Executive Decisions After *Arthrex*

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Decisionmaking in the modern executive branch frequently rests on a convenient formalism. Ultimate power is typically vested in high-level "principal" officers who, under the Appointments Clause, must be appointed by the President with the advice and consent of the Senate.[1] The vast bulk of day-to-day decisions within the branch, however, are made by thousands of lower-level officials who are either "inferior" officers appointed under the Appointments Clause[2] or mere employees lacking any official appointment under modern doctrine.[3] Those lower-level officials often wield power under contemporary norms that is as strong in practice as it is weak in theory.

United States v. Arthrex[4] marks out a constitutional limit to this modern allocation of power. Whatever de facto power lower-level officials possess as a matter of practice, the Court held in *Arthrex* that Congress cannot vest final decisional authority in subordinate civil servants not appointed by the President with the advice and consent of the Senate. In particular, the Court held that the administrative patent judges ("APJs") on the Patent Trial and Appeals Board ("PTAB"), who are inferior officers appointed by the Secretary of Commerce, could not constitutionally hold the degree of unsupervised power that statutory law appeared to vest in them—the power to issue final executive branch decisions

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[1] *See* U.S. CONST. art. II, § 2, cl. 2. The Appointments Clause does not use the phrase "principal officer." It instead prescribes a default method for appointing "Officers of the United States" (appointment by the President "by and with the Advice and Consent of the Senate") and then permits Congress "by Law" to vest the appointment of "inferior Officers" in three other locations: "the President alone," "the Courts of Law," or "the Heads of Departments." *Id.* Courts and commentators now generally use the term "principal officer" to refer to the category of non-inferior officers—those who must be appointed by the President with the advice and consent of the Senate. That terminology can be misleading. The text of the Constitution uses the term "principal officer" only once—in the "Opinions Clause," which is in the clause immediately preceding the Appointments Clause. *See id.* cl. 1. That clause empowers the President to require written opinions from "the principal officer in each of the executive Departments." The use of the singular there suggests that each department has only one "principal" officer, and that usage is consistent with both older and more modern meanings of the adjective "principal." *Compare, e.g.*, *Principal*, 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (S. Converse 1828) (defined to mean "[c]hief" and "the highest in rank"), *with Principal*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/principal (last visited Feb. 14, 2022) (defined as "chief" or "most important"). It would be far better if courts and commentators had followed the Supreme Court's lead in *United States v. Germaine*, 99 U.S. 508, 509–10 (1878), which drew the distinction between "inferior" officers and the "primary class" of officers who need appointment by the President with the consent of Senate. Despite the *Germaine* terminology's superior fidelity to constitutional text, this article will, for the convenience of readers, follow the modern practice of referring to the primary class of officers as "principal officers." *See also* Gary Lawson & Steven G. Calabresi, *Why Robert Mueller's Appointment as Special Counsel Was Unlawful*, 95 NOTRE DAME L. REV. 87, 135–37 (2019).

[2] U.S. CONST. art. II, § 2, cl. 2 ("[H]e 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.")

[3] *Cf.* Jennifer L. Mascott, *Who Are Officers of the United States?*, 70 STAN. L. REV. 443 (2018) (contending that the evidence of the Constitution's original public meaning suggests that the class of Article II officers is broader than modern doctrine presupposes and includes any official who performs a statutory duty).

[4] 141 S. Ct. 1970 (2021).

revoking issued patents through a discretionary administrative review process known as "inter partes review."[5]

As a remedy, the Court held that one statutory provision—section 6(c) of the Patent Act, which would otherwise prevent the Director of the U.S. Patent and Trademark Office ("USPTO") from reviewing PTAB decisions because it mandates that only the PTAB itself can rehear its own decisions—is "unenforceable as applied to the Director."[6] With that statutory provision held unenforceable, the Director (who is the only agency officer appointed by the President with the advice and consent of the Senate) could review PTAB decisions and "issue decisions himself on behalf of the Board" because the Patent Act's general provisions vest the Director with the "powers and duties" of the whole agency, including the PTAB.[7] As a result of the Court's holding, *Arthrex* and several other cases pending in the courts were remanded to the agency for further proceedings, including review of the PTAB decisions by the Director.[8]

Part of *Arthrex*'s significance is immediately clear: The Court has now, for the first time in its modern separation of powers jurisprudence, relied on a combination of the Appointments Clause and Article II's Executive Vesting Clause to invalidate statutory law not because of the tenure protections afforded to officers, but because of the distribution of decisional power between principal officers and the mass of lower-level officials. By establishing that executive power must include the authority to control outcomes in particular matters, *Arthrex* charts a course distinct from cases such as *Myers v. United States*,[9] *Bowsher v. Synar*,[10] *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[11] *Seila Law LLC v. Consumer Financial Protection Bureau*,[12] and *Collins v. Yellen*,[13] all of which focused on the statutory processes for removing officers as the key constitutional issue. Even the Court's most recent opinion on the Appointments Clause's distinction between principal and inferior officers, *Edmond v. United States*, relied heavily on an unrestricted power to remove officers as a "powerful tool for control" and a key indicator that officers are sufficiently subordinate to constitute "inferior" officers under the Appointments Clause.[14] In both its holding and its remedy, *Arthrex* seems to mark a significant shift, with a principal officer's direct supervision of final adjudicative decisions sometimes constitutionally required. Instead of ready removability satisfying the constitutional requirement for supervision, Arthrex

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[5] 35 U.S.C. § 311.

