NOTES

The Strength of a Giant: The Administrative State and the United States Patent & Trademark Office

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ABSTRACT

For Appointments Clause purposes, the Supreme Court historically has refused to draw a bright line between a "principal officer" and an "inferior officer." The vague separation between the officer ranks has caused lower courts and administrative law scholars to apply inconsistent standards in determining whether an officer is a principal or inferior. Recently, however, United States v. Arthrex adopted a bright line rule for distinguishing between officers that need to go through the formal constitutional process for appointment and officers that do not. This Essay argues that the Arthrex decision unduly burdens both the Senate and the Executive by imposing a rigid, unforgiving standard for addressing the principal-inferior officer distinction which implicitly overruled binding precedent. An examination of the Appointments Clause through a textualist, a purposivist, and an originalist lens suggests that the Supreme Court's historic jurisprudence in the area adequately addresses the accountability, transparency, and authority concerns inherent in the appointments procedures.

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INTRODUCTION

United States v. Arthrex, Inc.[1] reaffirms fears that the Supreme Court doesn't always reach the correct result. The decision wrongfully disrupts the carefully crafted scheme created by the Leahy-Smith American Invents Act (AIA). The AIA ushered in a new era for the U.S. patent law system. President Obama described the legislation as "vital to our ongoing efforts to modernize patent laws," and claimed that the Act harmonized the U.S. with the rest of the world.[2] Notably, Congress transformed the scheme from "first to invent" to "first to file" to provide greater certainty to patent applicants as well as to create international uniformity.[3] To realize the lofty goals of Congress, the Act implemented a new administrative scheme within the United States Patent and Trademark Office (PTO)[4]—an executive branch agency within the Department of Commerce

1. 141 S. Ct. 1970 (2021).

2. Intellectual Property Team at Vedder Price & Smitha B. Uthaman, *Summary of the American Invents Act*, NAT'L L. REV. (April 12, 2012), https://www.natlawreview.com/article/summary-america-invents-act [https://perma.cc/ZQV2-JCCJ].

3. *See* Leahy-Smith America Invents Act, Pub.L. No. 112-29, 125 Stat. 284 (codified as amended in 35 U.S.C.).

4. *See id.* at § 311.

tasked with overseeing the issuance and maintenance of patents.[5] Because the PTO is an agency, the Administrative Procedure Act dictates the procedural safeguards the PTO must employ in conjunction with the AIA.[6]

Under amended 35 U.S.C. § 311, PTO shall facilitate IPR, an adversarial process in which anyone—besides the patent owner—may petition to invalidate an issued patent's claims on the grounds that the patent lacks nonobviousness under 35 U.S.C. § 103, or novelty under 35 U.S.C. § 102. The PTO Director—a presidential appointee tasked with providing administrative oversight to the PTO[7]—and the Secretary of Commerce may decide whether to institute IPR.[8] In reaching his decision, the Director must review the petition to determine "whether there is a reasonable likelihood that the petitioner would prevail with respect to at least one of the claims challenged."[9] Additionally, the Director's decision to institute IPR is discretionary, "final, and non-appealable."[10]

Congress therefore ensured that procedural control of IPR proceedings remained committed to the Director's discretion.[11] After the Director initiates an IPR proceeding, the Patent and Trial and Appeal Board (PTAB) examines a challenged patent's validity.[12] The PTAB consists of several members: the Director, the Deputy Director, the Commissioner for Patents, the Commissioner for Trademarks, and approximately 264 administrative patent judges (APJs).[13] Importantly, the Secretary of Commerce, rather than the President, has discretion in appointing APJs to office.[14] Congress ensured that procedural control of IPR proceedings remained committed to the Director's discretion by granting the Director designation power;[15] the Director must designate at least three members of the PTAB to sit on a panel that actually conducts the IPR and may arbitrarily do so.[16] Because 35 U.S.C. § 6(c) does not address removal of PTAB panel members, the Director may also remove any panel member from any assignment at will.[17]

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5. *See id.* at § 1.

6. *See* Dickinson v. Zurko, 527 U.S. 150 (1999) (holding that the APA applies to the PTO).

7. *See* 35 U.S.C. § 3(a) (vesting the powers and duties of the USPTO in the Director and Secretary of Commerce).

8. *See* 35 U.S.C. § 314(b) ("The Director shall determine whether to institute an [IPR]. . . .").

9. 35 U.S.C. § 314(a).

10. 35 U.S.C. § 314(d); *see* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1378 (2018) (citing Cuozzo Speed Technologies, LLC v. Lee, 136 S. Ct. 2131 (2016)) ("The decision whether to institute [IPR] is committed to the director's discretion.").

11. *See* U.S. v. Arthrex, Inc., 141 S. Ct. 1970, 2002 (2021) (Thomas, J., dissenting) (stating that the Director's ability to select the panel is a "powerful check on Board Decisions").

12. 35 U.S.C. § 6; 35 U.S.C. 316(c).

13. 35 U.S.C. § 6(a); *see also*, Rick Bisenius & Dan Smith., *What is the PTAB and Who are the Judges?*, JDSUPRA (July 14, 2020), https://www.jdsupra.com/legalnews/what-is-the-ptab-and-who-are-the-judges-27854/ [https://perma.cc/Y9T3-LNET].

14. 35 U.S.C. § 6(a).

15. *See Arthrex,* 141 S. Ct. at 2002 (Thomas, J., dissenting) (stating that the Director's ability to select the panel is a "powerful check on Board Decisions").

16. 35 U.S.C. § 6(c).

17. *Id.*

The Director also exerts significant substantive control over the PTO adjudications. Prior to rendering a final decision following IPR proceedings, the PTAB panel must consider both binding policy directives[18] and binding precedent that the Director curates.[19] Additionally, the panel may refer to the Director's "instructions that include exemplary applications of patent law to fact patterns."[20] After accounting for the Director's instructions, the panel must issue a final written decision invalidating a patent's claims if the petitioner demonstrates to the panel that he has met his burden of proving unpatentability beyond a preponderance of the evidence.[21] The Director then must "issue and publish a certificate" that cancels "unpatentable" patent claims, confirms "patentable" claims, and incorporates "any new or amended claim determined to be patentable."[22] Importantly, a party desiring to appeal an adverse IPR decision "may appeal the Board's decision only to the United States Court of Appeals for the Federal Circuit."[23] However the PTAB may institute a rehearing upon petition.[24] Therefore, the only non-PTAB panel review of IPR decisions occurs outside of the Executive Branch in an Article III court.

