

# THE POLITICS OF AGENCY ADJUDICATION AFTER *UNITED STATES V. ARTHREX*

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## I. INTRODUCTION

When the Supreme Court granted certiorari in *United States v. Arthrex*, the patent bar feared that inter partes review (IPR), an administrative process to review patents, could be rendered unconstitutional.<sup>1</sup> By contrast, in administrative law circles, this case was viewed as a “potential blockbuster” with the potential to continue the Court’s trend of increasing Presidential control over the administrative state in the vein of *Lucia v. SEC* and *Seila Law v. CFPB*.<sup>2</sup> The decision in *Arthrex* declined to render IPRs unconstitutional, but it continues the Court’s jurisprudence of constitutional formalism, strict separation of powers, and the curtailing of agency independence.

The Court in *Arthrex* held that administrative patent judges (APJs) cannot constitutionally make final IPR decisions given their status as inferior officers under the Appointments Clause.<sup>3</sup> In so doing, *Arthrex* reframes the Appointments Clause through the lens of the Vesting Clause, thereby making the decision-making *powers* of inferior officers the domain of the Appointments Clause, rather than their appointment or removal.<sup>4</sup>

At a minimum, the decision in *Arthrex* advances the Court’s project to expand the President’s control of the Executive Branch and, therefore, administrative agencies. While the Appointments Clause once was the domain of appointment and removal of executive officers, the Court expands the reach of the Clause and Presidential control beyond the simple ability to hire or fire someone. Though Chief Justice Roberts’s Opinion declines to make the far-reaching holding that any decision by any inferior officer must be reviewable

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DOI: <https://doi.org/10.15779/Z38N87312C>

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1. See Douglas R. Nemas & Cassandra M. Baloga, *In Arthrex, Supreme Court to Review Constitutionality of the Patent Board’s Structure*, SKADDEN ARPS, SLATE, MEAGHER & FLOM LLP AND AFFILIATES (Dec. 22, 2020), <https://www.skadden.com/insights/publications/2020/12/insights-special-edition-us-supreme-court-term/in-arthrex-scotus-to-review>.

2. See Christopher J. Walker, *What Arthrex Means for the Future of Administrative Adjudication: Reaffirming the Centrality of Agency-Head Review*, YALE J. REG. & COMMENT BLOG (June 21, 2021), <https://www.yalejreg.com/nc/what-arthrex-means-for-the-future-of-administrative-adjudication-reaffirming-the-centrality-of-agency-head-review/>.

3. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1988 (2021).

4. See *id.* at 2003 (Thomas, J., dissenting) (describing the holding as leaving a “tried and true approach”).

by the President or a congressionally confirmed appointee, *Arthrex* nonetheless lays the groundwork for such a holding and furthers a project to reduce the independence of administrative agencies from the control of the President.<sup>5</sup>

While the Court furthers executive control under the unitary executive theory, its project of increasing political accountability implicates important due process concerns. The director review process created by *Arthrex* has a potential to weaken the quality of process afforded to parties and to increase the possibility for bias under the guise of policy. The new process is in conflict with the statutory scheme created by Congress to a further of philosophy of the constitution based on an interpretation of the text which even Justice Thomas calls a “penumbra.” This is all for the purpose of vindicating an interest in the outcome of an individual adjudication that is questionably an executive entitlement at all, an interest which may be overwritten entirely on judicial review. However, because the result of the opinion is to create more executive discretion, the remedy in *Arthrex* does not prevent the Director from taking measures to protect APJ independence and improve fairness in IPR. Recommendations are suggested herein which would increase the quality of process given to parties in IPR by using the executive discretion to protect independent adjudication.

Part II provides legal background including a brief overview of the relevant patent law (Section II.A) and the context for the constitutional question raised (Section II.B). Section II.B frames the argument that the constitutional issue in *Arthrex* is more one of separation of powers than appointment.

