

UNITED STATES V. ARTHREX, INC.: CLARIFYING APPOINTMENTS CLAUSE REQUIREMENTS FOR ADMINISTRATIVE JUDGES

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INTRODUCTION

Article II of the United States Constitution details the methods by which presidential subordinate officers must be appointed. Despite its presence in the Constitution’s original text, the Appointments Clause remains ambiguous. The Clause provides different appointment processes for principal and “inferior officers,” but does not distinguish between these officers’ functions. In *United States v. Arthrex, Inc.*, the Supreme Court must clarify the relationship between an Executive officer’s responsibilities and their appointment process.

Arthrex, Inc. (hereinafter “Arthrex”), a medical device manufacturer, holds a patent for a device that reattaches soft tissue to bone (the “907 patent”).¹ In 2015, the company filed suit in Federal District Court against Smith & Nephew, Inc. (hereinafter “Smith & Nephew”), a fellow medical device company. Arthrex alleged that the latter’s soft tissue reattachment device infringed the 907 patent.² In response, Smith & Nephew requested that the United States Patent and Trademark Office (“USPTO”) review the patent’s validity.³ Both parties agreed to resolve the dispute through a USPTO administrative proceeding called inter partes review (“IPR”).⁴ The IPR determined that Arthrex’s 907 patent was invalid because the design had been publicly disclosed before being granted, thus making it “prior art.”⁵ Arthrex appealed this decision to the Federal Circuit, but this time raised a constitutional argument as to why Smith & Nephew should lose: The IPR’s adjudicators, administrative patent judges (“APJs”), were principal officers whose appointments violated the Constitution.⁶ During this appeal, Petitioner United States intervened.⁷

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1. Brief for Arthrex, Inc. at 8, U.S. v. Arthrex, Inc., Nos. 19-1434, 19-1452, & 19-1458 (U.S. Dec. 23, 2020) [hereinafter Brief for Arthrex].

2. Opening Brief for Smith & Nephew, Inc. and Arthrocare Corp. at 9, U.S. v. Arthrex, Inc., Nos. 19-1434, 19-1452, & 19-1458 (U.S. Nov. 25, 2020) [hereinafter Brief for Smith & Nephew].

3. See Brief for Arthrex, *supra* note 1, at 9 (referencing the Patent Office).

4. Brief for Smith & Nephew, *supra* note 2, at 9.

5. Brief for Arthrex, *supra* note 1, at 9.

6. Brief for Smith & Nephew, *supra* note 2, at 10–11.

7. Brief for the United States at II, U.S. v. Arthrex, Inc., Nos. 19-1434, 19-1452, & 19-1458 (U.S. Nov. 25, 2020) [hereinafter Brief for U.S.].

The Appointments Clause of the United States Constitution provides that “[o]fficers of the United States” are to be nominated by the President and appointed “by and with the Advice and Consent of the Senate.”⁸ Officials who *must* be appointed this way are called principal officers.⁹ Article II further provides Congress discretion to create an alternative appointment process for “inferior officers.”¹⁰ These “inferior officers” may be appointed by “the President alone . . . the Courts of Law[] or . . . the Heads of Departments.”¹¹

Originally a mere patent dispute, *United States v. Arthrex, Inc.* has reached the Supreme Court with two outstanding questions.¹² First, are APJs principal officers who *must* be nominated by the President and confirmed by the Senate? Second, if APJs are principal officers, what should be done to cure the constitutional defect in their current appointments? The implications of this case are significant. The Executive Branch employs approximately 12,000 adjudicative officers (also known as administrative judges).¹³ If the Court determines APJs can be classified as principal officers, then the Court will likely hold the appointments of at least hundreds of similar adjudicators constitutionally infirm.¹⁴

This commentary first provides an overview of the USPTO and of APJs, and then discusses the case’s applicable legal doctrines. The analysis will then focus on the parties’ briefs and oral arguments. Finally, the merits of the respective positions will be evaluated, concluding that Arthrex should prevail on its claims.

I. FACTS

This section will first summarize the history of the United States Patent and Trademark Office and its administrative patent judges. Subsequently, the rationale behind the Federal Circuit’s decision will be discussed.

A. History of the USPTO and APJs

Since the Republic’s founding, the Executive Branch has been comprised of numerous Departments staffed by both principal and “inferior officers.”¹⁵ Founded in 1836,¹⁶ the USPTO is a Department of Commerce agency¹⁷ that oversees the granting and revoking of patents.¹⁸ The USPTO is supervised by its Director, a principal officer.¹⁹ APJs serve under the guidance of the Director; these judges hear appeals from various USPTO decisions.²⁰ From their creation in 1861 up

8. U.S. CONST. art. II, § 2, cl. 2.

9. *Edmond v. U.S.*, 520 U.S. 651, 659 (1997).

10. U.S. CONST. art. II, § 2, cl. 2.

11. *Id.*

12. This case comes before the Court on appeal from the United States Court of Appeals for the Federal Circuit. The court below found APJs to be principal officers based on a three-factor test derived from *Edmond v. United States*. As a remedy, the court severed APJs’ for-cause removal protections, to sway the balance of factors back towards “inferior officer” status. Subsequently, the court declined to rehear the case en banc. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1325, 1338 (Fed. Cir. 2019), *reh’g denied*, 953 F.3d 760 (Fed. Cir. 2020).

13. Brief for Smith & Nephew, *supra* note 2, at 42.

14. *Id.* at 40.

15. *See id.* at 21–22 (detailing the 1789 creations of the Department of Foreign Affairs and Department of War); Brief for Arthrex, *supra* note 1, at 27 (detailing the Treasury Department’s creation in 1789).

16. Brief for Arthrex, *supra* note 1, at 3.

17. Brief for U.S., *supra* note 7, at 3.

18. *See* 35 U.S.C. §§ 1–2.

19. 35 U.S.C. §§ 3(a)(1)–(2).

20. 35 U.S.C. § 6(a)–(b).

until 1975, APJs and their predecessors²¹ were appointed by the President with Senate confirmation.²² Since 1975, however, the Secretary of Commerce has appointed APJs “in consultation with the [USPTO] Director.”²³ Since then,²⁴ APJs have had Title 5 tenure protections which limits removal “for such cause as will promote the efficiency of the service.”²⁵ Title 5 protections originated with the 1946 Administrative Procedure Act (“the APA”), which sought to preserve judicial impartiality in administrative proceedings.²⁶ Since the APA’s enactment, the “traditional model” for administrative judge decisions has been “transparent review by accountable agency heads” who retain power to reject decisions.²⁷

APJs serve on the Patent Trial and Appeal Board (the “PTAB”).²⁸ In 2011, Congress introduced several adjudicatory procedures²⁹ including the inter partes review, a “party-directed, adversarial,” process akin to litigation.³⁰ In IPR, the PTAB reviews and cancels any issued patent it deems unpatentable.³¹ The Director retains final authority over whether to grant IPR,³² and IPR outcomes are reviewed by the U.S. Court of Appeals for the Federal Circuit.³³ The Director can choose which members will (and will not) adjudicate a proceeding,³⁴ can create PTAB rules and regulations,³⁵ and may give policy directives.³⁶ No PTAB decision (IPR or otherwise) is precedential without Director approval.³⁷

B. The Federal Circuit’s Decision

In its *Arthrex, Inc.* opinion, the Federal Circuit only concerned itself with Arthrex’s constitutional challenge.³⁸ It agreed with Arthrex that APJs are principal officers whose appointment process is therefore unconstitutional.³⁹ The court relied on *Edmond v. United States* in

21. Before 1999, APJs were known as “examiners-in-chief.” Their offices were created by Congress in 1861. Brief for Arthrex, *supra* note 1, at 3, 5.