The PTAB and IPR have faced harsh criticism and legal challenges because the PTAB invalidates patents at an alarmingly high rate. IPR does not require standing, as anyone other than the patent owner may seek review for any reason.[25] The proceedings' decreased requirements thus increase the availability of review and, in turn, the number of IPR proceedings.[26] For example, between October 1, 2020 and September 30, 2021, there were 1,447 petitions for review.[27] The PTAB entered a final written decision for 395—roughly 27%—of the total petitions.[28] For 235 of the total 395 final written decisions, all claims at issue were found to be unpatentable.[29] Therefore, the PTAB invalidated 59.5% of claims that reached a final written decision in the relevant time period.[30] Federal Circuit Chief Judge Rader deemed the PTAB the "patent death squad."[31]

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18. 35 U.S.C. § 3(a)(2)(A).

19. *See* PATENT TRIAL AND APPEAL BOARD, STANDARD OPERATING PROCEDURE 2 (REVISION 10), 1-2 (Sept. 20, 2018); *Arthrex*, 141 S. Ct. at 2001 (Thomas, J., dissenting).

20. *See Arthrex*, 141 S Ct. at 2001 (Thomas, J., dissenting).

21. 35 U.S.C. § 316(e).

22. 35 U.S.C. § 318(b).

23. 35 U.S.C. § 141(c).

24. 35 U.S.C. § 6(c).

25. 35 U.S.C. § 311(a).

26. *See* Fabian Koenigbauer, *PTAB by the numbers: A closer look at the most recent PTAB AIA trial statistics*, IP INTEL. REPORT (Jan. 23, 2020), https://www.ipintelligencereport.com/2020/01/23/ptab-by-the-numbers-a-closer-look-at-the-most-recent-ptab-aia-trial-statistics/ [https://perma.cc/P7MS-7T7T] (stating that, as of Dec. 31, 2019, 93% out of 10,966 AIA trials were IPRs).

27. PATENT & TRADEMARK OFFICE, PTAB TRIAL STATISTICS: FY21 END OF YEAR OUTCOME ROUNDUP https://www.uspto.gov/sites/default/files/documents/ptab_aia_fy2021__roundup.pdf [https://perma.cc/5CZF-ZEJS].

28. *Id.*

29. *Id.* at 11.

30. PTO FY21 ROUNDUP, *supra* note 27.

31. *Id.*

Recently, Arthrex, a corporation that produces medical devices, successfully alleged that the PTAB violates the Constitution in *United States v. Arthrex*.[32] Arthrex argued that APJs, who are appointed by the Secretary of Commerce, are in fact principal officers and must be appointed by the President by and with the advice of the Senate under the Appointments Clause.[33] A severely splintered Court agreed with Arthrex and found that APJs are principal officers under § 2, cl. 2 of Article II of the Constitution.[34] The majority reasoned that because the Director could not review the final decisions of the PTAB alone, the PTAB—composed of APJs—may issue final decisions on behalf of the United States.[35] Therefore, despite the APJs being inferior officers in all other respects, the power to render final decisions renders APJs principal officers.[36] To cure 35 U.S.C. § 6 of its unconstitutionality, the Court granted the Director the authority to review the findings of the APJs to reduce the judges to inferior officers.[37]

This contribution explores the intersection of administrative and patent law, critiques the *Arthrex* holding, and proposes a solution to the problem that decision creates. Part I analyzes textualist and purposivist interpretations of the Appointments Clause to conclude that Congress's designation of an officer as inferior warrants some judicial deference. Part II summarizes inferior-principal officer doctrine. Part III contrasts binding precedent with *Arthrex* to conclude that *Arthrex* violates precedent and is inherently inconsistent. Finally, Part IV discusses the effects of *Arthrex* on the USPTO and IPR and proposes that Congress establish an appellate body within the USPTO.

I. BOTH TEXTUALIST AND PURPOSIVIST INTERPRETATIONS OF THE APPOINTMENTS CLAUSE DEMAND A DEGREE OF JUDICIAL DEFERENCE TO CONGRESS

A. The Three Underlying Notions of Administrative Law: Accountability, Transparency, and Authority

The New Deal Era spurred the development of our administrative state.[38] Today, alphabet agencies perform many of the essential functions of our government. A federal agency is any "department, independent establishment, Government corporation, or other agency of the executive branch."[39] Our administrative state empowers the executive branch to act efficiently by fusing executive, "judicial," and

32. U.S. v. Arthrex, Inc., 141 S. Ct. 1970, 1970 (2021).
33. *Id.* at 1978.
34. *Id.* at 1985.
35. *Id.*
36. *Id.* at 1986 ("In every respect save the insulation of their decisions from review within the Executive Branch, APJs appear to be inferior officers—an understanding consistent with their appointment in a manner permissible for inferior but not principal officers.").
37. *Arthrex*, 141 S. Ct. at 1988 (stating that, for the President to be held accountable by the people, "the Director [must] have the discretion to review decisions rendered by APJs.").
38. *See generally* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231–33 (1994).
39. 42 U.S.C. § 5122(9).

"legislative" powers into a single entity.[40] For example, agencies may use quasi-legislative powers to promulgate rules, quasi-judicial power to adjudicate disputes, and executive power to enforce those rules and decisions.[41] The concentration of power strengthens and empower agencies to act efficiently and powerfully. Although some critics argue that our administrative state is unconstitutional and violative of the separation of powers,[42] agencies provide a solution to the legislature's inadequacies and the complexities of the modern world.[43]

To counter arguments against the administrative state, administrative law has adopted three underlying notions: authority, transparency, and accountability. Congress must properly convey authority to an agency via statute for an agency to act, and agencies may not exceed the scope of that granted authority.[44] Because agencies are given broad discretion to promulgating regulations and adjudicate disputes, agencies must also be held accountable and exercise transparency.[45] These principles are enshrined in Articles I, II, and III of the Constitution and the administrative state conforms to them to ensure that agencies efficiently operate without impeding liberties and rights. Thus, our administrative state represents a compromise between two tensions: the desire to have strong, effective government and the desire for the government to adhere to a rigid process to prevent deprivation of life, liberty, and property.

The Appointments Clause holds our administrative state accountable. Although seemingly insignificant, the Supreme Court has emphasized that the Appointments Clause "is more than a matter of etiquette or protocol; it is among the significant structural safeguards of the constitutional scheme."[46] Rather, § 2, cl. 2 of Article II of the Constitution provides a mechanism that—among other things—holds the chief executive accountable for his selection of officers.[47] To understand how the clause operates, one must first study its text.

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40. Charles J. Cooper, *Confronting the Administrative State*, NAT'L AFFS. (2015), https://www.nationalaffairs.com/publications/detail/confronting-the-administrative-state [https://perma.cc/P8PP-27EW].

