INTRODUCTION

Perhaps due in part to Justice Scalia’s passing in February 2016, this year was a particularly light one on the administrative law front at the U.S. Supreme Court. Only one Supreme Court decision—*Cuozzo Speed Technologies, LLC v. Lee*, discussed below—dealt primarily with agency adjudication. The chapter this year will thus focus more on developments in the circuit courts (Part I), as well as developments at the agency level (Part II), and reports and recommendations from the Administrative Conference of the United States (ACUS) (Part III).

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1. *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131 (2016). The Supreme Court reviewed a number of other cases arising from agency adjudications, but the Court’s holdings in those cases did not, in our judgment, address core issues or developments in the law of agency adjudication. See, e.g., *Torres v. Lynch*, 136 S. Ct. 1619, 1622 (2016) (clarifying what is an “aggravated felony” under the Immigration and Nationality Act); U.S. Army Corps of Engineers v. Hawkes Co., 136 S. Ct. 1807, 1813 (2016) (holding that a jurisdictional determination by the Army Corps of Engineers stating the presence or absence of waters of the United States on a particular property is a final agency action judicially reviewable under the APA).
PART I. JUDICIAL DEVELOPMENTS

A. Patent Adjudications, Judicial Review, and *Chevron* Deference

As noted above, the Supreme Court decided only one case that dealt with core issues of agency adjudication: *Cuozzo Speed Technologies, LLC v. Lee.*

In *Cuozzo*, the Court addressed two related questions regarding “inter partes review” by the Patent Trial and Appeal Board (PTAB): (1) whether decisions by the PTAB to institute *inter partes* review are judicially reviewable and (2) whether the U.S. Patent and Trademark Office (PTO), by regulation, could require applying the “broadest reasonable construction” standard to a claim brought via *inter partes* review.

By way of background, Congress created the PTAB in 2011 as part of the Leahy-Smith America Invents Act, which was “the most significant overhaul to our patent system, since the founding fathers first conceived of codifying a grand bargain between society and invention.” Inter partes review allows a third party to request that the PTAB, which is part of the PTO, reconsider and cancel claims in previously issued patents on the basis of prior art.

*Cuozzo* involved a patent granted to Giuseppe Cuozzo for a GPS linked speedometer that used a driver’s location and a multi-colored needle to alert the driver when he or she was speeding. In 2012, Garmin filed a petition seeking *inter partes* review of Cuozzo’s patent. The PTAB agreed to review three of the patent claims at issue and ruled in favor of Garmin, cancelling those claims under review. Cuozzo sought judicial review of the PTAB’s decision. The Federal Circuit rejected Cuozzo’s arguments and held that the decision by the PTO to institute *inter partes* review was nonappealable and that the interpretation adopted by the PTO was proper.
Chapter 1: Administrative Adjudication

The Supreme Court agreed. Justice Breyer, writing in part for a unanimous Court and in part for a majority, looked at the text of the applicable provision (35 U.S.C. § 314(d)), the Administrative Procedure Act (APA), prior interpretations, and the overall purpose of the act at issue. Based on this review, the Court concluded the decision by the PTO to institute *inter partes* review was nonappealable. Justice Breyer was careful to note, however, that the Court’s opinion was limited to “questions that are closely tied to the application and interpretation of statutes related to the PTO’s decision to initiate *inter partes* review” and did not cover or change the reviewability of constitutional questions or those raised by other unrelated provisions.

With respect to the PTO regulation requiring the agency give the broadest reasonable construction to a claim brought in an *inter partes* review, the Court again agreed with the Federal Circuit. Consistent with *Mead* and *Chevron*, the Court determined that Congress gave the PTO rulemaking authority and that there was in fact a “gap” or “ambiguity” in the statute regarding the standard of review. In light of that ambiguity, the Court concluded the PTO regulation was reasonable. As one of us has explored elsewhere prior to the Court’s decision in *Cuozzo*, the Court’s application of *Chevron* deference here could signal a broader willingness by the Court to apply *Chevron* deference to the PTO’s—and perhaps the PTAB’s—substantive interpretations of the patent act.

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7. *Cuozzo*, 136 S. Ct. at 2141 (“The text of the ‘No Appeal’ provision, along with its place in the overall statutory scheme, its role alongside the Administrative Procedure Act, the prior interpretation of similar patent statutes, and Congress’ purpose in crafting inter partes review, all point in favor of precluding review of the Patent Office’s institution decisions.”).

8. *Id.*

9. *Id.* at 2143–44. Relevant here, Justice Breyer discussed the differences between *inter partes* review and judicial proceedings and concluded that, despite certain adjudicatory characteristics, “inter partes review is less like a judicial proceeding and more like a specialized agency proceeding.” *Id.* at 2143. For Justice Breyer, this meant the agency was not required to apply the “ordinary meaning” standard for claim construction that the district courts use. *Id.*

10. *Id.* at 2144–46.

