Although the procedure for conducting reexamination is drastically different from the one employed in *inter partes* reviews, there are noticeable similar features. Parties other than the patent owner may request cancellation of a patent, the PTO may grant that request, and the patent owner may appeal to the U.S. Court of Appeals for the Federal Circuit (which is an Article III court) but not to a district court.<sup>13</sup>

Title 35 provided for *inter partes* reexamination. *Inter partes* reexamination was similar to *ex parte* reexamination, except that the party requesting the reexamination had additional rights. A third party requestor may submit papers during reexamination to appeal and to participate in the appeals by the patent owner<sup>14</sup>. *Inter partes* review carry out the same purpose as reexaminations: “to reexamine an earlier agency decision.”<sup>15</sup> *Inter partes* review therefore are no less proper an exercise of administrative authority-both involve public rights.

An IPR begins when the petitioning party submits a petition and supporting documentation arguing that the patent is invalid<sup>16</sup>. The patent owner then has

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<sup>12</sup> Act to Amend the Patent & Trademark Laws § 1, Pub. L. 96-517, 94 Stat. 3015, 3015-16 (Dec. 12, 1980).

<sup>13</sup> 35 U.S.C. § 302; 35 U.S.C. § 141.

<sup>14</sup> 35 U.S.C.A. § 311 (2010).

<sup>15</sup> *Cuozzo Speed Technologies, LLC v. Lee*, 136 S.Ct. 2131 (2016) at 2144.

<sup>16</sup> 35 U.S.C. § 312(a); 37 C.F.R. §§ 42.101, 42.104.

approximately three months to file its own response and evidence arguing that the patent is valid and the IPR proceeding should not be instituted<sup>17</sup>. Within three months of receiving that response, typically three PTAB judges assigned to the case determine whether to institute the IPR proceeding<sup>18</sup>. These judges have special technical and legal expertise, and at least one of them typically has a technical background and work experience related to the subject matter of the patent in question. IPRs commence when a party, often an alleged patent infringer, requests the Board to reconsider the PTO's issuance of an existing patent and request it be invalidated on the basis that it was anticipated by prior art or obvious.<sup>19</sup> If a decision is granted, the petition is estopped from raising in a later court case any invalidity challenge based on a ground raised or could have raised during the IPR.<sup>20</sup>

A party appealing a PTAB decision has options. If the final written decision by the PTAB does not meet the “three-legged” support, depending on which avenue is not supported will provide multiple strategies for challenging a PTAB's decision before the Federal Circuit (Rooney, 2017). These avenues are equally important (1) factual findings must be supported by substantial evidence; (2) legal conclusions must withstand *de novo* review; and (3) the decision cannot be arbitrary and capricious. The U.S. Supreme Court held that the Federal Circuit must use the “framework” set forth in the Administrative Procedure Act to review factual findings of the PTO<sup>21</sup>. The Federal Circuit has favored a stricter review of the PTAB (Rooney, 2017).

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<sup>17</sup> 35 U.S.C. § 313; 37 C.F.R. § 42.107.

<sup>18</sup> 35 U.S.C. § 314(b).

<sup>19</sup> 35 U.S.C. § 311(b).

<sup>20</sup> 35 U.S.C. § 315(e) (corresponds to AIA § 6(a)).

<sup>21</sup> *Dickenson v. Zurko*, 527 U.S. 150, 152 (1999).

The Patent Trial and Appeal Board (PTAB) Bar Association is a voluntary bar association of approximately 900 members engaged in private and corporate practice and in government service. Members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly and indirectly in the practice of patent law as well as other fields of law affecting intellectual property. They represent owners, users, and challengers of intellectual property rights (PTAB Bar Association, 2017). The association believes that the IPR procedure is an incremental modification of reexamination procedures used by the USPTO for decades to consider the same questions of patentability. But IPRs are far more efficient: by statute, they must reach final decisions within fixed times. Accordingly, district courts are more likely to stay cases pending IPRs than they were pending reexaminations, to take advantage of IPRs' streamlined patentability determinations. IPRs cannot be filed until after nine months from the issuance of the challenged patent.