22. *See id.* at 4 (summarizing the history of presidentially-appointed patent judges).

23. *See id.* Between 1999 and 2008, Congress authorized the Director to nominate and appoint APJs. However, after the constitutionality of this authority was questioned (the Director is not a department head), Congress reallocated the power back to the Secretary of Commerce. Act of Aug. 12, 2008, Pub. L. No. 110–313, §1(a), 122 Stat. 3014, 3014 (codified as amended at 35 U.S.C. § 6(a)).

24. *See* Act of Jan. 2, 1975, Pub. L. No. 93–601, §2, 88 Stat. 1956, 1956 (current version at 35 U.S.C. § 3(c)).

25. 5 U.S.C. § 7513(a).

26. Brief for Arthrex, *supra* note 1, at 50–51.

27. *Id.* at 51.

28. 35 U.S.C. § 6(a). The PTAB consists of APJs, the Director, and other officers. *Id.* It conducts each review with at least three members, whom the Director personally chooses. 35 U.S.C. § 6(c). Until 2011, the PTAB reviewed patent revocations through “examination” processes. *See* Brief for Arthrex, *supra* note 1, at 6 (referencing the switch from an examination to an adjudicative proceeding for inter partes reexamination); *see also* H.R. REP. NO. 112-98, pt.1, at 45–46 (2011) (explaining that third-parties that challenged patents through these processes had extremely limited roles in them once initiated). That year, Congress decided to make PTAB processes “objective, transparent, clear, and fair” by giving disputants more control over cases. 157 CONG. REC. S1380 (2011) (statement of Sen. Jon Kyl).

29. *See* Brief for Arthrex, *supra* note 1, at 6–7 (detailing the various new procedures).

30. *SAS Inst. v. Iancu*, 138 S.Ct. 1348, 1355 (2018).

31. *Cuozzo Speed Technologies v. Lee*, 136 S.Ct. 2131, 2136 (2016).

32. 35 U.S.C. § 314(d).

33. *See* 35 U.S.C. § 319 (giving no such power to the Director); *see also* 35 U.S.C. § 141 (giving the Federal Circuit exclusive review of PTAB decisions in post-grant reviews and ex parte reexaminations).

34. 35 U.S.C. § 6(c).

35. 35 U.S.C. § 2(b)(2)(A).

36. 35 U.S.C. § 3(a)(2)(A).

37. U.S. PAT. AND TRADEMARK OFF., PATENT TRIAL AND APPEAL BOARD, STANDARD OPERATING PROCEDURE 2 at 8 (10th rev. 2018).

38. *See Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1338–39 (Fed. Cir. 2019) (vacating the PTAB’s decision because its APJs were unconstitutionally appointed and therefore not reaching the merits of the case), *reh’g denied*, 953 F.3d 760 (Fed. Cir. 2020).

39. *Id.* at 1325.

its analysis—deriving at least three factors for determining whether APJs are actually “inferior.”⁴⁰ The court opined that⁴¹ at least two of the following must be true for any “inferior officer”⁴²: 1) a principal officer can review and reverse their adjudicative decisions; 2) a principal officer has sufficient “supervision and oversight” over them; and 3) a principal officer can remove them.⁴³ Though APJs were sufficiently subject to the Director’s “supervision and oversight,”⁴⁴ no principal officers reviewed their decisions,⁴⁵ and they could only be removed for-cause.⁴⁶ Seeking the narrowest remedy that still respected Congress’s USPTO design, the Federal Circuit severed Title 5 removal protections from applying to APJs.⁴⁷ Without these protections, APJs become removable at-will—tilting the balance of *Edmond* factors towards classification as “inferior officers.”⁴⁸ The court then vacated the PTAB’s decision and remanded the case back to the USPTO.⁴⁹ All three parties unsuccessfully petitioned for a rehearing en banc.⁵⁰ Several judges, however, dissented from the denial because they disagreed with the court’s initial judgment.⁵¹ On June 25, 2020, all three parties petitioned the Supreme Court for a writ of certiorari, which the Court granted on October 13, 2020.⁵²

II. LEGAL HISTORY

The two issues before the Court entail separate, though sometimes overlapping, legal histories. This section will first analyze the Appointments Clause’s origin and its subsequent judicial understanding. Then, this commentary will evaluate severance doctrine.

A. *The Nature of Administrative Patent Judges*

The Constitution’s Appointments Clause states that: [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . [o]fficers of the United States . . . but the Congress may by Law vest the Appointment of such inferior [o]fficers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”⁵³

The Clause’s default structure for appointments—nomination by the President and confirmation by the Senate—is rooted in concern for political accountability. In *The Federalist Papers*, Alexander Hamilton wrote that this structure ensures both political branches would be

40. *See id.* at 1334 (“We do not mean to suggest that the three factors discussed are the only factors to be considered. However, other factors which have favored the conclusion that [APJs are] . . . inferior officer[s] are completely absent here.”).

41. The court’s rule is largely inspired by the D.C. Circuit’s in *Intercollegiate Broadcasting System v. Copyright Royalty Board*, which applied *Edmond* to Copyright Royalty Judges. *See Intercollegiate Sys. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1338 (D.C. Cir. 2012) (“[*Edmond*] emphasized three factors . . .”), *reh’g denied*, 2012.

42. *See Arthrex*, 941 F.3d at 1335 (finding that two of the three factors weighed towards principal officer status).

43. *See id.* at 1329 (expressing the rule in terms of an appointed official’s supervisory powers, but concluding that neither of the USPTO’s “presidentially-appointed officers . . . exercise[] sufficient . . . supervision over [APJs].”) (emphasis added).

44. *Id.* at 1332.

45. *See id.* at 1331 (“APJs have substantial power to issue final decisions on behalf of the United States without any review by a presidentially-appointed officer . . . [T]his supports a conclusion that APJs are principal officers.”).

46. *Id.* at 1334.

47. *See id.* at 1338 (“[W]e are convinced that Congress would preserve the statutory scheme it created for reviewing patent grants and that it intended for APJs to be inferior officers. Our severance of the limits on removal of APJs achieves this.”).

48. *Id.*

49. *Id.* at 1338–39.

50. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 953 F.3d 760, 761 (Fed. Cir. 2020) (en banc), *cert. granted sub nom.*, 141 S.Ct. 549 (2020).

51. *See id.* at 780 (Dyk, J., dissenting) (finding that severance defies Congressional intent and that there are less disruptive remedies); *id.* at 781 (Hughes, J., dissenting) (determining that APJs are “inferior officers” and that, regardless, severance is not an appropriate remedy); *id.* at 788 (Wallach, J., dissenting) (concluding that APJs are not principal officers).

52. *U.S. v. Arthrex, Inc.*, 141 S.Ct. 549, 550 (2020).