41. 5 U.S.C. §§ 553, 554.

42. Lawson, *supra* note 38 at 1231 ("The post-New Deal administrative state is unconstitutional.").

43. K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis,* 131 HARV. L. REV. 1671, 1671 (2017).

44. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475–76 (2001) (holding that the Clean Air Act properly conveyed authority to the Environmental Protection Agency to consider costs in promulgating National Ambient Air Quality Standards).

45. *See* Dep't of Transp. v. Am. R.Rs., 575 U.S. 43, 61 (2015) (Alito, J., concurring) ("Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints."); United States v. Nova Scotia Food Prod. Corp., 568 F.2d 240, 251 (2d Cir. 1977) ("It is not consonant with the purposes of a rulemaking proceeding to promulgate rules on the basis of . . . data that in critical degree, is known only to the agency").

46. Edmond v. United States, 520 U.S. 651, 659 (1997).

47. *See* U.S. v. Arthrex, Inc., 141 S. Ct. 1970, 1979 (2021) ("Assigning the nomination power to the President guarantees accountability for the appointees' actions because the blame of a bad nomination would fall upon the president singly and absolutely." (internal quotation marks omitted)).

B. The Appointments Clause Creates a Horizontal and Vertical Separation and Prescribes Appointment Procedures

The Appointments Clause prescribes three separate appointment procedures. The text of the clause reads:

> *[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.*[48]

Thus, the first sentence of the clause creates horizontal separation: there are "Officers of the United States" and there are mere employees. *Freytag v. Commissioner* is the leading case on the officer-employee distinction.[49] Officers exercise "significant authority" and their duties and positions are codified in the statute.[50] For example, APJs are clearly "Officers of the United States" because they issue final decisions on behalf of the United States and their position and duties are codified by statute.[51] The significant authority test is consistent with the likely original public meaning of "officer"—one whom the government entrusts with ongoing responsibility to perform a statutory duty of any level of importance.[52] Thus, officers exercising "significant authority" must be appointed in a manner consistent with the Appointments Clause.[53] Conversely, employees may be appointed in a variety of other ways.

The second part of the Appointments Clause, "but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments," creates a vertical separation between Officers of the United States: principal officers and inferior officers. Principal officers must be appointed by the President by and with the consent of the Senate.[54] Inferior officers can be appointed by either (i) the President's appointment coupled with the Senate's consent or (ii) the Senate vesting appointment power in the President, a court of law, or department head.[55] The original meaning of "inferior officer," unlike that of "officer," is unclear,

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48. U.S. CONST. art. II, § 2, cl. 2.
49. Freytag v. Comm'r, 501 U.S. 868, 881 (1991).
50. *Id.* at 881–82.
51. *See* 35 U.S.C. § 6.
52. Jennifer L. Mascot, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 454 (2018).
53. *Freytag*, 501 U.S. at 881 (citing Buckley v. Valeo, 424 U.S. 1, 126 (1976) ("Any appointee exercising significant authority pursuant to the laws of the United States is an 'officer of the United States' and must, therefore be appointed in a manner prescribed by § 2, cl. 2, of Article II.").
54. N.L.R.B. v. SW Gen. Inc., 137 S. Ct. 929, 945 (Thomas J., concurring) (internal citation omitted).
55. *N.L.R.B.*, 137 S. Ct. at 945.

because the historical record thatdraws a line between a principal and inferior officer is extremely sparse.[56] Thus, one must examine the purpose of ratifying the Appointments Clause to understand the inferior and principal officer distinction.

C. The Purpose and Ratification of the Appointments Clause Highlight the Tension Between Accountability and Efficiency Concerns

As previously mentioned, the Appointments Clause was ratified to address accountability concerns. No rational person expects the president—who has the duty to take care that the laws are faithfully executed[57]—to discharge all executive duties of the federal government alone because the executive branch is so large.[58] President Biden's duties would be too numerous if the Constitution required him to act as a traffic police officer in Washington, D.C. Thus, the President must have subordinate officers who can assist him in ensuring that the laws are faithfully executed.[59] However, officers are not elected officials;[60] how can we, the people, act at the voting booth to rectify malfeasance or nonfeasance committed by an officer?[61]

The Framers ensured that unelected officers were accountable to political force and the will of the people by cabining appointment within a few elected positions.[62] Concentrating power in one person informs the public of who wields it. Because the public knows which elected official made a shoddy appointment, the public may remove that official at the voting booth.[63] Fear of removal incentivizes those wielding appointment power to select candidates carefully, which in turn improves the quality of appointments.[64]

Indeed, much of the debate surrounding the ratification of the Appointments Clause concerned whether the President or Congress should be granted sole appointment power. James Wilson argued that the Executive alone should have

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56. *See* Morrison v. Olson, 487 U.S. 654, 671 (1988) ("The line between 'inferior' and 'principal' officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn."); *Freytag*, 501 U.S. at 884 (stating there is "a sparse record" surrounding the "brief" debates over the Appointments Clause during ratification); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1536, 397–98 (3d ed. 1858) ("In the practical course of the government there does not seem to have been any exact line drawn, who are and who are not deemed inferior officers, in the sense of the constitution, whose appointment does not necessarily require the concurrence of the Senate."); In re Sealed Case, 838 F.2d 476, 532 (D.C. Cir. 1988) (Ginsburg, J., dissenting) (stating that "the founding fathers did not settle the question" of distinguishing between an inferior or principal officer).

57. U.S. CONST. art. II, § 3.

58. *Arthrex*, 141 S. Ct. at 1988–89 (Gorsuch, J., concurring).

59. 1 ANNALS OF CONG. 463 (1789) (Madison).

60. U.S. CONST. art. II, § 2, cl. 2.

61. U.S. v. Arthrex, Inc., 141 S. Ct. 1970, 1982 (2021) (citing THE FEDERALIST 70 (Hamilton) ("And the public can only wonder 'on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'").

62. *See id.*

63. *See id.*

64. *Id.* at 1979 ("[T]he 'sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation.'").

appointment power because "Congress' intrigue and partiality would lead to impropriety."[65] Conversely, James Madison argued that the Senate should receive appointment power because it was "sufficiently stable and independent."[66] Nathaniel Gorham ultimately won the debate by proposing a compromise derived from the Massachusetts constitution: the President has appointment power, but the Senate must consent to the appointment.[67] Gorham believed that the Senate was "too numerous, and too little personally responsible, to ensure a good choice."[68] Thus, by localizing appointment power in the President alone, we, the people, can hold the President accountable, because "the blame of a bad nomination would fall upon the president singly and absolutely."[69]

Concentrating power provides notice to the public of who possesses the power, but also runs the risk of abuse of power. Appointment power provides an opportunity for those wielding it to promote anti-democratic practices, such as despotism.[70] Therefore, Gorham also believed that the President should be held accountable by the Senate.[71] By requiring the Senate's consent to appoint officers, executive abuse of appointment power is curbed.[72] As Gouverneur Morris famously said at the Constitutional Convention, "As the president was to nominate, there would be responsibility, and as the Senate was to concur, there would be security."[73] Therefore the Appointments Clause functions to hold the Executive accountable to both the people and the Senate.