## 7. Argument of Costs Saved

Litigation is timely and expensive and even sometimes biased, although it is supposed to be fair and impartial. Prior to the AIA, scholars looked at possible solutions for inadequate litigation. An overhaul of the USPTO examinations and supplementing litigation with other *ex post* reexamination mechanisms was recommended in 2004 (Farrell, 2004). Congress chose to have patent examiners' patentability reviewed by PTAB judges appears to be well-reasoned and a correct decision. 75% of PTAB rulings were affirmed by the Federal Circuit with no remand as of September 1, 2017 (Cook, 2017). As with other administrative appeal processes, the PTAB remains fully subject to judicial review in the Federal Circuit. The PTAB's conclusions of law are reviewed de novo, including claim construction and patent eligibility on grounds like obviousness. The Federal Circuit allows for meaningful appellate review by applying settled administrative law principles<sup>22</sup>.

Proceedings in the PTAB conserve litigants' financial resources and avoid the unnecessary expenditure of judicial resources. First, because of Congress's choice to place firm deadlines in the statute, the timeline of an IPR is much shorter and much more predictable than district court litigation. The PTAB must determine whether to institute IPR no later than three months after the preliminary response to the IPR petition is due and it must issue its Final Written Decision on patentability a maximum of one year (or an additional six months on good cause) after institution<sup>23</sup>. In U.S.

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<sup>22</sup> *Homeland Housewares, LLC v. Whirlpool Corp.*, 865 F.3d 1372, 1374 (Fed Cir. 2017); *Unwired Planet, LLC v. Google Inc.*, 841 F.3d 995, 1000 (Fed. Cir. 2016).

<sup>23</sup> 35 U.S.C. 314 (b); 35 U.S.C. 316 (a)(11), 37 C.F.R. 42.100(c).

District Courts, a ruling on validity often must await several lengthy processes, including discovery, motions practice, and trial, which can stretch on for years.

The proceedings before the PTAB can also help shape the substantive litigation on the claims that went forward. Some commentators have suggested that the aggregate savings resulting from IPR ranges to at least \$2.31 billion (Landau, 2017). *Inter partes* review do not concern the enforcement of a private patent right against an alleged infringer. Instead, Congress specifically limited the scope of *inter partes* review to questions of patentability on grounds of lack of novelty and obviousness. *Inter partes* review allows the public (and not just an alleged infringer) to challenge whether the subject matter of a patent is patentable<sup>24</sup>. “Post grant reviews,” including *inter partes* reviews, are merely the next iteration of post-grant proceedings. The purpose of the *inter partes* review is not quite the same as the purpose of district court litigation. It is a specialized agency proceeding. The PTAB is staffed with administrative law judges that are able to understand the complex arguments of invalidity (Ojemen, 2016). Given the separate rights conferred by Congress in creating the patent system, and the express limitations of *inter partes* review, there is no basis for finding that *inter partes* review violates Article III or the Seventh Amendment. The public needs an efficient avenue which is not cost prohibitive in order to challenge weak patents and restore the equitable nature of the bargain made with inventors. Post-grant challenges, including *inter partes* review proceedings, provide that mechanism.

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<sup>24</sup> 35 U.S.C. § 102 and 103.

## 8. *Oil States v. Green's Energy Group, et al*

The Supreme Court will address the constitutionality of having an Article I tribunal extinguish patent rights in *Oil States vs. Greene's Energy Group, No. 16-712*. Greene's Energy Group petitioned for *inter partes* review of claims 1 and 22 of U.S. Patent 6,179,053 (hereinafter “the ‘053 patent”) maintaining that the claims were anticipated by Canadian Patent Application 2,195,118 (“Dallas ‘118”).

Greene's Energy Group, LLC file a reformatted Petition requesting an *inter parte* review of claims 1 and 22 of the ‘053 patent. The PTAB instituted a trial pursuant to 35 U.S.C. § 314 (a). The ‘053 patent is called “Lockdown Mechanism for Well Tools Requiring Fixed-Point Packoff” and relates to an apparatus and method for securing a mandrel of a well tool in an operative position in which the mandrel is packed off against a fixed-point in a well. The patent was issued on January 30, 2001 (US Patent No. 6,179,053, 2001).