53. U.S. CONST. art. II, § 2, cl. 2.

accountable for bad appointments.⁵⁴ Different concerns likely spurred the more flexible appointment mechanism for “inferior officers.” The Supreme Court believes this flexibility demonstrates the Framers’ concerns that appointments would become “inconvenient” as offices increased.⁵⁵ The Court frames this flexibility as reflective of a tradeoff, where convenience outweighs accountability only when appointing “inferior officers.”⁵⁶

The Appointments Clause does not define “officers” or “inferior officers.”⁵⁷ In *United States v. Germaine*, the Court defined an “officer” as anyone “who can be said to hold an office under the [Federal] government.”⁵⁸ Almost a century later, in *Buckley v. Valeo*, the Court elaborated further, defining an “officer” as “any appointee exercising significant authority pursuant to the laws of the United States.”⁵⁹ As for the difference between principal and “inferior officers,” the Court drew no meaningful distinction until *Morrison v. Olson* in 1988.⁶⁰ There, the officer in question was an independent counsel appointed to investigate Executive Branch officials.⁶¹ The Court declined to distinguish principal from “inferior officers”⁶² but deemed the independent counsel “inferior” because: 1) she could be removed by a superior officer;⁶³ 2) her duties were limited;⁶⁴ and 3) her office had a de facto time limit.⁶⁵

With *Morrison* in mind, the Court finally addressed the differences between principal and “inferior officers” in 1997 with its decision in *Edmond v. United States*, examining the Coast Guard Court of Criminal Appeals (the “Coast Guard Court”). The judges under examination were appointed by the Secretary of Transportation.⁶⁶ The Coast Guard Court’s decisions could be reviewed by the United States Court of Appeals for the Armed Forces.⁶⁷ The appellants argued, in part, that some of the Coast Guard Court judges were principal officers whose appointments were unconstitutional.⁶⁸ In its analysis, the Court first noted that “inferior” generally denotes “a relationship with some higher ranking officer,” so an “inferior officer” must have a superior.⁶⁹ It justified this determination with evidence of how the 1st United States Congress structured Executive officer positions.⁷⁰ The Court also considered the Appointments Clause’s structural

54. See THE FEDERALIST NO.77 (Alexander Hamilton) (“If an ill appointment should be made, the Executive for nominating, and the Senate for approving, would participate, though in different degrees, in the opprobrium and disgrace.”). Hamilton also believed that public accountability would stop the Executive Branch from abusing its necessarily broad, discretionary powers. See THE FEDERALIST NO.70 (Alexander Hamilton) (emphasizing the importance of Executive “energy” in ensuring Federal laws are observed, while noting that the “greatest securities [the people] can have for the faithful exercise of any delegated power” is “the restraints of public opinion.”).

55. See *U.S. v. Germaine*, 99 U.S. 508, 509–10 (1878) (“But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments.”).

56. See *Edmond v. U.S.*, 520 U.S. 651, 660 (1997) (“[C]onvenience was deemed to outweigh the benefits of the more cumbersome procedure only with respect to the appointment of ‘inferior [o]fficers.’”).

57. U.S. CONST. art. II, § 2, cl. 2.

58. *Germaine*, 99 U.S. at 510.

59. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

60. See *Morrison v. Olson*, 487 U.S. 654, 672–73 (1988) (noting that merely a “few previous decisions” required determining the status of a particular officer).

61. *Id.* at 667.

62. *Id.* at 671.

63. See *id.* (“[T]he fact that she can be removed by the Attorney General indicates that she is to some degree ‘inferior’ in rank and authority.”).

64. See *id.* (“[The] grant of authority does not include any authority to formulate policy for the . . . Executive . . .”).

65. See *id.* at 672 (“[W]hen [the] task is over the office is terminated, either by the counsel herself or . . . the Special Division.”).

66. *Edmond v. United States*, 520 U.S. 651, 653 (1997). The judges heard appeals from court-martials. *Id.*

67. *Id.*

68. *Id.* at 655–56.

69. *Id.* at 662.

70. See *id.* at 663–64 (discussing the Department of Foreign Affairs and the Department of War which designated supervisors as principal officers).

concern for political accountability.⁷¹ With these two principles in mind, the Court ruled that an “inferior officer” is one “whose work is directed and supervised *at some level*” by a principal officer.⁷²

Though the Court ultimately held the Coast Guard Court judges to be “inferior officers,”⁷³ its analysis did not clearly define what “directed and supervised at some level” entails.⁷⁴ The Court considered several different factors in reaching its decision but did not explain how to weigh them.⁷⁵ For instance, the Court factored in the ability of the Judge Advocate General (“JAG”) to remove judges at-will but went no further than to opine that “[t]he power to remove officers . . . is a powerful tool for control.”⁷⁶ The Court also placed substantial weight on the ability of principal officers to review Coast Guard Court decisions.⁷⁷ While acknowledging this review power was limited, the Court said scope was irrelevant because “[w]hat is significant is that the [Coast Guard Court] judges . . . have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.”⁷⁸

Since 1997, only one Supreme Court case has directly applied *Edmond* to an Appointments Clause question. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court considered whether the Public Company Accounting Oversight Board (the “PCAOB”) of the Securities and Exchange Commission (the “SEC”) consisted of principal or “inferior officers.” The Court noted that the SEC could manage the PCAOB’s budget, regulate its operations, relieve it of authority, and amend its sanctions.⁷⁹ Combined with the SEC’s ability to remove PCAOB members at-will,⁸⁰ these powers gave the Court “no hesitation” in finding that PCAOB members were “inferior officers.”⁸¹ Nevertheless, the Court did not expressly specify a weight for any one factor.⁸²

Therefore, as it currently stands, an “inferior officer” is one “whose work is directed and supervised at some level by” a principal officer.⁸³ The meaning of “directed and supervised at some level” remains a point of contention.

B. Severance as a Remedy

Severance, when a court invalidates a portion of an unconstitutional statute to make it

71. *See id.* at 662–63 (“It is not enough that other officers . . . formally maintain a higher rank . . . in the context of a clause designed to preserve political accountability relative to important government assignments . . .”).

72. *Id.* at 663 (emphasis added).

73. *Id.* at 666.

74. *See Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1329 (Fed. Cir. 2019) (“These factors are strong indicators of the level of control and supervision appointed officials have over the officers and their decision-making on behalf of the Executive Branch.”) (noting that the Court in *Edmond* emphasized three factors without specifying a rule for determining whether an individual is principal or inferior officer), *reh’g denied*, 953 F.3d 760 (Fed. Cir. 2020).

75. *Edmond*, 520 U.S. at 664–65; *see also Arthrex*, 941 F.3d at 1329 (assigning equal weight to all three distilled *Edmond* factors).

76. *Edmond*, 520 U.S. at 664.

77. *See id.* (“The [JAG’s] control . . . is . . . not complete . . . [he] has no power to reverse decisions . . . [but] [t]his . . . power does reside . . . in another Executive Branch entity, the Court of Appeals for the Armed Forces.”). The Court of Appeals for the Armed Forces is administered by the Department of Defense. 10 U.S.C. § 941.

78. *Edmond*, 520 U.S. at 665.

79. *Free Enter. Fund v. Pub. Acct. Oversight Bd.*, 561 U.S. 477, 504 (2010).

