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Last month, the Supreme Court heard oral arguments for a case called *Arthrex, Inc. v. United States* which could have a significant impact on the world of patents but, even more profoundly, on the whole of the administrative state. The argument presented by the lower court is that Administrative Patent Judges (APJs) of the Patent Trial and Appeal Board (PTAB) wield too much power to not be approved by Senate confirmation. Rather than requiring appointment, the Federal Circuit decided to subordinate the APJs to political directors by stripping them of employment protections which are instituted to ensure the crucial Due Process protections of patent holders. The Federal Circuit's analysis and remedy did not come out of left field. They were the inevitable product of decades of unitary executive theory[1] and skepticism towards the administrative state.

The judicial grounding for much of this skepticism can be found in a string of cases in the late 20th century which established the standard by which to judge executive officers. This history

begins with the cases of *Morrison v. Olson* and *Edmond v. United States* decided in 1988 and 1997, respectively, which led to the slightly amorphous and currently applied standard of examining factors such as the officer's level of supervision by a principal officer,[2] the reviewability of the officer's work,[3] whether the officer is removable at will versus for cause,[4] and the scope of the officer's duties.[5] According to the Federal Circuit in *Arthrex, Inc.*, "[t]hese 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. . . [which is] the central consideration."[6]

Since those decisions, the independence and appointment of officers within the Executive Branch have continued to be targets of judicial scrutiny. There has been a recent string of decisions which have found that the executive power vested in the President has been unconstitutionally distributed to other members of the Executive Branch or limited in such a way that the President may not "take Care that the Laws be faithfully executed."[78] In parallel with this pattern of increased scrutiny towards executive oversight, there is increased scrutiny of the officers who exercise the power of the Executive Branch.[9] One particular locus of concern in this area has been the adjudicatory officers[10] of the Executive Branch.

Part of this increased scrutiny may be due in part to the fact that, in the past decade, there has been a great increase in the number of administrative law judges (ALJs) and the activity of those judges across the entirety of the Executive Branch.[11] The Dodd-Frank Act increased the jurisdiction of, and granted more authority to, Security & Exchange Commission ALJs, which led to a tripling in the number of adjudications against public companies from 2011 to 2016.[12] The Social Security Administration, by far the largest employer of ALJs, has increased the number of judges from about 1,100 to over 1,600 in the past decade.[13]The America Invents Act passed in 2012 created the PTAB and the position of APJ, which now accounts for almost 200 officers.[14]

Each administrative adjudicator's authority and jurisdiction within their respective administration differs but the goal of Congress in creating them has remained the same: creating adjudicative bodies within the administrative system, which retain subject matter expertise and provide as neutral a body as possible for the fair administration of the law and the protection of litigants' Due Process rights.[15] This is a noble goal and has allowed for specialized tribunals that prevent the flood of cases that would otherwise be heard by the more plenary and already overworked Article III courts. In the pursuit of this system, Congress has afforded certain removal protections to the members of the adjudicative bodies in an attempt to ensure impartiality by somewhat insulating them from the influence of their superiors.[16]

Until recently, many of these ALJs were thought of as just employees, not officers, and were therefore not subject to the Appointments Clause of the Constitution.[17] However, the Supreme Court struck a blow to this theory in the case of *Lucia v. S.E.C* when it found that ALJs within

the SEC were in fact inferior officers and required appointment by the President, a court of law, or the head of a department.[18] This decision sent many administrations scrambling to correct any deficiencies in their own ALJ appointment process in order to protect the constitutionality of their adjudicative bodies.[19] For example, the Acting Commissioner of the Social Security Administration, the largest employer of ALJs, worked quickly to reappoint them herself in accordance with the Appointments Clause.[20]

The decisional creep[21] has now set in and, in the case of *Arthrex, Inc. v. Smith & Nephew, Inc.*, the Federal Circuit has found that some of these adjudicative officers, specifically Administrative Patent Judges of the PTAB, are in fact principal officers.[22] This decision would require the appointment of APJs by the President with the advice and consent of the Senate.[23] The Federal Circuit found as such because, in the particular case of APJs, there is no "presidentially-appointed officer who can review, vacate, or correct decisions by the APJs combined with the limited removal power."[24] This decision was guided in part by a similar finding by the D.C. Circuit Court of Appeals in *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, which held that Copyright Royalty Judges, who are authorized to make final decisions and had limitations on their removal, were also principal officers.[25]

In both cases, the respective courts did not defer to Congress for changes or maintain the system put in place by Congress while requiring the proper appointment. Instead, the courts chose a remedy which would ensure their designation as inferior officers.[26] The remedy chosen by both courts was severability of the statutory "for cause" protections of the administrative judges, putting them more closely under the control of a presidentially-appointed officer of the United States who would "constrain to a significant degree"[27] their decision-making.