Part III provides the case’s procedural history (Section III.A), followed by summary of the four opinions on the constitutional issue (Section III.B) and the three opinions on the remedy (Section III.C). The Court in *Arthrex* is deeply divided. While the case lacks a majority opinion, two different sets of justices create an effective majority on each of the constitutional issue and the remedy. While Chief Justice Roberts, and Justices Alito, Barrett, and Kavanaugh remain in both majorities, Justice Gorsuch leaves the five-member majority on the constitutional issue to write a separate dissent on the remedy. In the remedy, Justices Breyer, Kagan, and Sotomayor join the 7–2 majority. Part II shows that in each of the issue and the remedy the deciding fifth vote differs radically from the other four on its view of the role of impartiality (and, implicitly, due process) in agency adjudication.

Part IV argues that *Arthrex* was wrongly decided (Sections IV.A–C) and concludes with policy prescriptions (Section IV.D) to improve fairness for parties after *Arthrex*. Section IV.A argues that agency head final review solves no issue that the Court set out to decide. Section IV.B illustrates the tension created between strong executive oversight and fairness of process. Section

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5. See discussion *infra* Section II.B.1.

IV.C argues the remedy upsets Congress's statutory controls and that more deference to Congress was owed. Section IV.D provides suggestions by which the Director can use their discretion to improve fairness and protect independence.

## II. LEGAL BACKGROUND

### A. PATENT EXAMINATION AND POST GRANT PROCEEDINGS

#### 1. *Patents and Initial Examination*

A patent is a government issued “right to exclude” others from practicing certain claimed subject matter,<sup>6</sup> and the power to grant these rights is an enumerated power of Congress.<sup>7</sup> The so-called quid pro quo of the patent system dictates that in exchange for a limited monopoly the inventor must provide useful information to the public, such that the public gains something of value once the patent term expires.<sup>8</sup> While patents have “the attributes of personal property,” the Supreme Court has repeatedly held that these “attributes” are confined by the patent right's status as a “public franchise.”<sup>9</sup> Accordingly, patents exist as an economic policy device of the government that has at least some aspects of personal property.

Initial issuance of patents is through an ex parte examination process overseen by the United States Patent and Trademark Office (USPTO), an administrative agency within the Department of Commerce.<sup>10</sup> The USPTO hires and trains patent examiners, who are far more often scientists than lawyers and who determine whether a patent application meets the basic requirements of patentability.<sup>11</sup> These basic requirements include: subject matter eligibility, utility, novelty, non-obviousness, and adequate disclosure.<sup>12</sup> An unfavorable decision on patentability during examination may be appealed to the Patent Trial and Appeal Board (PTAB).<sup>13</sup> An appeal is presided over by

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6. 35 U.S.C. § 154(a)(1).

7. U.S. CONST. art. I, § 8, cl. 8.

8. *See* *Brenner v. Manson*, 383 U.S. 519, 534 (1966).

9. 35 U.S.C. § 261; *see also* *Oil States Energy Servs., L.L.C. v. Greene's Energy Grp.*, 138 S. Ct. 1365, 1374 (2018) (citing with approval *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 63–64 (1998) and *Seymour v. Osbourne*, 78 U.S. 516, 533 (1870)).

10. 35 U.S.C. § 1(a); *see generally* U.S. PATENT & TRADEMARK OFF., *MANUAL OF PATENT EXAMINING PROCEDURE* § 700 (9th ed., rev. 10, 2019) (describing the process of patent examination).

11. H. Whei Hsueh, Comment, *Standardizing Patent Examiner Training and Qualifications*, BERKELEY TECH. L.J. (Apr. 11, 2016), <https://btj.org/2016/04/standardizing-patent-examiner-training-and-qualifications/> (showing a technical degree is required, but a law degree is atypical).

12. 35 U.S.C. §§ 101–03, 112.