80. In the original authorizing statute, the SEC could only remove PCAOB members for-cause. However, because the SEC itself could not be removed by the President at-will, the PCAOB had two levels of removal insulation. The Court held this unconstitutional, and its remedy was to sever the PCAOB’s own for-cause removal requirement. *Id.* at 486–87, 508–09.

81. *See id.* at 510 (“Given . . . the [SEC] power to remove Board members at[-]will, and given the . . . other [SEC] oversight authority, we have no hesitation in concluding that under *Edmond* the Board members are inferior officers . . .”).

82. *But see id.* at 504 (finding removal power to be a stronger supervisory mechanism than “[b]road power over [PCAOB] functions,” though this statement was made *in dicta*).

83. *Edmond*, 520 U.S. at 663.

constitutional, derives from the Court’s cognizance that a “ruling of unconstitutionality frustrates the intent of the elected representatives of the people.”⁸⁴ Therefore, “a court should refrain from invalidating more of [a] statute than necessary.”⁸⁵ Severance is only appropriate if: 1) it cures *all* constitutional defects; 2) the statute can function without the severed portion; and 3) the statute remains evidently consistent with Congress’s “basic objectives.”⁸⁶

In *Free Enterprise Fund*, the Court determined that severance would mitigate the Appointments Clause issue.⁸⁷ PCAOB members benefitted from two layers of for-cause removal protection: SEC Commissioners could only remove them for-cause, but the Commissioners *themselves* were only removable for-cause by the President.⁸⁸ The Court held that this two-level insulation from at-will removal violated the Appointments Clause because it obstructed presidential accountability for PCAOB actions.⁸⁹ The Court remedied the situation by severing for-cause removal from the PCAOB’s authorizing statute.⁹⁰ It justified this decision by finding that the remainder of the authorizing statute could independently function, and that there was no evidence Congress “would have preferred no [PCAOB] at all to a [PCAOB] whose members are removable at[-]will.”⁹¹

Most recently, in *Seila Law v. Consumer Financial Protection Bureau*, the Supreme Court severed a for-cause removal restriction on the Director of the Consumer Financial Protection Bureau (the “CFPB”).⁹² The Court found that even without the restriction, the CFPB’s authorizing statute “remain[s] fully operative” with regards to the Bureau’s “structure and duties.”⁹³ And there was no evidence to suggest Congress preferred the CFPB be found entirely unconstitutional; in fact, the authorizing statute expressly required that its remainder stay effective in the event of severance.⁹⁴

The Court has firmly established that severance is appropriate when a statute can maintain its underlying purpose without the severed portion. Precedent regarding the Appointments Clause, however, is less clear. Therefore, the novelty of *Arthrex, Inc.* lies in this latter issue.

III. UNITED STATES V. ARTHREX, INC.

In this case, both Petitioner and Respondent Smith & Nephew argue that administrative patent judges are “inferior officers.” Respondent Arthrex maintains its position from appeal that administrative patent judges are principal officers. Despite these differences, all parties reject the Federal Circuit’s three-factor *Edmond* test and instead present alternative *Edmond* interpretations. Each party believes their own interpretation reflects historical understanding and political practice.

84. *Regan v. Time*, 468 U.S. 641, 652 (1984). Use of severance to remedy an unconstitutional statute goes back to the early days of the Republic. Indeed, in the 1803 case *Marbury v. Madison*, the Court severed an unconstitutional provision of the Judiciary Act of 1789. *Marbury v. Madison*, 5 U.S. 137, 179–80 (1803); *see also* *Barr v. Am. Ass’n of Pol. Consultants*, 140 S.Ct. 2335, 2350 (2020) (“The Court’s power . . . to partially invalidate a statute . . . has been firmly established since *Marbury v. Madison*.”).

85. *Regan*, 468 U.S. at 652.

86. *U.S. v. Booker*, 543 U.S. 220, 258–59 (2005).

87. *Free Enter. Fund*, 561 U.S. at 508 (2010).

88. *Id.* at 486–87.

89. *See id.* at 508 (severing for-cause removal for PCAOB members because “Congress may [not] deprive the President of adequate control over the [PCAOB] . . .”).

90. *Id.*

91. *Id.* at 509.

92. *Seila Law v. Consumer Fin. Prot. Bureau*, 140 S.Ct. 2183, 2211 (2020).

93. *Id.* at 2209.

94. *See id.* (“[N]othing in the text or history . . . demonstrates Congress would have preferred *no* CFPB to a CFPB supervised by the President.”); 12 U.S.C. § 5302 (“If any provision of this Act . . . is held to be unconstitutional, the remainder . . . shall not be affected . . .”).

Petitioner and Smith & Nephew argue severance was unnecessary, whereas Arthrex deems severance improper “judicial policymaking” because the Federal Circuit had multiple remedies from which to choose.

A. *The Nature of Administrative Patent Judges*

Disagreement over whether APJs are principal or “inferior officers” is based primarily on interpretations of legal and political history. The parties also raise different policy concerns, including potential consequences for presidential accountability.

1. Prior Decisions and Statutory Arguments

Arthrex believes that for administrative judges to qualify as “inferior officers,” their adjudications *must* be reviewable and modifiable by principal officers.⁹⁵ It reaches this conclusion based on the Court’s proposition in *Edmond* that “[w]hat is significant” for “inferior officer” status is that a principal officer could keep decisions from being final.⁹⁶ Arthrex contends that without review, administrative judges decisively speak on the Executive Branch’s behalf.⁹⁷ Given the Appointments Clause’s accountability concerns, the absence of review by superiors is a “hallmark of principal officer status.”⁹⁸ Therefore, Arthrex concludes that because their decisions cannot be reviewed by any principal officer, APJs are not “inferior officers.”⁹⁹

Both Petitioner and Smith & Nephew argue that *Edmond* does not render specific criteria necessary for an officer to be “inferior.” Instead, they both interpret *Edmond* for the proposition that “a court should consider the *cumulative* effect of the supervisory mechanisms available to various [principal] officers.”¹⁰⁰ This view “respect[s] Congress’s prerogative” to design Executive offices as it sees fit.¹⁰¹ Further, both Petitioner and Smith & Nephew argue that this interpretation supports the efficiency goal underlying the Appointments Clause’s flexibility towards “inferior officers.”¹⁰² Smith & Nephew also reads two Court decisions, *Lucia v. Securities and Exchange Commission* and *Freytag v. Commissioner of Internal Revenue*, as categorizing administrative judges who made final decisions “inferior officers.”¹⁰³

Both Petitioner and Smith & Nephew argue that other supervisory mechanisms placed on APJs cumulatively substitute decision review. Petitioner argues that the Secretary of Commerce has “substantial” removal power under Title 5, including the power to remove APJs for failing to follow

95. Brief for Arthrex, *supra* note 1, at 20.

96. *Id.* at 20–21.

97. *Id.* at 22.

98. *Id.* Arthrex believes that the power to remove APJs does not render them “inferior officers” because this power does not include the alternate method to undo their decisions. *Id.*

99. *Id.* at 23 (determining that APJs are fundamentally different from principal officers).

100. Brief for U.S., *supra* note 7, at 20; *see also* Brief for Smith & Nephew, *supra* note 2, at 32 (“The Federal Circuit’s rigid test fails to account for the cumulative effect of principal [o]fficers’ full range of supervisory powers.”).