This language does not at all seem consistent with Congress's goal of creating administrative bodies capable of impartial adjudications that ensures the due process of law.[28] However, the courts found that it was "consistent with the intent of Congress"[29] because Congress "would have preferred a Board whose members are removable at will rather than no Board at all."[30] The Federal Circuit made no attempt at an analysis of Congressional intent other than the above statement that reads more like a mob shakedown than well-reasoned insight. Even if control of APJ decision-making by executive branch officers is seen as requisite for inferior officer status, the remedy chosen by the Federal Circuit significantly undermines Congressional intent and patent owners' Due Process protections. There are other, less drastic, remedies available that would be preferable in preserving Congress's intent and sacred constitutional protections. Within the coming months, we will see if the Supreme Court agrees and if it can rise to the tall task of bringing more certainty to such a clouded area of the law.

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1. In essence, the unitary executive theory is "the establishment of a highly centralized bureaucratic structure of government that would ensure that ultimate control of decisionmaking in all executive branch agencies, including independent regulatory agencies, would rest in the hands of the President or his delegate." See Morton Rosenberg, Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive, 57 Geo. Wash. L. Rev. 627, 628-29 (1989)
2. Edmond v. United States, 520 U.S. 651, 652 (1997).
3. Id. at 664-65.
4. Id. at 664.
5. Morrison v. Olson, 487 U.S. 654, 671 (1988).
6. Arthrex, Inc. v. Smith & Nephew, Inc., 941 F.3d 1320, 1329 (Fed. Cir. 2019).
7. U.S. Const. art. II, § 3.
8. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010), Seila Law, LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).
9. Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332 (D.C. Cir. 2012), Lucia v. S.E.C., 138 S. Ct. 2044 (2018).
10. "Adjudicatory officer" is used to describe the members of the Executive Branch whose job entails functions that are traditionally thought of as judicial functions, such as overseeing trial-like procedures and applying law to facts to determine the outcome of a proceeding.
11. See Administrative Law Judges: ALJs by Agency, Office of Personal Management (Oct. 9, 2020), https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency; Statement of Michael J. Astrue Commissioner, Social Security Administration Before the House Committee On Ways and Means, Subcommittee on Social Security and the H. Comm. on the Judiciary Subcommittee on the Courts, Commercial and Administrative Law, (2011) (https://www.ssa.gov/legislation/testimony_071111.html).
12. Breon S. Peace & Elizabeth Vicens, Changes and Challenges in the SEC's ALJ Proceedings, Harv. L. Sch. F. on Corp. Governance (Oct. 9, 2020), https://corpgov.law.harvard.edu/2016/11/12/changes-and-challenges-in-the-secs-alj-proceedings/.
13. Administrative Law Judges: ALJs by Agency, Office of Personal Mgmt. (Oct. 9, 2020), https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency; Statement of Michael J. Astrue Commissioner, Social Security Administration

Before the House Committee On Ways and Means, Subcommittee on Social Security and the H. Comm. on the Judiciary Subcommittee on the Courts, Commercial and Administrative Law, (2011) (https://www.ssa.gov/legislation/testimony_071111.html).

14. Arthrex, Inc. v. Smith & Nephew, Inc., 941 F.3d 1320, 1329 (Fed. Cir. 2019).
15. Polaris Innovations Ltd. v. Kingston Tech. Co., Inc., 792 F. App'x 820, 828–30 (Fed. Cir. 2020) (Hughes, J., concurring).
16. Id.
17. Lucia v. S.E.C, 138 S. Ct. 2044, 2050 (2018).
18. Id.
19. SSR 19-1p: Titles II and XVI: Effect of the Decision in Lucia v. Securities and Exchange Commission (SEC) on Cases Pending at the Appeals Council, 84 Fed. Reg. 9582 (Mar. 15, 2019).
20. SSR 19-1p: Titles II and XVI: Effect of the Decision in [Lucia] on Cases Pending at the Appeals Council (https://www.ssa.gov/OP_Home/rulings/oasi/33/SSR2019-01-oasi-33.html).
21. "Decisional creep" is a term partially borrowed from engineering where the term "creep" refers to slow but steady deformation of materials under stress rather than an immediate failure. Past a certain point in the deformation process, creep can accelerate and result in failure of the piece.
22. Arthrex, Inc. v. Smith & Nephew, Inc., 941 F.3d 1320 (Fed. Cir. 2019), cert. granted, 2020 WL 6037206 (U.S. Oct. 13, 2020) (No. 19-1434).
23. U.S. Const. art. II, § 2, cl. 2.
24. Arthrex, Inc., 941 F.3d at 1335.
25. Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332 (D.C. Cir. 2012).
26. Intercollegiate, 684 F.3d 1332; Arthrex, Inc., 941 F.3d 1320.
27. Intercollegiate, 684 F.3d at 1341.
28. Congress's "overarching purpose" in the AIA was "to create a patent system that is clearer, fairer, more transparent, and more objective." 157 Cong. Rec. 12,984 (Sept. 6, 2011) (Sen. Kyl).
29. Arthrex, Inc., 941 F.3d at 1337 (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987)).
30. Id. at 1337–38.