Our _____ Patent System

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Twenty years ago, the Court of Appeals for the Federal Circuit was *the* dominant institution in the patent system. But the allocation of power over patent law has changed in many ways:

- In the America Invents Act of 2011, Congress shifted power to the Patent and Trademark Office (PTO) by creating the Patent Trial and Appeal Board (PTAB) and expanding the avenues for administrative review of patent validity.

- Decisions in PTAB proceedings are reviewed by the Federal Circuit—indeed, PTAB appeals now account for most of the Circuit's patent docket—but, because of the fact-intensive nature of PTAB disputes, the Circuit applies a deferential standard of review, limiting its ability to influence patent *law*.

- Though the Federal Circuit's power to review the PTAB is limited, in *United States v. Arthrex* (2021), the Supreme Court held that, as a matter of constitutional law, the director of the PTO (who is removable at will by the President) must be allowed to unilaterally review PTAB decisions.

- In early 2025, the acting PTO director captured even more power by giving herself unconstrained authority to decide whether to institute PTAB proceedings at all.

- And, on the federal courts, the most important patent judges sit not on the Federal Circuit but on district courts in Texas and Delaware, where patent litigation is heavily concentrated.

In short, power over the patent system is now concentrated in a small number of executive officers and district judges—all of whom have self-interests that might not align with the public's interest. It's probably too early to definitively *name* our post-Federal Circuit patent system. (Is it post-technocratic? Oligarchic? Plutocratic? Corrupt? Unintentional? Or something else entirely?) But it seems clear that, for the foreseeable future, patents, like many aspects of American law and life, won't be immune from the winds of politics and the whims of politicians.

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