Importantly, the Framers also recognized that "when offices became numerous, and sudden removals necessary," appointing all officers via Presidential nomination and Senate confirmation would be "inconvenient."[74] Thus, for the sake of "administrative convenience,"[75] Congress may vest appointment power for inferior officers in either the President, courts of law, or department heads.[76] Currently, there are between 1,200 and 1,400 principal officer positions with

65. Daniel S. Cohen, *Do Your Duty*, 103 VA. L. REV. 673, 683 (2017).

66. *Id.*

67. *Id.* at 684.

68. *Id.*

69. *Arthrex*, 141 S. Ct. at 1979 (citing A. Hamilton, THE FEDERALIST, No. 77, at 517 (Jacob Cooke ed., 1961)).

70. Freytag v. Comm'r, 501 U.S. 868, 883 (1991). ("The power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth-century despotism. . . . Those who framed our Constitution addressed these concerns by carefully husbanding the appointment power to limit its diffusion." (internal quotations omitted)).

71. Cohen, *supra* note 65, at 683–84.

72. *Id.*

73. Note, *Congressional Restrictions on the President's Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 HARV. L. REV. 1914, 1917–20 (2007).

74. United States v. Germaine, 99 U.S. 508, 510 (1878).

75. U.S. v. Edmond, 520 U.S. 651, 660 (1997) (stating that the provision electing an alternate appointment method for inferior officers was "obvious[ly]" for the purpose of "administrative convenience").

76. U.S. CONST. art. II, § 2, cl. 2.

thousands more inferior officers.[77] As the Senate takes longer and longer to confirm various nominees, the government would come to a standstill if both principal and inferior officers were required to be confirmed before appointment.[78] Congress certainly has more important things to worry about, such as eliminating daylight savings time.[79] Thus, the inferior and principal officer distinction represents a compromise between holding the President accountable to the Senate and the people and ensuring that the government is run efficiently.

D. Principal–Inferior Officer Questions Warrant (Some) Judicial Deference

Although the purpose of the Appointments Clause and its effect on appointment is clear, the line between principal and inferior officers remains vague. Many insist that the vagueness indicates judicial deference should be applied to principal–inferior officer questions.[80] Congress and the courts in conjunction—the proponents argue—must determine if an officer is inferior. Proponents point out that the current principal–inferior officer doctrine ignores the words "may by Law" and "as they think proper" in the phrase "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper,"[81] when it is well established that "it is . . . a cardinal principle of statutory construction that we must 'give effect, if possible to every clause and word of a statute.'"[82] "May by Law . . . as they think proper" strongly suggests that Congress has considerable freedom to determine whether an officer is inferior—especially when viewed in conjunction with the Necessary and Proper Clause.[83] "As they think proper" could indicate a "textually demonstrable constitutional commitment of the issue" for Congress to decide.[84] "By Law" incorporates the Necessary and Proper Clause and Art. I § 7's process for creating a law in which both the House of Representatives and Senate must ratify an act signed by the President.[85]

The Necessary and Proper Clause grants Congress broad—but not unlimited—authority to enact and implement laws, and courts have traditionally afforded a

77. Brad Plumer, *Does the Senate really need to confirm 1,200 executive branch jobs?*, WASHINGTON POST (July 16, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/07/16/does-the-senate-really-need-to-confirm-1200-executive-branch-jobs [https://perma.cc/VQ8E-BWYV].

78. *Id.*

79. Sunshine Protection Act of 2021, H.R. 69, 117th Cong. (2021).

80. *See*, U.S. v. Arthrex, Inc., 141 S. Ct. 1970, 1994 (2021) (Breyer, J., concurring in part and dissenting in part); Lucia v. SEC, 138 S. Ct. 2044, 2062 (2018) (Breyer, J., concurring in part and dissenting in part); Alan B. Morrison, *The Principal Officer Puzzle*, YALE J. ON REG. (2019).

81. U.S. CONST. art. II, § 2, cl. 2.

82. *See* Williams v. Taylor, 529 U.S. 362, 404 (2000).

83. *See Arthrex*, 141 S. Ct. at 1994 (Breyer, J., concurring in part and dissenting in part) ("The words 'by Law . . . as they think proper' strongly suggest that Congress has considerable freedom to determine the nature of an inferior officer's job and that courts ought to respect that judgement.").

84. Baker v. Carr, 369 U.S. 186, 217 (1962); Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 J. CONST. L. 745, 761 (2008).

85. *Id.* at 759.

large degree of deference to Congress in this area.[86] For example, in 1819, Chief Justice Marshall stated that the Framers made efforts to create a durable Constitution, and that it is "unwise" to prescribe "the means by which government should, in all future time, execute its powers."[87] Thus, the broad authority of Congress grants the legislature flexibility in deciding a particular appointment scheme.

The incorporation of the Necessary and Proper Clause, in conjunction with a lack of historical record, prompted multiple Justices to conclude that judicial deference is owed in principal–inferior officer questions. Justice Breyer advocated for judicial deference to Congress' choice in determining whether an officer is inferior.[88] Importantly, in his dissent in *Morrison*, Justice Scalia agreed that Congress deserves some deference when the Executive and Legislative branches agree that an officer is inferior:

> Where a private citizen challenges action of the Government on grounds unrelated to separation of powers, harmonious functioning of the system demands that we ordinarily give some deference, or a presumption of validity, to the actions of the political branches in what is agreed, between themselves at least, to be within their respective spheres.[89]

Indeed, the cases surrounding Appointments Clause issues suggest that deference is given to Congress, as only one case prior to *Arthrex* invalidated an appointment scheme.[90] Thus, case law strongly suggests that judicial deference is appropriate in principal–inferior officer questions, especially when the legislature and the president are in agreement.