Oil States maintained in its Patent Owner Response that claims 1 and 22 were not anticipated based on Oil States' proposed claim constructions. Oil States also maintained that Dallas ‘118 was not enabling. Oil States also moved to amend claims 1 and 22. “To anticipate a claim, a reference must disclose every element of the challenged claim and enable one skilled in the art to make the anticipating subject matter.”<sup>25</sup> Enablement requires that “the prior art reference must teach one of ordinary skill in the art to make or carry out the claimed invention without undue experimentation.”<sup>26</sup> The determination of whether “undue experimentation” is required may include consideration of factors such

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<sup>25</sup> *PPG Indus., Inc. v. Guardian Indus. Corp.*, 75 F.3d 1558, 1566 (Fed. Cir. 1996).

<sup>26</sup> *Minnesota Mining & Mfg. Co. v. Chemque, Inc.*, 303 F.3d 1294, 1301 (Fed.Cir. 2002).

as (1) the quantity of experimentation; (2) the amount of direction or guidance present; (3) the presence or absence of working examples; (4) the nature of the invention; (5) the state of the prior art; (6) the relative skill of those in the art; (7) the predictability or unpredictability of the art; and (8) the breadth of the claims<sup>27</sup>. In a Final Written Decision, the Board rejected Oil States' proposed constructions and found claims 1 and 22 unpatentable as anticipated by Dallas '118.

The Patent Owner, Oil States proposed a substituted claim 28 in its Motion to Amend contingent on claim 1 being found unpatentable, and substitute claim 29, contingent on claim 22 being found unpatentable. A motion to amend must set forth support in the original disclosure of the patent for each claim that is added or amended. The Board determined Oil States had no discussion of the support for the substituted claims in its Motion. A Patent Owner bears the burden in this type of motion to show a patentable distinction<sup>28</sup>. The Board denied the Oil States motion to amend claims 1 and 22<sup>29</sup>.

Oil States appealed the Board's determination to the Federal Circuit, on the basis that the Board erred in construing the claims at issue. First, Oil States argued that the Board ignored the patent's discussion of the shortcomings of the prior art tool and its explanation<sup>30</sup>. Following oral argument, a panel of the Federal Circuit affirmed without opinion. The court of appeals denied panel rehearing and rehearing *en banc*.

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<sup>27</sup> *In re Wands*, 858 F.2d 731, 737 (Fed. Cir. 1988).

<sup>28</sup> 37 C.F.R. § 42.20(c).

<sup>29</sup> The Board's decision is published at *Greene's Energy Group, LLC v. Oil States Energy Services, LLC*, 2015 Pat. App. Lexis 5328 (P.T.A.B. May 15, 2015).

<sup>30</sup> Brief of Patent Owner-Appellant at 18-33, *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, (No. 2015-1855), 639 F. App'x 639 (Fed. Cir. 2016).

Under the Patent Act, invalidity is an “affirmative defense” to a claim for patent infringement. If invalidity is established this precludes the liability between the parties in an infringement case<sup>31</sup>. While a party can file a “counterclaim” and assert invalidity, it is not a separate cause of action. Invalidity can be asserted at the outset of a patent case only to counter a charge of infringement or as a claim for relief under the Declaratory Judgment Act. Invalidity defenses and counterclaims in district courts are thus inextricably tied to claims of infringement. In the absence of “adverse legal interests” between parties arising from an actual or threatened infringement claim, there is no case or controversy, and a district court has no subject matter jurisdiction over an assertion of invalidity<sup>32</sup>.

There were three questions presented by Oil States in the petition for writ of certiorari. They were:

1. Whether *inter partes* review – an adversarial process used by the Patent and Trademark Office (PTO) to analyze the validity of existing patents – violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury.
2. Whether the amendment process implemented by the PTO in *inter partes* review conflicts with Court’s decision in *Cuozzo Speed Technologies, LLC v. Lee*, 136 S.Ct. 2131 (2016), and congressional direction.
3. Whether the “broadest reasonable interpretation” of patent claims – upheld in *Cuozzo* for use in *inter partes* review – requires the application of traditional claim construction principles, including disclaimer by disparagement of prior art and reading claims in light of the patent’s specification.

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<sup>31</sup> *Commil USA, LLC v. Cicso Sys., Inc.*, 135 S. Ct. 1920, 1929 (2015); 35 U.S.C. § 282(b)(2) (2012).