[6] 141 S. Ct. at 1987 (plurality opinion of Roberts, C.J.); *see also id.* at 1997 (opinion of Breyer, J., concurring in part and dissenting in part) (agreeing with the remedy set forth in the plurality opinion). Section 6(c) also requires the PTAB to sit in panels of three members, and thus the Director, even though a member of the Board, would need the concurrence of at least one other member of the PTAB (all of whom are inferior officers) to review a decision.

[7] 141 S. Ct. at 1987 (plurality opinion of Roberts, C.J.) (relying on the Director's general powers in 35 U.S.C. § 3(a)(1)).

[8] *Id.* at 1988 (plurality opinion of Roberts, C.J.). The Supreme Court remanded the cases pending before it to the Federal Circuit, which in turn remanded the cases to the agency if the party complaining of the Appointments Clause violation wanted the remedy afforded by the Court's decision. Not every party viewed the remedy—review by the Director—as worth the bother to pursue. *See*, *e.g.*, *Snyders Heart Valve LLC v. St. Jude Med., LLC*, 2021 U.S. App. LEXIS 29905 (Oct. 5, 2021) (noting that the party seeking judicial review waived its Appointments Clause challenge after the Supreme Court remanded its case to the Federal Circuit for reconsideration in light of *Arthrex*).

[9] 272 U.S. 52 (1926).

[10] 478 U.S. 714, 734 (1986) ("By placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function.").

[11] 561 U.S. 477 (2010).

[12] 140 S. Ct. 2183 (2020).

[13] 141 S. Ct. 1761 (2021).

[14] 520 U.S. 651, 664 (1997).

requires principal officer supervision on the front end of actions, with the discretion to review and reissue certain decisions before they become final for the Executive Branch.

The *Arthrex* Court relied crucially on "the traditional rule" in executive adjudications—a rule touted as being followed in "the patent system in particular"—"that a principal officer, if not the President himself, makes the final decision on how to exercise executive power."[15] Yet rather than leading back toward a traditional approach to executive power, *Arthrex* could lead to an inversion of tradition in two respects.

First, within the patent system in particular, as well as more generally, the tradition of adversarial adjudication between private parties is not merely that some principal officer has a formal power to review inferior officer decisions. The tradition is instead one of locating the primary responsibility for significant adjudicative power in principal officers. That is clearly the tradition in the judicial branch of the federal government responsible for wielding adjudicative power in private rights disputes. Presidentially appointed, Senate-confirmed federal judges do not merely supervise, in cursory and formalistic manner, the work of hundreds of inferior adjudicators who do the bulk of the work. Article III judges instead do the bulk of the work themselves, assisted with a small staff of clerks and some inferior officers such as magistrates and clerks of court. As shown in part II below, that tradition is evident in the history of the patent system too, with presidentially appointed, Senate-confirmed officers presiding over adversarial adjudications until very recent times. And it is the tradition even for multi-member administrative agencies created in the late nineteenth and early twentieth centuries in which principal officers wield not only de jure but also de facto responsibilities over complex adjudications.

Yet coupled with twentieth century administrative law governing executive decisionmaking, *Arthrex* has the potential to be not a return to that tradition but an inversion of it. *Arthrex*'s holding means that the complex decisions of hundreds of inferior officers, such as administrative patent judges, must be subject to the review of a principal officer. In the Patent Office, a single person—the Director—will formally be in control of that process, supervising the rulings of "more than 200" administrative patent judges.[16] But supervising administrative patent judges is not the Director's only duty. The Director heads a multi-billion dollar agency employing over 12,000 people, including 8,000 patent examiners whom the Director is charged with supervising as they issue hundreds of thousands of patents per year.[17]

In short, the Director had a full-time job before *Arthrex* imposed the responsibility of having to supervise the adversarial adjudicative decisions of more than 200 administrative patent judges.[18] A key question, then, is whether a presidential appointee such as the Director may delegate such review (either by rule or by practice) to subordinates, including to inferior officers or even staff-level employees. The Supreme Court's mid-twentieth century decision in *United States v. Morgan* maintains that even where

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[15] *Arthrex*, 141 S. Ct. at 1984.

[16] *Id.* at 1977.

[17] *See* United States Patent and Trademark Office ("USPTO"), Performance and Accountability Report 2021 at 2, https://www.uspto.gov/sites/default/files/documents/USPTOFY21PAR.pdf (noting the agency's more than 12,000 employees); *id.* at 19 (noting the agency's employment of 8,073 examiners); *id.* at 148, 166 (showing the agency's budgetary resources and program costs in excess of, respectively, $4.4 billion and $3.6 billion); U.S. Patent Statistics Chart, https://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm (showing the issuance of 388,900 total patent grants in 2020).

[18] It is true that the staff of Article III judges grew in the twentieth century, with the addition of law clerks, and judges also supervise a number of inferior officers such as magistrate judges, bankruptcy judges and court clerks. Still, the sheer scale of the number of subordinate inferior officers that the Director must now supervise, coupled with the Director's many other duties, makes the Director's supervision of each adjudication orders of magnitude more spread thin than the supervision exercised by judges.

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