However, the amount of deference owed to Congress via incorporation of the Necessary and Proper Clause is not as broad as some have suggested. In *Buckley v. Valeo*, for example, the Court agreed that Congress has the authority under the Necessary and Proper Clause to create offices, "[b]ut Congress' power under that Clause is inevitably bounded by the express language" of the Appointments Clause and must comport with the prescribed method.[91] Further, the text does not support affording as much judicial deference as Justice Breyer has suggested. Commas separate "as they think proper" in the phrase: "the Congress may by

86. U.S. CONST. art. I, § 8, cl. 18; *Arthrex,* 141 S. Ct. at 1988 (Breyer, J., concurring in part and dissenting in part).

87. McCulloch v. Maryland, 17 U.S. 316, 415 (1819).

88. *See* Lucia v. SEC, 138 S. Ct. 2044, 2062 (2018) (Breyer, J., dissenting) ("Congress, not the judicial branch alone, must play a major role in determining who is an 'office[r] of the United States.'").

89. Morrison v. Olson, 487 U.S. 654, 704 (1988) (Scalia, J., dissenting).

90. *Lucia*, 138 S. Ct. at 2063 (Breyer, J., dissenting) (noting that only *Buckley v. Valeo* found that the appointment scheme was unconstitutional); *Arthrex*, 141 S. Ct. at 1999 (Breyer, J., concurring in part and dissenting in part) (stating inferior officer decisions "invariably result in this Court deferring to Congress' choice of which constitutional appointment process works best.").

91. Buckley v. Valeo, 424 U.S. 1, 138–39 (1976).

Law vest the Appointment of such inferior Officers, as they think proper."[92] Therefore, "as they think proper," naturally read, has two possible meanings: "the Congress may, as they think proper" or "such inferior Officers, as they think proper." The former construction is not likely to be correct. "May" is discretionary. "As they think proper" also provides discretion in this context. Thus, "as they think proper" would render "may" superfluous.[93]

The latter interpretation—"such inferior officers, as they think proper"—is far more likely to be correct and indicates that Congress has the discretion to place qualifications on such inferior officers.[94] The interpretation is supported by another constitutional clause that contains "such . . . as they think proper." The Extraordinary Occasions Clause states:

> *[H]e may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper*.[95]

In interpreting the Extraordinary Occasions Clause, current doctrine suggests that "as he shall think proper" relates to "such Time."[96] Thus, the President may elect a time of his choosing for Congress to adjourn. Applying the same logic to the Appointments Clause, "as they shall think proper" relates to "such inferior officers" and may be interpreted as to provide Congress with the authority to require inferior officers to meet qualifications prior to appointment.[97] Indeed, APJs must have competent legal knowledge and scientific ability to be appointed.[98] Thus, although deference is not as strong as its advocates say, judicial precedent establishes that some judicial deference must be applied. Ultimately, however, the judiciary is tasked with defining what the law is, and the case law doctrine determines the principal–inferior officer question.[99]

II. THE PRINCIPAL–INFERIOR OFFICER DOCTRINE

A. The Principal–Inferior Officer Distinction: Morrison v. Olson, Edmond v. United States*, and other cases*

Morrison and *Edmond* are the two leading cases distinguishing principal and inferior officers. The *Morrison* Court, after noting the uncertainty surrounding the definition of inferior officers, declined to decide "exactly where the line falls

92. U.S. CONST. art. II, § 2, cl. 2.
93. Volokh, *supra* note 84, at 760–61.
94. *Id*.
95. U.S. CONST. art. II, § 3.
96. Volokh, *supra* note 84, at 761–62.
97. *Id*. at 762.
98. *See* 35 U.S.C. § 6(a).
99. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

between the two types of officers."[100] Rather, the 8–1 majority weighed several factors in determining that the Independent Counsel was an inferior officer: (i) whether an officer is removable by a higher Executive official, (ii) whether an officer has the authority to formulate policy or perform administrative duties outside of those necessary to the operation of her office, (iii) whether an officer has limited jurisdiction, and (iv) whether the office is limited in tenure.[101] *Morrison*'s multifactor balancing test embodies a functionalist approach.

Justice Scalia penned a scathing lone dissent in which he argued the *Morrison* majority decided the principal–inferior officer question based on "irrelevant" dicta and failed to look to the text of the Constitution.[102] Relying on the dictionary, the Federalist Papers, and other uses of "inferior" in the Constitution, Justice Scalia defined "inferior" to mean subordinate.[103] Because the Independent Counsel had independent authority to exercise all investigative and prosecutorial functions of the Department of Justice and was removable only for "good cause," Justice Scalia reasoned that the counsel was not subordinate to the President nor the Attorney General and was therefore a principal officer.[104]

Less than ten years later, Justice Scalia authored the majority's decision in *Edmond* based on his dissent in *Morrison*.[105] After noting that there is no "exclusive criterion for distinguishing between principal and inferior officers," Justice Scalia relied on his interpretation of "inferior" in *Morrison* to proffer that "whether one is an inferior officer depends on whether he has a superior."[106] However, a formalistic label deeming an officer as "inferior" does not suffice for the officer to be constitutionally "inferior;" a principal officer must functionally direct and supervise the officer "at some level."[107] *Edmond* provides more structure to the principal–inferior officer analysis by asking a bright-line question—whether an officer has a superior—but maintains a degree of flexibility by leaving undefined the required "level" of supervision.

The *Edmond* court ultimately held that Coast Guard Court of Criminal Appeals judges were inferior officers because the judges were completely supervised by both the Judge Advocate General and the Court of Appeals for the Armed Forces

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100. Morrison v. Olson, 478 U.S. 654, 671 (1988) (citing 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1536, 297–98 (1858) ("In the practical course of government there does not seem to have been any exact line drawn, who are and who are not to be deemed inferior officers.")).

101. *Id.* at 672.

102. *Id.* at 719 (Scalia, J., dissenting) ("Rather than erect a theory of who is an inferior officer on the foundation of such an irrelevancy, I think it preferable to look to the text of the Constitution and the division of power that it establishes.").

103. *See id.* at 719–21.

104. *Id.* at 723.

105. *See* Adrian Vermeule, *Morrison v. Olson is Bad Law*, LAWFARE (June 9, 2017, 8:14 PM), https://www.lawfareblog.com/morrison-v-olson-bad-law [perma.cc/Z927-B6AH]; United States v. Hilario, 218 F.3d 19, 25 (2000) (noting that the *Edmond* definition of an inferior officer is strikingly similar to the *Morrison* dissent).