101. Brief for U.S., *supra* note 7, at 24; *see also* *Myers v. U.S.*, 272 U.S. 52, 129 (1926) (describing the various powers vested in Congress).

102. *See* Brief for U.S., *supra* note 7, at 24 (“[Our proposed] approach is also practically workable.”); *see also* Brief for Smith & Nephew, *supra* note 2, at 23 (“*Edmond*’s pragmatic distinction . . . maintains flexibility, as Congress can readily ascertain whether it can select an alternate method of appointment for a particular [o]fficer.”).

103. *Id.* at 35–36. *Freytag* determined that Tax Court special trial judges were “inferior officers” despite the Chief Judge’s power to authorize them to “render . . . decisions of the Tax Court in declaratory judgment proceedings and limited-amount tax cases.” *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 882 (1991). In *Lucia*, on the other hand, the Court solely addressed whether SEC administrative law judges were officers *to begin with*. *Lucia v. Sec. and Exch. Comm’n*, 138 S.Ct. 2044, 2051 (2018). However, the Court noted that the special trial judges in *Freytag* were “near-carbon copies” of the judges in *Lucia*. *Id.* at 2052.

orders.¹⁰⁴ Thus, a de facto at-will removal power exists because APJs can be removed for failure to comply with the Director’s promulgations.¹⁰⁵ In addition, the Director controls APJs’ assignments, which Smith & Nephew argues is akin to “powerful” assignment removal in *Edmond*.¹⁰⁶ Both parties also stress that, like the JAG in *Edmond*, the Director can promulgate adjudicative procedure.¹⁰⁷ They also highlight the Director’s ability to issue directives on patent law application to hypothetical fact patterns, which APJs must use to decide cases with similar facts.¹⁰⁸ Further, the Director can designate PTAB decisions as non-precedential, and can choose a panel to decide whether a decision should be reheard.¹⁰⁹ Thus, the Director “has other means of preventing or limiting the reach of decisions with which he disagrees.”¹¹⁰

Arthrex counters these arguments by first noting that even if the power to remove an administrative judge may substitute review, this power is not an appropriate substitute here. The Director’s removal power is too limited: “Title 5 . . . provides robust procedural rights in connection with any removal,” including a right to an appeal.¹¹¹ Indeed, Arthrex cites *Seila Law* for the proposition that an “inefficiency” standard cannot “be interpreted to reserve substantial discretion.”¹¹² And in any event, Arthrex contends, a robust removal power would defy Congress, which intended APJs be immune to outside pressure.¹¹³ Arthrex also contends that the Director’s removal power is limited because the power applies only to individual PTAB assignments, not APJs’ appointments.¹¹⁴

Arthrex further argues that reassignment likely violates due process because it hinders an impartial adjudication.¹¹⁵ For this contention, Arthrex cites both academic criticism¹¹⁶ as well as the Sixth Circuit’s statement that “[t]here is no guarantee of fairness when the one who appoints a judge has the power to remove [them] . . . before the end of proceedings for rendering a decision which displeases”¹¹⁷ Taken together, Arthrex’s arguments seek to rebut the claim that alternative mechanisms of control can replace principal officer review.

2. History and Policy Arguments

Arthrex justifies its *Edmond* interpretation¹¹⁸ by emphasizing presidential accountability: In

104. Brief for U.S., *supra* note 7, at 26–27.

105. *See id.* at 38 (“[T]he [Commerce] Secretary’s power to remove . . . in conjunction with the Director’s power to prescribe the rules [APJs] must follow, enables those superiors to ensure that their will is carried out.”).

106. *See* Brief for Smith & Nephew, *supra* note 2, at 35 (“Where, as here, the [principal officer] has *other* supervisory mechanisms for inducing . . . compliance, including reassignment, there is no reason to insist upon at[-]will removal from employment as a constitutional touchstone.”).

107. *Id.* at 26–27; Brief for U.S., *supra* note 7, at 29.

108. Brief for U.S., *supra* note 7, at 5; Brief for Smith & Nephew, *supra* note 2, at 27.

109. Brief for U.S., *supra* note 7, at 37.

110. *Id.*; *see also* Brief for Smith & Nephew, *supra* note 2, at 26–27 (“Because the Director has these mechanisms for controlling the content of APJ[s]’ decisions on the front end, there is little need . . . to review decisions on the back end.”).

111. Brief for Arthrex, *supra* note 1, at 37.

112. *See id.* at 36 (“The President [cannot] [] ‘remove an officer based on disagreements about agency policy.’”) (quoting *Seila Law v. Consumer Fin. Prot. Bureau*, 140 S.Ct. 2183, 2206 (US 2020)).

113. *Id.*

114. *See id.* at 38 (“The threat of receiving a paycheck while not being assigned any work does not have the same potency as the threat of losing one’s job.”).

115. *See generally id.* at 41–42 (explaining lower courts have rejected “panel stacking” and other mechanisms that allow Directors to manipulate administrative panels as violating due process).

116. *See id.* (“The notion of due process . . . is mocked when the PTAB is allowed to stack a panel with sympathetic judges, contrary to the practice of every other court.”) (quoting Richard A. Epstein, *The Supreme Court Tackles Patent Reform*, 19 FED. SOC. REV., 124, 128 (2018)).

117. *See id.* at 41 (quoting *Utica Packing Co. v. Block*, 781 F.2d 71, 78 (6th Cir. 1986)).

118. Petitioner contends that appointing APJs without Senate confirmation *increases* the President’s political accountability. Brief

Seila Law, the Court stated that “the Framers made the President the most democratic and politically accountable official” in order to check his vast power.¹¹⁹ Pursuant to this design, Arthrex argues that the President can and should be held culpable for the successes and failures of Executive officers. Therefore, all final Executive Branch actions (including patent decisions) must be made by either the President or those personally selected by him: principal officers.¹²⁰

Smith & Nephew raises the concern that finding APJs to be principal officers would call into question the appointments of “over 100 other administrative adjudicators who issue more than 85,000 decisions each year without further review”¹²¹ Smith & Nephew also invokes the “great weight” deference given to “[l]ong settled and established” political practice¹²² when it argues that Congress has always viewed APJs and their predecessors as “inferior officers.”¹²³ Smith & Nephew supports this position with legislative history that indicates the 1975 reforms¹²⁴ were for efficiency purposes, suggesting Congress did not view the changes as *only then* making APJs’ predecessors “inferior officers.”¹²⁵

Arthrex rejects this historical interpretation—arguing that principal officer review of administrative adjudications is *the* norm.¹²⁶ Arthrex quotes Attorney General (and later, Supreme Court Justice) Robert Jackson, who articulated the “long-continued policy of Congress [to] jealously confine[] the power of final decision in matters of substantial importance to . . . principal administrative officers.”¹²⁷ Arthrex also challenges Smith & Nephew’s inference about the 1975 reforms, and argues that Congress did not weigh constitutional consequences.¹²⁸

B. Severance as a Remedy

Petitioner and Smith & Nephew believe severance was unnecessary because APJs are already “inferior officers.”¹²⁹ Arthrex, on the other hand, argues that severance did not cure the actual constitutional defect,¹³⁰ and that severance may create a due process violation because it limits

for U.S., *supra* note 7, at 25.