11. Christopher J. Walker, *Chevron Deference and Patent Exceptionalism*, 65 Duke L.J. Online 149, 155–56 (2016); see also Chris Walker, *Some Thoughts on Chevron and Patent Exceptionalism from Today’s Supreme Court Decision in Cuozzo*, Yale J. on Reg.: Notice & Comment (June 20, 2016), available at https://perma.cc/HCP8-MWUL (last visited Apr. 16, 2017) (“*Cuozzo* seems to signal that the Court is receptive to more aggressive arguments from the PTO for *Chevron* deference of substantive patent law, especially after the enactment of the America Invents Act. Perhaps *Cuozzo* is one of the first chapters chronicling the demise of patent exceptionalism.”).
Although Parts I and III of the decision were unanimous, Justice Thomas filed a concurring opinion with respect to Part II. Justice Thomas agreed with the majority’s conclusion, but disagreed with its application of Chevron and questioned the continued use of the doctrine altogether. Justice Alito, joined by Justice Sotomayor, dissented with respect to Part II. The dissent disagreed with the majority’s reading of Congress’s intent and instead would have found in favor of reviewability.

With the recent statutory creation of the PTAB and inter partes review, we expect to see a substantial amount of litigation concerning its procedures in the coming years. To provide but one more example, in Ethicon Endo-Surgery, Inc. v. Covidien LP, the Federal Circuit considered whether there was a due process violation when the PTO assigned the same PTAB panel to make the final decision as had initially decided to institute inter partes review. The PTO decided to give the same panel both decisions based on efficiency concerns. Ethicon, whose patent was successfully challenged by Covidien in this case, complained this practice was an unconstitutional combination of functions.

The Federal Circuit disagreed. The court first found jurisdiction since this appeal was for review of a final action rather than for review of the decision to institute inter partes review. The court then rejected the constitutional claim, holding that there was no issue since both decisions were adjudicatory—as opposed to investigative or prosecutorial—and finding no evidence of bias. The Federal Circuit, seeing “no due process concerns in combining

13. *Id.* at 2151 (Alito, J., dissenting) (“Thus, while the decision to institute inter partes review is ‘final and nonappealable’ in the sense that a court cannot stop the proceeding from going forward, the question whether it was lawful to institute review will not escape judicial scrutiny. This approach is consistent with the normal rule that a party may challenge earlier agency rulings that are themselves ‘not directly reviewable’ when seeking review of a final, appealable decision.”).
15. *Id.* at 1029.
16. *Id.* at 1030. (“[T]he decision to institute and the final decision are adjudicatory decisions and do not involve combining investigative and/or prosecutorial functions with an adjudicatory function.”).
17. *Id.* at 1030–31 (“To rise to the level of presenting actual bias, the challenger must show that an adjudicator is exposed to unofficial, ‘extra-judicial’ sources of information. . . . There is no allegation of exposure to extra-judicial information here.”).
the functions of initial decision and final disposition in the same Board panel,” affirmed the agency decision.18

B. Mandamus as Means to Challenge Agency Adjudication Delays

In American Hospital Association v. Burwell, the D.C. Circuit held that a federal court has jurisdiction to consider a mandamus action to compel agency action in response to a significant backlog of administrative appeals for Medicare reimbursement claims.19

The Medicare Act created a multi-tiered administrative appeals process with statutorily prescribed deadlines at each step. On top of this appeals process is an additional process, an auditing program (The Medicare Auditing Program), for reviewing Medicare claim payments. The decisions of the auditing process are also appealable. In total, the administrative appeal process, as described in the statute, should take roughly a year to complete. By the time this case was before the D.C. Circuit, however, the administrative law judges (ALJs) working on Medicare-related appeals were taking an average of 572 days to reach a decision.20

With a financial stake in the outcome of the pending appeals, the American Hospital Association (Association) and its hospitals sought a writ of mandamus to compel the U.S. Department of Health and Human Services (HHS) Secretary to adhere to the statutory deadlines. The district court dismissed the case for lack of jurisdiction. The D.C. Circuit reversed. Looking at the nature of the writ, the D.C. Circuit walked through the three jurisdictional requirements necessary in mandamus cases21 and found the Association had met all three. Finding the jurisdictional requirements met, the D.C. Circuit proceeded to provide its thoughts on the “equitable grounds,” discussing the arguments for and against mandamus in light of the six factors that the D.C. Circuit first articulated in Telecommunications Research & Action Center v. Federal Com-

18. Id. at 1031.
20. Id. at 186–87.
21. “To show entitlement to mandamus, plaintiffs must demonstrate (1) a clear and indisputable right to relief, (2) that the government agency or official is violating a clear duty to act, and (3) that no adequate alternative remedy exists . . . unless all are met, a court must dismiss the case for lack of jurisdiction.” Id. at 189 (citing U.S. v. Monzel, 614 F.3d. 528 (D.C. Cir. 2011)).