<sup>32</sup> *MedImmune, Inc., v. Genentech, Inc.*, 549 U.S. 118, 130 (2017); *Organic Seed Growers & Trade Ass’n v. Monsanto Co.*, 718 F. 3d 1350, 1359 (Fed. Cir. 2013).

The Supreme Court granted certiorari only on the first question. The decision before the U.S. Supreme Court is whether *inter parte* review which is an adversarial process used by the PTO violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury.

#### **A. Petitioner, Oil States**

The Petitioner, Oil States believes suits to invalidate patents historically were tried before a jury in a court of law thereby IPRs are violating these constitutional rights. The Court's decision in *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118 (2007) "theoretically" broadened the standing doctrine in patent law. The Court as recently as 2016 affirmed that IPRs may consider patent claims under their "broadest reasonable construction"<sup>33</sup>. The PTO's treatment of potential amendments to patents in *inter partes* review directly conflicts with that standard. As the patent office itself has noted, the broadest reasonable interpretation standard only makes sense when a patent holder (or potential patent holder) has the ability to engage in the back-and-forth process for amending the patent (United States Patent and Trademark Office, 2015).

In 1791, "[a]n action for patent infringement is one that would have been heard in the law courts of old England." *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996). And it had been that way for 200 years before that, too (Bracha, 2005) "none of the parties disputed that the common law court had jurisdiction to decide the validity of the patent"). The only other way for a patent to be revoked at that time would

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<sup>33</sup> *Cuozzo Speed Technologies, LLC v. Lee*, 136 S.Ct. 2131 (2016).

have been a writ *scire facias*<sup>34</sup> which could be filed in the Chancery courts. And even in those instances, any disputed facts were tried to a jury in the common law courts.<sup>35</sup>

While the dividing line between law and equity can be difficult to draw and has spawned debate over whether a jury should be required in every case, (Lemley, 2013) the issue here is that the option must be open to patent holders and not stopped by *inter partes* review proceedings.

The Supreme Court has long held that patent “infringement cases today *must* be tried to a jury, as their predecessors were more than two centuries ago.”<sup>36</sup> The Constitution requires that an Article III judge adjudicate all cases in law and in equity arising under federal law. U.S. Const. art. III. Contrary to this Court's precedent, the Board's *inter partes* review proceeding provides neither the jury nor the Article III forum guaranteed by the Constitution. The Supreme Court has held “the common law and statutes in England and this country granted copyright owners causes of action for infringement [and those suits were] tried in courts of law, and thus before juries.”<sup>37</sup> It is thus clear that patent infringement cases - including invalidity defenses where damages are sought - are the province of the jury<sup>38</sup>. As even the PTO has recognized, patents are a property right, complete with the most important characteristic of private ownership - the right of exclusion (USPTO, 2018). Even more important is that the private right exists wholly apart from the government once granted. “[The subject of the patent] has

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<sup>34</sup> A show-cause order as to why patent should be revoked. (Unknown, 2018).

<sup>35</sup> *Ex Parte Wood & Brundage*, 22 U.S. 603, 614-615 (1824).

<sup>36</sup> *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996).

<sup>37</sup> *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340,348-49 (1998).

<sup>38</sup> *Markman*, 517 U.S. at 377; *Tegal Corp. v. Tokyo Electron Am., Inc.*, 257 F.3d 1331, 1340 (Fed. Cir. 2001).

been taken from the people, from the public, and made the private property of the patentee”. That is why “[o]nce a patent is issued, the patentee must enforce the patent without aid of the USPTO.”<sup>39</sup>

## **B. Respondent, Greene’s Energy Group, LLC**

The Federal Circuit held the opinion that neither Article III nor the Seventh Amendment bars the PTO from conducting *inter parte* review of patents in *MCM Portfolio, LLC v. Hewlett-Packard Co.*, 812 F. 3d 1284 (Fed. Cir. 2015). If an administrative adjudicative scheme comports with Article III, the Seventh Amendment “poses no independent bar.”<sup>40</sup>, only where Article III compels Congress to assign adjudication of particular claims to federal courts, or where Congress chooses to do so, does the Seventh Amendment guarantee the parties “a right to a jury trial whenever the cause of action is legal in nature.”<sup>41</sup>

Greene Energy argues that the Seventh Amendment provides in pertinent part that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved” (U.S. Const. amend. VII). The Seventh Amendment guarantees the right to a jury trial only of those claims that are adjudicated in Article III courts. Thus, “if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal in nature.”<sup>42</sup> In contrast, if Congress has

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<sup>39</sup> *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 370 (1888).