119. See Brief for Arthrex, *supra* note 1, at 18–19 (“The Framers deemed an energetic [E]xecutive essential”) (quoting *Seila Law v. Consumer Fin. Prot. Bureau*, 140 S.Ct. 2183, 2203 (2020)).

120. See *id.* at 19 (“[T]he Appointments Clause makes the President and the principal officers he personally selects accountable for [E]xecutive action, so that the public may hold the President responsible for any success or failure.”).

121. Brief for Smith & Nephew, *supra* note 2, at 38–39.

122. *Id.* at 43 (quoting *Nat’l Lab. Rel’s Bd. v. Noel Canning*, 573 U.S. 513, 524 (2014)).

123. *Id.* Though APJs’ predecessors were appointed via presidential nomination and Senate confirmation until 1975, both Smith & Nephew and Petitioner argue that this practice did not mean the predecessors were considered principal officers; rather, their confirmation method is simply the “default manner” for appointments unless Congress provides otherwise. *Id.* at 44 (quoting *Edmond v. U.S.*, 520 U.S. 651, 660 (1997)); see also Brief for U.S., *supra* note 7, at 43 (“The method of appointment . . . does not imply that Congress viewed those officials as principal officers.”).

124. Before 1975, appointments were through presidential nomination and Senate confirmation. Brief for Arthrex, *supra* note 1, at 4.

125. See Brief for Smith & Nephew, *supra* note 2, at 45 (“Congress selected this method of appointment because presidential nomination and senatorial confirmation had become a ‘burden.’”) (quoting *Polaris Innovations Ltd. v. Kingston Tech.*, 792 F. App’x 820, 829 (Fed. Cir. 2020) (Hughes, J., dissenting)).

126. See generally Brief for Arthrex, *supra* note 1, at 27–30 (“Principal officer review remains a cornerstone of the modern administrative state.”).

127. *Id.* at 29 (citing H.R. Doc. No. 76-986, at 10 (1940)).

128. Compare *id.* at 33 with Brief for Smith & Nephew, *supra* note 2, at 45 (arguing that by 1975, Congress already believed APJs were not principal officers).

129. See Brief for U.S., *supra* note 7, at 39 (arguing that because “inferior officer” status is determined by the cumulative effects of various supervisory mechanisms, the “singular focus” on removal power was not correct).

130. Brief for Arthrex, *supra* note 1, at 45; see also *U.S. v. Booker*, 543 U.S. 220, 258 (2005) (holding that severance can only be appropriate if the remaining statute is constitutional).

impartial decision-making.¹³¹ The due process concern is heightened here because if severance applied, the Director would lack transparent methods to influence APJs.¹³² Further, Arthrex contends that severance is inconsistent with Congress’s desire for autonomous APJs, as expressed in both the PTAB’s structure and by individual members of Congress.¹³³ Arthrex also argues that severance is inappropriate because of “[t]he sheer multitude” of other available remedies, noting that at least ten other remedies have been proposed by either Arthrex itself, the other two parties, or amici.¹³⁴ Arthrex believes the Court should allow Congress to use “the range of policy choices” available to make reform.¹³⁵

Finally, Arthrex distinguishes this case from both *Seila Law* and *Free Enterprise Fund* by emphasizing that in both of those cases, severance cured the constitutional defect.¹³⁶ Further, the officers in both *Seila Law* and *Free Enterprise Fund* whose removal protections were severed were mostly responsible for policymaking and rule enforcement, not adjudications.¹³⁷ Arthrex believes that while “Congress has no settled tradition of granting tenure protections [for officers] with broad policymaking and enforcement authority,” there is such a tradition for officers who merely adjudicate.¹³⁸ Arthrex concludes that this tradition applies to APJs.¹³⁹

IV. ORAL ARGUMENT

During oral arguments, the Court spent much of its time probing four distinct areas of concern: 1) due process; 2) practicality; 3) prior decisions and historical practice; and 4) remedy.¹⁴⁰

A. *Petitioner and Smith & Nephew*

During its oral argument, Smith & Nephew faced due process challenges several times.¹⁴¹ Justice Roberts suggested that using the Director’s current control mechanisms to prevent an adjudication from being final would make a “charade” out of the process.¹⁴² In response, counsel for Smith & Nephew consistently emphasized that the Court did not grant certiorari to answer due process questions.¹⁴³ Likewise, Petitioner defended its position from multiple practicality challenges. Justice Thomas asked how Petitioner would determine when its cumulative *Edmond* test was met.¹⁴⁴ Petitioner answered that while there is no bright-line determinant, the Court should “primarily”

131. See Brief for Arthrex, *supra* note 1, at 63–64 (“Due process requires a ‘neutral and detached’ decisionmaker . . . [a]lthough this Court has not decided whether at[-]will removal of administrative judges violates due process, the question is widely recognized to be substantial.”) (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 61–62 (1972)).

132. See *id.* at 64 (“Those due process concerns are magnified here . . . [b]y denying the Director review power, Congress encouraged him to resort to subtle and indirect means . . . [a] system where adjudicators decide cases subject to hidden influences . . . is at best constitutionally dubious.”).

133. *Id.* at 54–55 (quoting *Booker*, 543 U.S. at 259).

134. *Id.* at 56–59. Arthrex notes that Congressional remedies include giving the Director review power, reforming APJs’ appointment processes, and eliminating IPR. *Id.* at 57–58.

135. *Id.* at 59.

136. *Id.* at 60.

137. See *id.* at 60–61 (“The CFPB Director in *Seila Law* . . . performed adjudicative functions only . . . as one component of her vast responsibilities [citation omitted]. Similarly, the PCAOB . . . in *Free Enterprise Fund* . . . performed adjudicatory functions only in that they also oversaw . . . disciplinary proceedings.”).

138. *Id.* at 61.

139. *Id.* at 62 (“Eliminating those protections here would be a radical departure from tradition.”).

140. Oral argument took place on March 1, 2021. Transcript of Oral Argument at 1, *U.S. v. Arthrex, Inc.*, (U.S. argued Mar. 1, 2021) (No. 19-1434).

141. *Id.* at 29–30, 40–41.

142. *Id.* at 29–30.

143. See *id.* at 30, 41 (“Due process is a separate issue, not presented in the petition, not presented in this case.”).