13. 35 U.S.C. § 134(a).

a panel of at least three agency adjudicators, APJs, who are chosen from a pool of more than two hundred.<sup>14</sup> The APJs are appointed by the Director of the USPTO and are required to be “persons of competent legal knowledge and scientific ability who are appointed by the Secretary [of Commerce], in consultation with the Director.”<sup>15</sup>

## 2. *Inter Partes Review*

Once a patent has issued, the validity of the patent may be challenged by a third-party in two ways: through suit in an Article III court, for example, by asserting the defense of invalidity in an action for infringement, or by petition for administrative review, such as inter partes review (IPR).<sup>16</sup> The 2011 Leahy-Smith America Invents Act (AIA) ended the previously existing inter partes reexamination proceeding overseen by the then Board of Patent Trials and Interferences and replaced it with a set of new post-grant proceedings, including IPR, overseen by a rebranded PTAB.<sup>17</sup> An IPR is an adversarial administrative proceeding which allows for a third party to challenge and, potentially, cancel an issued patent on grounds of lack of novelty or obviousness and based on prior patents and printed publications.<sup>18</sup> The patent owner defends the validity of the patent, and a three-member panel of APJs makes a final determination after reviewing the arguments of both sides.<sup>19</sup>

To begin an IPR proceeding, a person who is not the patent owner or their privy files a petition for review with a specific statement of the grounds on which the challenge is based.<sup>20</sup> The petition must be reviewed within three months and a decision to institute may be issued in the Director’s discretion if “there is a reasonable likelihood that the petitioner would prevail with respect to at least one of the claims.”<sup>21</sup> If instituted, the patent is reviewed by a panel

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14. 35 U.S.C. § 6(c); *see also* Georgianna Witt Braden, *USPTO Administrative Tribunal: Patent Trial and Appeal Board*, U.S. PATENT & TRADEMARK OFF., slide 8 (Aug. 26, 2021), [https://www.uspto.gov/sites/default/files/documents/20210824-PTAB-Stadium\\_Tour\\_presentation\\_\\_short\\_version\\_edited-IQ\\_808095-Updated\\_for\\_Aug\\_2021-IQ\\_819421-Final.pdf](https://www.uspto.gov/sites/default/files/documents/20210824-PTAB-Stadium_Tour_presentation__short_version_edited-IQ_808095-Updated_for_Aug_2021-IQ_819421-Final.pdf).

15. 35 U.S.C. § 3(b)(3); 35 U.S.C. § 6(a).

16. 35 U.S.C. § 282(b)(2); *see also* 35 U.S.C. § 311.

17. Leahy-Smith America Invents Act (A.I.A.), Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified at 35 U.S.C.).

18. 35 U.S.C. § 311(a)–(b).

19. 35 U.S.C. § 316(a)(1)–(13), 316(c).

20. 35 U.S.C. §§ 311–12; *see also* *Uniloc 2017 LLC v. Facebook Inc.*, 989 F.3d 1018, 1027–28 (Fed. Cir. 2021) (“‘Determining whether a [ ]party is a [real party in interest] demands a flexible approach that takes into account both equitable and practical considerations,’ with the heart of the inquiry focused on ‘whether a petition has been filed at a [ ]party’s behest.’” (citing *Applications in Internet Time, LLC v. RPX Corp.*, 897 F.3d 1336, 1351 (Fed. Cir. 2018))).

21. 35 U.S.C. § 314.

of at least three adjudicators who may include the Director of the USPTO, the Secretary of Commerce, and their appointed APJs.<sup>22</sup>

Each year the USPTO institutes between 800 and 1,000 IPRs and denies institution of around 400 to 500 petitions.<sup>23</sup> Additionally, between 200 and 300 petitions are settled pre-institution.<sup>24</sup> By comparison, district court patent proceedings range from about 4,500 to 6,000 filings per year.<sup>25</sup> Of the IPR proceedings that are instituted, around 80% result in invalidation of some or all of the claims.<sup>26</sup> Because of the relatively high rate of invalidation (once instituted), IPRs have become a tool for defendants in infringement suits.<sup>27</sup> The IPR process also puts pressure on patent owners to settle, because termination of the IPR after institution is discretionary, rather than mandatory, and an IPR is less likely to be terminated the further the IPR is in the process.<sup>28</sup> A string of constitutional challenges to the IPR process has followed the passage of the A.I.A.; however, the IPR proceeding has proven relatively resilient.<sup>29</sup>

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22. 35 U.S.C. § 6(a)–(c).