106. Edmond v. United States, 520 U.S. 651, 662–63 (1997).

107. *Id.*

(CAAF).[108] The Judge Advocate General exercised administrative oversight over the judges by prescribing rules of procedure, formulating policies, and retaining the ability to remove a judge from his judicial assignment without cause.[109] The CAAF, an Article I court, had a limited ability to review decisions and could not initiate *sua sponte* review.[110] Importantly, the *Edmond* court stated that "this limitation upon review does not in our opinion render the judges of the Court of Criminal Appeals principal officers. What is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so."[111]

Edmond currently controls Appointment Clause cases, but still allows for flexibility. For example, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court relied on *Edmond* to find that board members are subject to supervision by another principal officer, as the members are removable at will.[112] *Free Enterprise*'s reasoning for finding supervision "at some level" does not go as far as the complete control exerted by the CAAF and Judge Advocate General in *Edmond*, indicating that "at some level" is a more flexible standard.

B. Morrison *and* Edmond *Are Reconcilable*

Because Justice Scalia's sole dissent in *Morrison* was the basis of *Edmond*'s holding, some erroneously believe that the *Morrison* multifactor test and *Edmond* "superior" test are irreconcilable, which would render *Morrison* limited to its facts.[113] Even Justice Thomas labeled *Morrison*'s approach as "nebulous" and stated that *Morrison* was unlikely to have survived *Edmond* in his concurrence in *NLRB v. SW General, Inc*.[114] Furthermore, the majority opinion in *Arthrex* was the only opinion that failed to cite *Morrison*, suggesting the majority viewed *Morrison*'s multi-factor test as no longer applicable.[115] However, *Morrison* certainly still applies because *Edmond* did not overrule *Morrison*. Rather, *Edmond* cited *Morrison* as precedent.[116] Further, the Supreme Court has frequently relied on *Morrison* in the Appointments Clause setting after *Edmond*. In 2020—a year before *Arthrex*—the Supreme Court relied on *Morrison*, rather than *Edmond*, to determine whether a CFPB Director was an inferior officer in *Selia Law, LLC v. Consumer Financial Protection Bureau*.[117] Thus, *Edmond* and *Morrison* are reconcilable, and the Court should have applied both cases in *Arthrex*.

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108. *Id.* at 664-665.
109. *Id.*
110. *Id.* (describing the CAAF review as "narrower" because the CAAF would not reevaluate facts if there is competent evidence on the record establishing each element beyond a reasonable doubt).
111. *Id.* at 665.
112. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 510 (2009).
113. *See* Vermeule, *supra* note 105 (stating Morrison is "anticanonical" after *Edmond*).
114. N.L.R.B. v. SW General, Inc., 137 S. Ct. 929, 948 n.4 (2017) (Thomas, J., concurring).
115. *See* United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021).
116. *See* United States v. Hilario, 218 F.3d 19, 25 (1st Cir. 2000).
117. Seila Law, LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2200 (2020).

In practice, the cases complement—rather than contradict—each other because both use a functionalist approach.[118] *Edmond's* second prong, whether an inferior officer is supervised and directed by a principal officer at some level, has been applied as a multifactor test in tandem with *Morrison* by the lower courts. In *Arthrex, Inc. v. Smith Nephew, Inc.*, the Federal Circuit evaluated whether APJs were inferior officers by examining *Edmond*'s three factors: power to review, level of supervision and oversight, and removal power.[119] The court then examined "other factors" listed in *Morrison*.[120] Both courts and academics alike agree the cases are reconcilable because "supervision by a superior officer is a sufficient but perhaps not a necessary condition to the status of inferior officer."[121] Thus, an inferior officer may fail *Edmond*'s test but still be an inferior under *Morrison*'s definition. Likewise, the inverse is true. Ultimately, *Edmond* and *Morrison* are both binding precedent and should have been applied by the *Arthrex* court.

III. THE *ARTHREX* HOLDING PRODUCES AN UNWORKABLE DOCTRINE AND CONTRADICTS BINDING PRECEDENT

A. The Arthrex *Decision is Inherently Inconsistent, Produces Absurd Results, and Contradicts Legislative Intent*

The *Arthrex* decision produced a bright-line rule: whether the officer is a principal or inferior officer is determined by the finality of his decisions.[122] On its face, the rule is inherently inconsistent because it is simultaneously underinclusive and overinclusive. First, the rule is underinclusive because it classifies the Director as an inferior officer. The Director is a principal officer properly appointed by the President.[123] The Supreme Court stressed that the PTAB, rather than the Director, issued final decisions. Thus, *Arthrex* renders the Director an inferior officer because he does not issue final decisions.

Second, the rule is dangerously overinclusive. For example, 12,869 FBI agents investigated criminal enterprises and federal crimes in 2020.[124] As Justice Thomas noted, the agents must make final decisions at times, such as whether to use force.[125] FBI agents are not considered to be principal officers by anyone; however, under the *Arthrex* standard, FBI agents are principal officers because

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118. *Arthrex*, 141 S. Ct. at 2000 (Thomas, J., dissenting) ("But according to the Court in *Edmond*, formal inferiority is 'not enough.' So the Court imposed a functional requirement: The inferior officer's work must be 'direct and supervised at some level by others who were appointed by Presidential nomination with advice and consent of the Senate.'") (citation omitted).

119. Arthrex, Inc v. Smith & Nephew, Inc. 941 F.3d 1320, 1329 (Fed. Cir. 2019).

120. *Id.* at 1334.

121. *See* United States v. Gantt, 194 F.3d 987, 999 n.6; *See also* Note, *Separation of Powers—Appointment and Removal—Principal and Inferior Officers*—United States v. Arthrex, Inc., 135 HARV. L. REV. 391, 392 (2021) [hereinafter "Note"].

122. *Arthrex*, 141 S. Ct. at 1987.

123. *See* 35 U.S.C. § 3(a).

124. FED. BUREAU OF INVESTIGATION, 2020 BUDGET REQUEST AT A GLANCE, https://www.justice.gov/jmd/page/file/1142426/download [perma.cc/YB2C-Z4NY].

125. *Arthrex*, 141 S. Ct. at 2004 (Thomas, J., dissenting).

they may render a final decision. Together, the *Arthrex* decision's under-inclusiveness and over-inclusiveness render the rule inherently unworkable.

Further, the Supreme Court's rule disregards the purpose of the Appointments Clause. As discussed previously, the Appointments Clause represents a compromise between efficiency and procedural safeguards. The 12,869 FBI agents, now principal officers, significantly raise the estimated number of principal officers from 1,200 officers to 14,069:[126] a 1172.4% increase. Our government would come to a screeching halt if both the Senate and President were required to complete the principal officer appointment method for each of the 12,869 agents. *Arthrex* effectively eviscerates the inferior officer appointment method. Thus, the Supreme Court's holding also produces absurd results and contradicts a key concern of the Appointment Clause: efficiency.