<sup>40</sup> *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54 (1989).

<sup>41</sup> *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54 (1989).

<sup>42</sup> *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54 (1989).



permissibly assigned “the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a non-jury factfinder.” “Congress may decline to provide jury trials” where the action involves “statutory rights that are integral parts of a public regulatory scheme and whose adjudication Congress has assigned to an administrative agency”<sup>43</sup>

*Inter partes* review would not violate the Seventh Amendment even if the application of the jury trial right to patent claims depends solely on whether the claims at issue were historically tried before juries. *Inter partes* review provide no right to monetary damages, it can only decide the cancellation of a patent. Claims for annulment or cancellation of a patent, as distinct from claims of patent infringement, were traditionally brought before courts of equity, not resolved by juries<sup>44</sup>. Prior to the existence of administrative avenues for patent reconsideration, that “the appropriate tribunal for the annulling of a grant or patent from the government” is “the chancery jurisdiction and its mode of proceeding” (Lemley, 2013).

The U.S. Supreme Court heard oral arguments on November 27, 2017. Justice Ruth Ginsburg asked attorney Allyson Ho whether or not the Patent Office could correct the errors made, like missing prior art (Ho, 2017). Ho stated they believed the Patent Office can correct just not through adjudication. She went on to argue that the *ex parte* reexaminations were perfectly adequate and consistent for Article III (Ho, 2017).

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<sup>43</sup> *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987) (“[T]he Seventh Amendment is not applicable to administrative proceedings”); *Atlas Roofing Co. v. Occupational Safety & Health Comm'n*, 430 U.S. 442, 455 (1977) “[W]hen Congress creates new statutory ‘public rights,’ it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment”; *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974).

<sup>44</sup> *Mowry v. Whitney*, 81 U.S. (14 Wall.) 434, 440 (1872).

The Court held a discussion on the history of patent revocation as it stood during English common law. A number of Justices questioned the Petitioner when she was trying to draw around IPRs being an unconstitutional exercise of judicial power by the executive branch, while other Patent Office proceedings, such as reexamination or interference proceedings, are not. When the Petitioner argued that the difference in IPR proceedings that made them problematic was the high level of third party involvement, the Justices came back with other examples of disputes between parties that are resolved by administrative bodies without violating the Constitution such as bankruptcy cases and proceedings before Magistrates<sup>45</sup>.

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<sup>45</sup> The Court looked at the constitutionality of the Bankruptcy Court when Congress created Article I bankruptcy courts and the 1979 Magistrate Act which authorized magistrates to render final judgment in civil cases and criminal misdemeanor cases referred to them by district judges. Both of these enactments expanded limits on legislative courts and already raised the question between Article I tribunals and Article III courts (Finley, 1980).

## 9. Court's Ruling

On April 24, 2018, the Supreme Court issued its Opinion of the Court. The Court in a 7-2 opinion affirmed the lower court's findings. (U.S. Supreme Court, 2018). Justice Thomas wrote the opinion with Justice Breyer filing a concurring opinion joined by Justices Ginsburg and Sotomayor. Justice Gorsuch filed a dissenting opinion with Chief Justice Roberts joining. *Inter parte* reviews do not violate Article III nor do they violate the Seventh Amendment.

Justice Thomas divides the problem before the Court into two steps, first explaining why “the decision to grant a patent is matter involving public rights.” Once he establishes that point, he argues that, because “[i]nter partes review is simply a reconsideration of that grant, Congress has permissibly reserved the PTO’s authority to conduct that reconsideration.”<sup>46</sup> The Court held that “Congress has significant latitude to assign adjudication of public rights to entities other than Article III courts”<sup>47</sup>. The Court believes *inter parte* reviews fall squarely within the public-rights doctrine. *Inter parte* reviews are simply a reconsideration of granting a decision of a patent which is a matter involving public rights. The Court stated that this case did not require them to address the distinction between public and private rights since it has long recognized that the granting of a patent is a public right.<sup>48</sup> By “issuing patents, “the PTO “take[s]

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<sup>46</sup> *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, U.S. Supreme Court October Term, 2017; 16-712 (Argued November 27, 2017; Decided April 24, 2018).