23. See U.S. PATENT & TRADEMARK OFF., TRIAL STATISTICS IPR, PGR, CBM, PATENT TRIAL AND APPEAL BOARD–JUNE 2020 (June 30, 2020), slide 6, [https://www.uspto.gov/sites/default/files/documents/Trial\\_Statistics\\_20200630\\_.pdf](https://www.uspto.gov/sites/default/files/documents/Trial_Statistics_20200630_.pdf) [hereinafter TRIAL STATISTICS] (showing the institution rate for IPRs hovers around 60% and also showing that, while the decision to institute is not apolitical, the institution rate has nonetheless been relatively stable over time).

24. See TRIAL STATISTICS, *supra* note 23, at slide 8.

25. *Just the Facts: Intellectual Property Cases—Patent, Copyright, and Trademark*, U.S. COURTS: JUDICIARY NEWS (Feb. 13, 2020), <https://www.uscourts.gov/news/2020/02/13/just-facts-intellectual-property-cases-patent-copyright-and-trademark>; *accord*, 2021 *Patent Dispute Report: First Half in Review*, UNIFIED PATENTS (July 1, 2021), <https://www.unifiedpatents.com/insights/q2-2021-patent-dispute-report>.

26. See TRIAL STATISTICS, *supra* note 23, at slide 11.

27. See *id.*; see also Meaghan H. Kent, *10 Reasons Every Defendant in Patent Litigation Should Consider Inter Partes Review*, VENABLE, LLP (Apr. 23, 2014), <https://www.venable.com/insights/publications/2014/04/10-reasons-every-defendant-in-patent-litigation-sh>. In a famous example, former Federal Circuit Chief Judge Randall Rader at the AIPLA annual meeting in October 2013 famously called the IPR panels “death squads.” Tony Dutra, *Rader Regrets CLS Bank Impasse, Comments on Latest Patent Reform Bill*, BLOOMBERG BNA (Oct. 29, 2013).

28. See 37 C.F.R. § 42.74(a); see, e.g., *Rubicon Commc’ns, LP, v. Lego A/S*, No. IPR2016-01187 (PTAB, Paper No. 100, Dec. 14, 2017) (denying both parties’ motions to terminate the IPR after settlement of district court litigation because of the public interest in invalidation and the advanced state of the IPR proceeding).

29. See, e.g., *Thryv, Inc. v. Click-To-Call Techs.*, 140 S. Ct. 1367 (2020); *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853 (2019); *Oil States Energy Servs., L.L.C. v. Greene’s Energy Grp.*, 138 S. Ct. 1365 (2018); *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348 (2018); *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261 (2016).

Final decisions of the PTAB, including institution decisions and final written decisions on patentability and in IPR, are reviewable within the USPTO upon filing a Request for Rehearing,<sup>30</sup> which must indicate a material misapprehension of fact or law.<sup>31</sup> Review is taken in the PTAB's discretion and may be reheard by the same panel of three APJs who heard the original IPR.<sup>32</sup> Typically, around 5% of requests for rehearing are accepted.<sup>33</sup> Negative decisions of patentability from the PTAB or of invalidity during administrative proceedings are appealable to the United States Court of Appeals for the Federal Circuit (C.A.F.C.), which has exclusive jurisdiction over patent appeals.<sup>34</sup> Prior to *Arthrex*, the final written decision of the PTAB following a Request for Rehearing was the final word from the USPTO<sup>35</sup>

While the USPTO is an administrative agency, its status with respect to the requirements of the Administrative Procedure Act (APA) has not always been clear. This is in part because the patent office predates the APA<sup>36</sup> Only in 1999 did the Supreme Court rule that the USPTO was an agency governed by the APA.<sup>37</sup> Because of this ambiguity, patent office procedures for adjudication have not always found easy parallels to a particular model of agency adjudication, even by comparison to the range and variety of models within Article II. The Federal Circuit has at various times “accepted” that IPRs are a “formal” adjudication under the APA<sup>38</sup> Despite the many ways in which IPR bears the trappings of formal adjudication under the APA or even Article III

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30. 35 U.S.C. § 6(c).