144. *Id.* at 8.

consider whether mechanisms exist for prospectively instructing an officer on their duties.¹⁴⁵ Justice Barrett questioned the effectiveness of the Director’s non-absolute removal power.¹⁴⁶ Petitioner conceded that while the Director did not have final say on removal, he did on reassignment, an “important” tool for control.¹⁴⁷

Justice Gorsuch asked Petitioner if *Seila Law* required an “inferior officer” be subject to “ongoing” presidential “supervision and control.”¹⁴⁸ Justice Gorsuch expressed doubt whether this requirement was met for administrative judges whose decisions were not subject to Executive review.¹⁴⁹ Petitioner countered, in part, that the Federal Circuit could review decisions.¹⁵⁰ Combining caselaw interpretation with practicality concerns, Justice Sotomayor challenged Justice Gorsuch’s understanding of *Seila Law* as “totally at odds with an adjudicatory system of any kind.”¹⁵¹

Justice Kavanaugh focused on history, and voiced concerns that the tradition of principal officer review indicates the PTAB’s constitutional infirmity.¹⁵² Acknowledging this tradition, Petitioner nevertheless stated its position that review need not be “plenary” under *Edmond*.¹⁵³ Smith & Nephew responded to Justice Kavanaugh’s concerns by noting that the Director is still the officer who must ultimately cancel any unpatentable claim.¹⁵⁴ Smith & Nephew ended its oral argument with the proposition that principal officers “sit at the right hand of the President and make national policy.”¹⁵⁵ Sympathetic to this position, Justice Sotomayor stated during Arthrex’s oral argument that the “founding generation” of elected representatives understood principal officers as department heads.¹⁵⁶

B. Arthrex

Arthrex faced formidable practicality challenges during its oral argument. Justice Roberts voiced doubt as to whether the Director could give “meaningful review” of all PTAB decisions.¹⁵⁷ Arthrex responded that the Director could delegate review power but would nevertheless be accountable for the delegate’s decisions.¹⁵⁸ Justice Roberts similarly wondered why case law and legal principles do not support giving administrative judges substantial leeway to impartially resolve disputes.¹⁵⁹ Arthrex responded that placing an adjudicator in the Executive Branch requires presidential accountability in decisions.¹⁶⁰ Arthrex added that impartial decision-making *and* post-decision review are traditionally used to ensure that administrative judges comply with the will of the Executive Branch.¹⁶¹

145. *Id.* at 8–9.

146. *Id.* at 25.

147. *Id.*

148. *Id.* at 19.

149. *Id.*

150. *Id.* at 20–21.

151. *Id.* at 36.

152. *Id.* at 22, 41–42.

153. *Id.* at 23.

154. *Id.* at 43.

155. *Id.* at 46.

156. *See id.* at 66 (“In early debates and enactments that structured [E]xecutive department[s], heads of the department[s] were . . . referred to as principal officers and other members as inferior officers.”).

157. *Id.* at 52.

158. *Id.* at 52–53.

159. *Id.* at 49.

160. *Id.* at 50.

161. *Id.*

Arthrex encountered questions regarding proper remedy—stating that it found no case law¹⁶² to justify the Court picking one of several remedies instead of deferring to Congress.¹⁶³ Justice Alito, however, challenged the wisdom of deference, and asked why the Court could not simply read into the statute a review requirement.¹⁶⁴ Arthrex reiterated its stance that choosing a remedy is a policy choice which should be left for Congress.¹⁶⁵

V. ANALYSIS

Edmond must be read in light of the Appointments Clause’s main structural concerns: political accountability and efficiency. Furthermore, the adjudicative nature of administrative patent judges means due process concerns must also be considered. Combined with historical practice, these considerations should lead the Court to hold that administrative judges are “inferior officers” only if a principal officer can prevent their decisions from being final. Therefore, the Court should find APJs are principal officers. As for remedy, the Court should concur with Arthrex’s claim that the remedy is best left for Congress to decide on.

Ultimately, the President must be responsible for “inferior officer” actions taken on his behalf. As discussed, both the Appointments Clause’s structure and the Framers’ own words emphasize fair public accountability for bad decisions. If the President or someone appointed by him could not block a binding “inferior officer” action, the President would not be directly responsible for that action.¹⁶⁶ Though not controlling here, the Court’s decision in *Free Enterprise Fund* to strike down dual-layers of for-cause removal illuminates the analysis. Because neither the SEC nor the PCAOB could be removed at-will, the latter were not accountable to the President.¹⁶⁷ This structure, the Court found, was unconstitutional because the President could no longer “ensure that the laws are faithfully executed.”¹⁶⁸ The underlying principle of *Free Enterprise Fund* is cogent: The President *must*, as a matter of duty and policy, be responsible for “inferior officer” actions.¹⁶⁹

In light of this need for responsibility, administrative adjudications must reflect the President’s will. This reflection is only possible if adjudications are made or approved by someone presidentially-nominated.¹⁷⁰ At first glance, *Edmond* indicates, and *Free Enterprise Fund* confirms, at least two other methods to “direct and supervise at some level”: removal and general oversight. This conclusion, however, is incorrect with regards to administrative judges. Though a “powerful tool for control,”¹⁷¹ at-will removal cannot ensure that adjudications reflect presidential views. As Arthrex points out, assignment removal does not guarantee that a specific adjudication will turn out a certain way.¹⁷² Nor does removal alter prior adjudications.¹⁷³ And threatening removal, either from

162. *Id.* at 80, 84–85.

163. *Id.* at 87.

164. *Id.* at 63.

165. *Id.* at 64.

166. The public, in turn, could not effectively voice its displeasure with this action by voting, because the President would not be responsible. Also, this analysis presumes that the “inferior” appointment method chosen is not the default one (presidential nomination and Senate confirmation). Otherwise, the President is fairly responsible because he chose the officers.

167. *See* *Free Enter. Fund v. Pub. Acct. Oversight Bd.*, 561 U.S. 477, 496 (2010) (“Without the ability to oversee the [PCAOB], or to attribute the [PCAOB]’s failings to those whom he *can* oversee, the President is no longer the judge of the [PCAOB]’s conduct.”).

168. *Id.* at 498.

169. Indeed, the Federal Circuit confirmed this view, stating that “[t]he lack of control over APJ[s]’ decisions does not allow the President to ensure the laws are faithfully executed.” *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1335 (Fed. Cir. 2019), *reh’g denied*, 953 F.3d 760 (Fed. Cir. 2020).

170. Of course, the President could lawfully review administrative adjudications himself, but that would be infeasible.

171. *Edmond v. United States*, 520 U.S. 651, 664 (1997).

172. *See* Brief for Arthrex, *supra* note 1, at 42 (“Altering panel composition might permit the Director to *influence* outcomes . . .”).

173. *Id.* (“Rules or policy guidance may enable the Director to *affect* future decisions, but they do not permit him to *correct or undo*

assignment or office, to achieve a desired outcome raises due process concerns because it compromises judicial impartiality.¹⁷⁴ In resolving this constitutional question, the Court should not create a new constitutional problem.¹⁷⁵ As Arthrex mentioned, the “traditional model” is impartial adjudication followed by principal officer review.¹⁷⁶ Though due process may not be perfectly compatible with ensuring that adjudications reflect presidential will, this conflict is inevitable¹⁷⁷ when it comes to administrative judges; the traditional model minimizes its magnitude.

While at-will removal may well be an “inferior officer” quality for Executive officials charged with policy or regulatory creation, it cannot serve as a tool for adjudicators. The nature of their responsibilities prevents at-will removal from ensuring fair presidential accountability in a lawful manner.

