USPTO Director Squires Will Personally Make All IPR and PGR Institution Decisions

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Just one day after the USPTO issued proposed rules limiting the availability of *inter partes* review when the claims might be subject to repeated consideration after issuance, Director John Squires published an open letter announcing the "Return of Institution Authority under 35 U.S.C. §§ 314 and 324 to the Director."[1] Simply put, Director Squires announced that he will personally be making all institution decisions rather than referring them to the Patent Trial and Appeal Board (or PTAB). Like the proposed rules, Director Squires's changes announced in the open letter and appended memorandum are likely to limit the availability of post-grant review; unlike the proposed rules, there is no doubt that Director Squires is legally entitled to take this step. But the end result is likely to be the same: fewer patents reviewed by the USPTO in post-grant review.

Under the America Invents Act, the power to make institution decisions in post-grant and *inter partes* review proceedings is vested initially in the Director of the USPTO. 35 U.S.C. §§ 314(a), 324(a). That is not surprising – all of the powers of the USPTO are initially vested in the Director. 35 U.S.C. § 3(a)(1). To carry out most of his or her duties, the Director appoints officers, employees, and agents of the USPTO, including (among others)

administrative patent judges and patent examiners, and delegates specific responsibilities to them. 35 U.S.C. § 3(b)(3). That is, the functions of the USPTO are carried out primarily through the Director delegating power to officers and employees; the officers and employees have no inherent statutory authority.[2]

Making institution decisions in post-grant (IPR and PGR) proceedings is a lot of work. It requires reviewing lengthy, complicated petitions with supporting declarations and exhibits (and potentially the patent owner's preliminary response and supporting materials) and applying the law to the facts identified therein. For that reason, since the start of such proceedings, the Director has delegated responsibility for making institution decisions to the PTAB. Under the delegation, a panel of the PTAB has made the institution decision in writing, providing the basis for its decision and a framework for further proceedings if institution has been granted. The PTAB then has responsibility for conducting the review proceedings after institution. 35 U.S.C. §§ 316(c), 326(c). As with any system, the process has not been perfect, but it has been workable and has developed settled expectations for parties on both sides. Director Squires, however, believes that there are "structural, perceptual, and procedural concerns" that outweigh those expectations. He identified three specific concerns that motivated him to blow up the current system:

- Perception of Self-Incentivization: Director Squires asserts that delegation of institution proceedings may have created a perception – which he admits may be unfounded – that the PTAB may be concerned with "filling its own docket" to remain busy. If the PTAB is not involved in the institution decision, there can be no such perception.
- Bifurcated Procedures for Discretionary Considerations: Director Squires notes that the bifurcated processes that led to a preliminary review before PTAB referral were smart and necessary, but expresses concern over the high institution rates for referred cases.
- Statutory Adherence and Administrative Clarity: Unquestionably, the AIA charges the Director, rather than the PTAB, with making the institution decision.

In light of those concerns, Director Squires is fundamentally changing the institution decision process immediately.[3] He will make all institution decisions personally, in consultation with at least three administrative patent judges from the PTAB. He will then issue either a summary notice granting or denying institution. In cases involving "novel or important factual or legal issues," he may issue a decision on institution addressing those issues. And if he decides "detailed treatment of issues raised in a petition is appropriate (e.g., complex claim construction issues, priority analysis, or real party in interest determination)," he may refer the institution decision to one or more administrative patent judges from the PTAB. For the most part, however, petitioners will simply get a thumbs up or thumbs down.

The Director's decision will have two major effects.

First, requiring that he personally consider each institution decision will create a bottleneck in the process. Given that the timing for making the institution decision is set statutorily (*see* 35 U.S.C. § 314(b)), that bottleneck cannot be relieved by extending the review process, only by spending less time on each review. That is, Director Squires will have less time himself than the nearly 200 administrative patent judges that constitute the PTAB and will therefore have to perform a shallower dive into the petitions. That may align with the USPTO's drive to avoid looking for reasons to find patents invalid (as it has suggested already with regard to § 101).

Second, parties will have less information about how the USPTO views the merits of a validity dispute from the general absence of a reasoned institution decision. The presence or absence of reasoning has no impact on any

appeal of an institution decision because there can be no appeal of an institution decision as a matter of law. 35 U.S.C. § 314(d) ("The determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable."). But the reasoning of the institution decision has been critically important in framing the remainder of the validity dispute between the parties, especially when the post-grant proceedings have been instituted. For example, past institution decisions have indicated which of several grounds were the basis of institution (and conversely, which arguments the PTAB had not found convincing). Parties will now be flying blind into the rest of the proceedings and will have to address all challenged claims and all grounds for potential invalidation.

Under these circumstances, the job of a petitioner has gotten more challenging. A petition must, of course, lay out all of the grounds upon which *inter partes* or post-grant review is sought. But it must now make its points more succinctly and clearly, so that they can be understood on a more cursory reading. There will be a premium on making points quickly. In addition, clients on both sides of petitions must be prepared for the increased expense and difficulty that will result from not having a narrowing institution decision to guide them (whether in the post-grant proceedings or in related litigation). Parties will not know what the issues for review are in granted petitions, and will not know whether a decision has been made on the merits or the Director's discretion in rejected petitions. All in all, post-grant proceedings will be less useful and more expensive, which may drive more disputes to the courts rather than the USPTO. And given the rules promulgated the day before, that may be part of the point.

For questions pertaining to the aforementioned rules, please reach out to Partner, Joshua Rich (jrich@lippes.com) to discuss further.

[1] The letter is available at https://www.uspto.gov/sites/default/files/documents/open-letter-and-memo_20251017.pdf
[2] There are narrow exceptions for Deputy Director of the USPTO "who shall be vested with the authority to act in the capacity of the Director in the event of the absence or incapacity of the Director" and the Commissioner of Patents and Commissioner of Trademarks, who "serve as the chief operating officers for the operations of the Office relating to patents and trademarks, respectively, and shall be responsible for the management and direction of all aspects of the activities of the Office that affect the administration of patent and trademark operations, respectively." 35 U.S.C. § 3(b)(1) & (2). Those officers are not relevant to the authority being exercised here.
[3] The change in procedures applies to any petition not referred to a panel of the PTAB for consideration of the merits prior to October 20, 2025. Accordingly, all newly-filed petitions, as well as petitions undergoing review for discretionary considerations will have their institution decisions made by the Director.