[https://www.supremecourt.gov/opinions/17pdf/16-712\\_87ad.pdf](https://www.supremecourt.gov/opinions/17pdf/16-712_87ad.pdf)

<sup>47</sup> *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, U.S. Supreme Court October Term, 2017; 16-712 (Argued November 27, 2017; Decided April 24, 2018).

[https://www.supremecourt.gov/opinions/17pdf/16-712\\_87ad.pdf](https://www.supremecourt.gov/opinions/17pdf/16-712_87ad.pdf)

<sup>48</sup> *United States v. Duell*, 172 U.S. 576, 582-583 (1899).

from the public rights of immense value, and bestow[s] them upon the patentee.”<sup>49</sup> The Court stated granting patents is one of “the constitutional functions” that can be carried out by “the executive or legislated departments” without “judicial determination.”<sup>50</sup>

The Court clarified that *inter parte* reviews are “a second look at an earlier administrative grant of a patent.”<sup>51</sup> The Court stated the primary distinction between the initial review in granting a patent and the *inter parte* review is that the patent is already issued and that distinction does not make a difference in this case.<sup>52</sup>

When Congress properly assigns a matter to adjudication in a non-Article III tribunal, “the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.”<sup>53</sup> The Court did not adopt a “looks like” test as Oil State argued due to the agency using court-like procedure. The Court rejected the notion that tribunal exercises Article III judicial power because it is “called a court and its decisions called judgments.”<sup>54</sup> The Court went on to say that *inter parte* reviews do not make any binding determination regarding the liability under the law as defined.<sup>55</sup>

Justice Gorsuch is critical of the majority’s reliance on cases sanctioning administrative limitations on franchises. He points out, courts always have held that the invalidation of interests in land, even when granted by the sovereign, necessarily

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<sup>49</sup> *United States v. American Bell Telephone Co.*, 128 U.S. 315, 370 (1888).

<sup>50</sup> *Crowell v. Benson*, 285 U.S. 22, 50 (1932).

<sup>51</sup> *Cuozzo Speed Technologies, LLC v. Lee*, 579 U.S. 2131 (2016).

<sup>52</sup> *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, U.S. Supreme Court October Term, 2017; 16-712 (Argued November 27, 2017; Decided April 24, 2018).

[https://www.supremecourt.gov/opinions/17pdf/16-712\\_87ad.pdf](https://www.supremecourt.gov/opinions/17pdf/16-712_87ad.pdf)

<sup>53</sup> *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

<sup>54</sup> *Williams v. United States*, 289 U.S. 553, 563 (1933).

<sup>55</sup> *Crowell v. Benson*, 285 U.S. 22, 50 (1932).

involves an exercise of the judicial power. He sees no reason to treat invention patents any differently, and thus would reject the scheme for *inter partes* review as an intolerable incursion on the judicial power. He closes with a characteristically rhetorical flair, ornamented by a quote from the Federalist Papers: “[T]he loss of the right to an independent judge is never a small thing. It’s for that reason Hamilton warned the judiciary to take ‘all possible care ... to defend itself against’ intrusions by the other branches.”<sup>56</sup>

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<sup>56</sup> *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, U.S. Supreme Court October Term, 2017; 16-712 (Argued November 27, 2017; Decided April 24, 2018) (7-2 decision)(Gorsuch, dissenting). [https://www.supremecourt.gov/opinions/17pdf/16-712\\_87ad.pdf](https://www.supremecourt.gov/opinions/17pdf/16-712_87ad.pdf)

## **10. Conclusion**

The passage of the AIA in 2011 created new procedural options for the patent system. This was at the urging to curb litigation costs and protect innovators. One of the leading motivations for the development of *inter partes* review was a broadly held perspective that the adjudicative process for patent litigation was working so poorly that it had become a drag on innovation. *Inter parte* review being confirmed as non-Article III tribunals by the U.S. Supreme Court this will go a long way in protecting the legislative vision to advance the economic and technological goals of the AIA. Patents exist as a matter of administrative action. The core benefit of *inter parte* reviews for the patent system is the placement of authority for remedying certain errors in the issuance of patents with the very agency that issued the patent in the first place.

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