In determining that Coast Guard Court judges were “inferior officers,” the Court in *Edmond* twice noted that principal officers could prevent their decisions from being final.¹⁷⁸ That the Court called this ability “significant”¹⁷⁹ for purposes of its analysis reveals its importance. And though the Court’s opinion in *Free Enterprise Fund* did not subsequently emphasize principal officer review, it did not have to because the PCAOB was not a primarily adjudicative body; amongst other things, the PCAOB also “promulgate[d] auditing and ethics standards . . . [and] perform[ed] routine inspections of all accounting firms”¹⁸⁰ Nevertheless, the SEC *could* amend PCAOB sanctions—analogueous to a principal officer reviewing adjudicative decisions.¹⁸¹

Within the context of administrative judges, “supervision and oversight” is unnecessary because only review power can ensure that an adjudication reflects Executive will. In the case of APJs, sample fact patterns and other procedural directives cannot perfectly dictate a hearing’s outcome.¹⁸² Patent law application to unique fact patterns is still subject to varying interpretations, and procedure does not provide substantive standards. Furthermore, even if the Director declares a decision non-precedential, it nevertheless binds the parties to the hearing.¹⁸³ Therefore, “supervision and oversight” cannot ensure fair presidential accountability for administrative adjudications.

Of course, Congress can structure “inferior” offices as it sees fit, mindful of efficiency concerns.¹⁸⁴ However, this discretion does not eliminate fundamental political accountability requirements.¹⁸⁵ These offices must still be designed to ensure the President is accountable for their occupants’ actions. For administrative judges, this means their offices must be structured such that their

decisions that misapply his directives.”).

174. *See id.* at 41 (“There is no guarantee of fairness when the one who appoints a judge has the power to remove . . . before the end of proceedings for rendering a decision which displeases”) (quoting *Utica Packing Co. v. Block*, 781 F.2d 71, 78 (6th Cir. 1986)).

175. *See* *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”).

176. Brief for Arthrex, *supra* note 1, at 51.

177. During oral argument, both Smith & Nephew and Arthrex acknowledged this tension. *See* Transcript of Oral Argument at 36–37, 49–50, *U.S. v. Arthrex, Inc.* (U.S. argued Mar. 1, 2021) (No. 19-1434) (“[T]here is . . . an inherent tension in agency adjudicatory-type proceedings between adjudicative independence and presidential control”).

178. *Edmond v. United States*, 520 U.S. 651, 665–66 (1997).

179. *Id.* at 665.

180. *Free Enter. Fund v. Pub. Acct. Oversight Bd.*, 561 U.S. 477, 485 (2010).

181. *Id.* at 504.

182. *See* Brief for Arthrex, *supra* note 1, at 43 (“The Director can promulgate regulations . . . [b]ut he has no general rulemaking authority over substantive patentability standards.”).

183. *Id.* at 44.

184. Brief for U.S., *supra* note 7, at 24–25; *see also* *Myers v. U.S.*, 272 U.S. 52, 129 (1926) (“To Congress under its legislative power is given the establishment of offices, [and] the determination of their functions and jurisdiction”).

185. *See* Brief for U.S., *supra* note 7, at 25 (“To be sure, the Constitution prevents Congress from creating or structuring offices in a manner that . . . fails to maintain political accountability for the Executive Branch’s actions.”).

decisions are reviewable and, if necessary, reversible by principal officers.

Arthrex validly argues that final Executive adjudicative decisions have historically been rendered by principal officers. Yet, Smith & Nephew’s interpretation of legislative history is more appropriate. The Court should not, as Arthrex suggests, infer that Congress in 1975 was indifferent towards whether APJs were principal or “inferior officers.” The Court “will . . . not lightly assume that Congress intended to . . . usurp power constitutionally forbidden it.”¹⁸⁶ This canon of statutory construction acknowledges “that Congress . . . is bound by and swears an oath to uphold the Constitution.”¹⁸⁷ Though intent is distinct from indifference, suggesting that Congress did not care whether it was misappropriating principal officer appointment power undermines Congress’s integrity. Therefore, the Court should acknowledge that APJs and their predecessors were historically deemed “inferior officers.” Since 1975, however, APJs’ responsibilities have become mostly adjudicative in nature.¹⁸⁸ Therefore, APJs must now be understood in light of Congress’s “[l]ong settled and established practice”¹⁸⁹ of deeming Executive adjudicators who make final decisions principal officers.

As a result, the Court should find that APJs are principal officers whose appointments are unconstitutional.¹⁹⁰ Though the Director retains various control mechanisms, he cannot reverse or review APJs’ decisions. Their adjudications decisively speak for the Executive. Severance, however, is not the proper remedy here. It does not cure the constitutional defect because it does not alter how APJs’ decisions are finalized. If anything, severance creates a constitutional due process issue because APJs cannot serve impartially without removal protection. Furthermore, Congress intended impartial adjudication: in creating IPR, it sought to ensure a “fair” and “objective” process.¹⁹¹ As Representative Jerry Nadler stated, without removal protections, “litigants will be left wondering if the decision they receive truly represents the impartial weighing of facts and evidence under the law.”¹⁹² If APJs cannot impartially operate as Congress intended them to, then it is also unlikely that their authorizing statute can function without Title 5, or that Congress’s “basic objectives” in structuring their offices remain met.¹⁹³ Thus, severance is inappropriate. As an alternative, the Court should defer to Congress to amend the authorizing statute as it sees fit.

VI. CONCLUSION

The Appointments Clause reflects early recognition that a workable republic requires both political accountability and bureaucratic efficiency. Political accountability, however, is paramount. In creating Executive Branch offices, Congress must ensure that appointment processes do not erode presidential power, responsibility, and accountability. This mandate entails that when an officer is appointed as an “inferior” type, their actions must be directly supervised by either the

186. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988).

187. *Id.*

188. *See* Brief for Arthrex, *supra* note 1, at 33 (“Congress vastly expanded APJs’ [powers] . . . Congress also made APJs much more like typical administrative law judges . . .”).

189. *Nat’l Lab. Rel’s Bd. v. Noel Canning*, 573 U.S. 513, 524 (2014).

190. This outcome may force Congress to amend many statutes that structure Executive officer appointments. *See* Brief for Smith & Nephew, *supra* note 2, at 38–39 (“[O]ver 100 other administrative adjudicators who issue more than 85,000 decisions each year without further review within the Executive Branch . . . are not appointed as principal [o]fficers . . .”). However, for reasons given in this commentary, these statutes are unconstitutional and must be changed regardless of burden.

191. 157 CONG. REC. S1380 (2011) (statement of Sen. Jon Kyl).

192. *The Patent Trial and Appeal Board and the Appointments Clause: Hearing Before the Subcomm. on Cts., Intell. Prop. & the Internet of the H. Comm. on the Judiciary*, 116th Cong. 45:45-46:03 (2019) (statement of Rep. Jerrold Nadler, Chairman, H. Comm. on the Judiciary).

193. *U.S. v. Booker*, 543 U.S. 220, 258–59 (2005).

President or someone the President appointed. For “inferior officers” who are administrative judges, adequate supervision entails that a principal officer can review their decisions and prevent those decisions from becoming final. This rule acknowledges the unique nature of Executive Branch adjudications, and respects historical attitudes towards them. Therefore, APJs are not “inferior officers” because their decisions cannot be reviewed by a principal officer. As for remedying their unconstitutional positions, the Court should defer to elected representatives for next steps. Congress created APJs, and it should decide how to properly regulate them.

Based on oral argument, it appears likely that the Court will agree with Arthrex. The focus of several Justices on remedy, combined with the due process concerns echoed throughout the proceedings, likely reflect the Court’s inclination to find APJs’ appointments unconstitutional. As for deciding a proper remedy, the multiplicity of options combined with historical deference to political branches will likely lead the Court to let Congress decide next steps.