B. Arthrex *Disregards Binding Precedent to Create a New Judicial Rule*

Until *Arthrex*, the Court had never attempted to draw a line between an inferior and principal officer because the record defining "inferior officer" is sparse.[127]*Arthrex* markedly departed from prior hesitancies by adopting a bright-line rule that effectively overrules both *Morrison* and *Edmond*. *Morrison* and *Arthrex* are clearly irreconcilable because the cases use strikingly different methods. Broadly speaking, *Morrison* is a functionalist multifactor test, whereas *Arthrex* provides a formalistic rule. Therefore, an officer may be inferior under *Morrison*, but principal under *Arthrex*. For example, under the new standard, an officer who renders final decisions on behalf of the Executive Branch is a principal officer even if (i) another Officer of the United States may remove the officer at will, (ii) the officer has limited tenure, and (iii) the officer has limited jurisdiction. Despite meeting three of the four *Morrison* factors, *Arthrex* holds that the officer is a principal officer. Thus, *Arthrex* overrules *Morrison*.[128]

Arthrex also disregards Justice Scalia's dissent in *Morrison*—the origin of *Edmond*. As previously mentioned, the dissent expressly calls for judicial deference when both the legislature and executive are in agreement.[129] The AIA is an example of inter-branch agreeance. Congress drafted the law and President Obama signed it into law. President Obama even hailed the AIA as "vital."[130] The *Arthrex* Court completely failed to discuss this.

The majority opinion in *Arthrex* also violates *Edmond* in two ways. First, the Supreme Court vastly increased the rigidness of the principal–inferior officer question under the guise of following *Edmond*; however, the *Arthrex* Court did not have the precedential backing to "boil[] down" the distinction between an

126. FED. BUREAU OF INVESTIGATION, *supra* note 124.

127. *See* Morrison v. Olson, 478 U.S. 654, 671 (1988); Edmond v. United States, 520 U.S. 651, 651 (1997); *Arthrex*, 141 S. Ct. at 1999 (Thomas, J., dissenting).

128. *See* Note, *supra* note 121, at 397 (arguing that *Morrison* and *Arthrex* are not reconcilable).

129. *Supra* text accompanying note 89.

130. *Summary of the American Invents Act*, *supra* note 2.

inferior and principal officer to reviewability of final decisions alone.[131] Both *Morrison* and *Edmond* engage in a functional analysis. *Edmond* only requires an inferior officer to be supervised "at some level." The *Edmond* Court, like in *Morrison*, did not purport to "set forth an exclusive criterion for distinguishing between principal and inferior officers" and left the definition of "some level" unclear.[132] Rather, Appointments Clause cases are to be decided on a case-by-case basis.[133]

Arthrex disregards *Edmond*'s requirement that an inferior officer be supervised at "some level." The majority determined that the Director's supervision and control over procedural and substantive aspects of IPR proceedings was dispositive and that such "machinations blur the lines of accountability demanded by the Appointments Clause."[134] Until *Arthrex*, however, no Supreme Court decision purported to draw any lines between a principal and inferior officer due to a lack of historical guidance.[135] One cannot blur a line that doesn't exist.

Second, the Supreme Court increased the necessary amount of decisional review that a principal officer must provide to an inferior officer to prevent an inferior officer's decisions from being labeled as final. Limited review sufficed in *Edmond*,[136] but *Arthrex* appears to require the court to review *sua sponte*. The Court heavily relied on the finding that the Director may not institute review himself[137]—but neither could the CAAF in *Edmond*. Both IPR and CAAF review are conditional. The CAAF reviews every decision (a) that had a sentence extend to death, (b) that was ordered so by the Judge Advocate General, or (c) for which it grants review after receiving petition.[138] Likewise, the PTAB may not institute review unless there is a petition.[139] Thus, neither the appellate body in *Edmond* nor the Director have the independent authority to initiate review. A condition must be met to trigger review. Because the *Edmond* Court found that the conditional CAAF review prevented the Criminal Court of Appeals from issuing a final decision,[140] the *Arthrex* Court departed from *Edmond* by holding that the Director's conditional review did not prevent the APJs from rendering a final decision. Consequently, *Arthrex* alters the required amount of review to render an inferior incapable of issuing a final decision.

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131. *Arthrex*, 141 S. Ct. at 2002–03 (Thomas, J., dissenting).

132. *Edmond*, 520 U.S. at 661.

133. *See* Tina Seideman, *Inferior or Principal? The Current Appointments Clause Jurisprudence Just Isn't Enough*, GEO. J.L. & PUB. POL'Y LEGAL BLOG (June 10, 2021), https://www.law.georgetown.edu/public-policy-journal/blog/inferior-or-principal-the-current-appointments-clause-jurisprudence-just-isnt-enough/ [https://perma.cc/H9GE-74T9] (stating that the principal–inferior officer distinction is a fact-specific inquiry).

134. *Arthrex*, 141 S. Ct. at 1982.

135. *See supra* text accompanying note 56.

136. *See Edmond*, 520 U.S. at 665.

137. *See* 35 U.S.C. § 6(c).

138. *See* 10 U.S.C. § 867(a); *Edmond*, 520 U.S. at 664–65.

139. *See* 35 U.S.C. § 6(c); *Arthrex*, 141 S. Ct. at 1982.

140. *See Edmond*, 520 U.S. at 665.

Arthrex justifies the heightened "review" requirement by incompletely distinguishing between CAAF and Director review.[141] The CAAF reviews Criminal Court of Appeals decisions itself, whereas the Director may only review an IPR decision in conjunction with two other members of the PTAB.[142] The Court erroneously relies on this difference to designate APJs as inferior officers for two reasons. First, the *Arthrex* Court concluded that the Director's lack of review power enables him to evade "responsibility for the ultimate decision."[143] The Court's observation points to a key purpose of the Appointments Clause: accountability. The Director, an unelected official, must be held accountable because he wields significant executive authority.[144] The Supreme Court, however, simultaneously downplayed the Director's broad control over IPR review. According to the majority, the Director only provides "half" of the supervision as in *Edmond* and does not exercise control over patentability decisions.[145] *Arthrex*'s position as to the Director's scope of authority lacks consistency.

The Director may take several steps, including crafting an entirely new PTAB panel, to reach his desired results. As Justice Gorsuch, who joined the *Arthrex* majority, stated in *Oil States*, "[i]f they (somehow) reach a result he does not like, the Director can add more members to the panel—including himself—and order the case reheard."[146] Additionally, the Director may designate which PTAB decisions are binding precedent.[147] Because APJs are required to be impartial adjudicators under the Administrative Procedure Act (APA),[148] the APJs must be bound by rules and must reach the Director's desired decision. In this sense, APJs are soldiers following the Director's orders. Given the Director's procedural and substantive control over IPR review, the PTAB can only reach a result inconsistent with the objectives and policy of the President by the Director's inaction. The Director's broad control provides more than enough supervision "at some level" to ensure that we, the people, are aware that the Director is to blame for the PTO's bad acts. Therefore, the *Arthrex* Court erred by declaring that the Director's lack of review allows him to evade responsibility.

Second, the Court's distinguishment between the CAAF and Director is incomplete because the *Arthrex* majority overlooked a key difference: the CAAF is a quasi-judicial body whereas the Director is an executive official. The CAAF,

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141. *See Arthrex*, 141 S. Ct. at 1980 (describing the CAAF as an "executive tribunal").

142. *See* 35 U.S.C. § 6(c).

143. *Arthrex*, 141 S. Ct. at 1981.

144. *See* 35 U.S.C. § 3(a) (describing powers vested in the Director).

145. *Arthrex*, 141 S. Ct. at 1980 ("He is the boss, except when it comes to the one thing that makes the APJs officers exercising 'significant authority' in the first place—their power to issue decisions on patentability.").

146. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC., 138 S. Ct. 1365, 1381 (2018) (Gorsuch, J., dissenting) (citing 35 U.S.C. §§ 6(a), 6(c); In re Alappat, 33 F.3d 1526, 1535 (Fed. Cir. 1994) (en banc); Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co., 868 F. 3d 1013, 1020 (Fed. Cir. 2017) (Dyk, J., concurring)).

147. *See* 35 U.S.C. §§ 3(a)(2)(A), 316(a)(4).

148. *See* 5 U.S.C. § 556(b)(3).

unlike the Director, only applies policy judgements and does not create them.[149] Prior to *Arthrex,* the PTO scheme ensured that IPRs remained insulated from the political forces that controlled the Director to ensure that the proceedings were impartial.[150] Congress acted within its proper scope of authority in implementing the AIA because both Congress and the Court have consistently insisted that administrative law judges are insulated from impartiality.

The APA mandates that formal adjudications be "conducted in an impartial manner."[151] Thus, IPR—a type of formal adjudication—must be conducted impartially.[152] Further, *Weiner v. United States* unanimously held that the War Claims Commission may be "'entirely free from the control or coercive influence, direct or indirect,' . . . of either the Executive or the Congress."[153] The commission's "intrinsic judicial character" demanded impartiality in decision-making.[154] Likewise, IPRs have an intrinsic judicial character because, for most of our nation's history, patent invalidation after issuance was an Article III court function.[155] The Court, however, directly exposed the judges to political pressure despite decades of precedent. The Director—who is subject to political pressures—may now *sua sponte* review any decision, eviscerating any independence that the APJs previously had.[156]

Therefore, the Court took an inherently inconsistent position that is both under-inclusive and overinclusive, reached absurd results, and acted contrary to the purpose of the Appointment Clause. Further, because the case is irreconcilable with *Morrison* and contradicts *Edmond*, *Arthrex* overruled established precedent and imposed a new judicial rule that subjects the APJs to the Executive's coercive forces. Accordingly, *Arthrex* should be revisited and reversed.

IV. CONCLUSION: THE EFFECTS OF *ARTHREX* AND A RECOMMENDATION TO CONGRESS

The immediate effect of *Arthrex* is that the Director may review decisions by the PTAB under 35 U.S.C. § 6(c).[157] In practice, IPR has not changed significantly. The proceeding remains the most popular forum for patent disputes within the PTO, comprising 96% of all trials.[158] Additionally, the rates of IPR institution

149. *See Arthrex*, 141 S. Ct. at 1995 (Breyer, J., concurring in part, dissenting in part).

150. *See id.*

151. *See* 5 U.S.C. § 556(b)(3).

152. *See* Belden Inc. v. Berk-Tek LLC, 805 F.3d 1064, 1080 (Fed. Cir. 2015) ("And for a formal adjudication like the one at issue here, the [APA] requires the PTO to 'timely inform[]' a patent owner of 'the matters of fact and law asserted' in an [IPR] . . . ."); *Arthrex*, 141 S. Ct. at 1996 (Breyer, J., dissenting) ("Congress chose to grant the APJs a degree of independence.").

153. Wiener v. United States, 357 U.S. 349, 355–56 (1958) (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935)).

154. *Wiener*, 357 U.S. at 355.

155. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC., 138 S. Ct. 1365, 1370–71 (2018) (explaining that Congress granted the PTO authority to reexamine wrongly issued patents in 1980).

156. *See id.*

157. *See* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1987 (2021).

158. *See* PAT. TRIAL & APPEAL BD., U.S. PAT. & TRADEMARK OFF., PTAB TRIAL STATISTICS: JANUARY 2022 IPR, PGR 3 (2022).

by petition and settlement do not differ from pre-*Arthrex* rates.[159] More time will reveal the true and concrete effects of *Arthrex* on the PTO and U.S. patent law; however, a big fallout is unlikely.

Despite the apparent PTO stability, public opinion has shifted further against the PTAB. Following the decision, many commentators began wondering if IPRs would remain impartial because APJs are now subject to political pressure to reach a certain result.[160] There have also been fears that "a political USPTO is a non-technical USPTO" and the restructuring would impede, rather than promote innovation.[161] *Arthrex* therefore diminishes public confidence in the PTO.

Due to growing public distrust in the PTO and PTAB, Congress should establish an appellate body within the PTAB comprised of no more than ten principal officers who are subject to for-cause removal. This reviewing court would prevent the APJs from rendering "final decisions" and would prevent others from challenging the constitutionality of the APJs appointment mechanism. Further, fewer than ten judges should comprise the appellate body. The small membership ensures that the appointment of the members does not unduly burden the Senate and allows the government to run efficiently. Finally, for-cause removal insulates the appellate judges from political coercion and allows for IPRs to be decided on the merits. The appellate body therefore removes the public distrust of the PTO and minimally impacts the efficiency of the government, allowing the PTO to thrive in a post-*Arthrex* world.

159. *See id*. at 5–10.

160. Randy J. Pummill & Bradley Roush, *Arthrex's Fallout—How is the Supreme Court Decision Affecting Appeals*, FOLEY & LARDNER, LLP (Aug. 30, 2021), https://www.foley.com/en/insights/publications/2021/08/arthrex-fallout-supreme-court-decision-appeals [https://perma.cc/Y5TE-L7HP].

161. Alan Clement & Daniel Fiorello, *Impact of U.S. v. Arthrex*, JDSUPRA (July 30, 2021), https://www.jdsupra.com/legalnews/impact-of-us-v-arthrex-7431450/ [https://perma.cc/8SW3-V82F].