31. 37 C.F.R. § 41.52(a)(1).

32. 35 U.S.C. § 6(c) (“Only the Patent Trial and Appeal Board may grant rehearings.”) (overruled by *United States v. Arthrex*, 141 S. Ct. 1970 (2021)); *see also* *Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1029 (Fed. Cir. 2016) (“The PTO’s assignment of the institution and final decisions to one panel of the Board does not violate due process.”).

33. Jason N. Mock & Michael R. Houston, *While Tempting, PTAB Requests for Rehearing Face Long Odds*, FOLEY & LARDNER LLP: PTAB TRIAL INSIGHTS (Oct. 15, 2019), <https://www.foley.com/en/insights/publications/2019/10/ptab-requests-rehearing-face-long-odds>.

34. 28 U.S.C. § 1338(a); 28 U.S.C. §§ 1295(a)(1), (a)(4)(A).

35. 35 U.S.C. § 6(c).

36. *See* Nate Smith, *The Peripatetic U. S. Patent Office: Locations 1790 to Present*, LIBRARY OF CONG. BLOGS (July 13, 2020), [https://blogs.loc.gov/inside\\_adams/2020/07/the-patent-office/](https://blogs.loc.gov/inside_adams/2020/07/the-patent-office/) (describing that what would be known as the Patent Office was created in 1790 and gradually expanded and formalized).

37. *Dickinson v. Zurko*, 527 U.S. 150, 153 (1999) (holding that the standards of evidence of the APA apply to patent proceedings).

38. *See, e.g.,* *Synopsys, Inc. v. Mentor Graphics Corp.*, 814 F.3d 1309, 1322 (Fed. Cir. 2016), *overruled on other grounds by* *Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1328 (Fed. Cir. 2017) (accepting without deciding that the precedential Board decision in *MasterImage* is such a “formal agency adjudication”).

litigation, at least one scholar has argued that IPR is not a formal adjudication subject to sections 554 and 556–557 of Title V.<sup>39</sup>

The Director of the USPTO also serves as the Undersecretary of Commerce for Intellectual Property and is appointed by the President with the advice and consent of Congress.<sup>40</sup> The Director of the USPTO is responsible for promulgating regulations related to the procedures governing post-grant proceedings and examination of patents.<sup>41</sup> The Director has the discretionary authority to determine whether an IPR is instituted,<sup>42</sup> whether an IPR is de-instituted,<sup>43</sup> whether the decision rendered by the PTAB has the force of precedent,<sup>44</sup> which adjudicators will sit on the panel during review,<sup>45</sup> and, if a rehearing is granted, which adjudicators will sit on the panel during rehearing.<sup>46</sup> In practice, many of these decisions are delegated.<sup>47</sup> However, it was the Director's notable lack of the power to grant a rehearing or to grant a final decision in that rehearing that was the subject of the constitutional challenge in *Arthrex*.<sup>48</sup>

## B. APPOINTMENTS AND SEPARATION OF POWERS

### 1. *The Constitutional Question*

The primary question under review in *Arthrex* was whether the administrative patent judges were principal officers or inferior officers for the purposes of the Appointments Clause.<sup>49</sup> If the administrative patent judges

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39. See Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, Section III.A. (2019).

40. 35 U.S.C. § 6(a).

41. 35 U.S.C. § 2(b)(2); 35 U.S.C. § 316(a).

42. 35 U.S.C. § 314(a).

43. *Sling TV, LLC v. Realtime Adaptive Streaming LLC*, 840 F. App'x 598, 599 (Fed. Cir. 2021) (dismissing appeal based on challenge that Direct lacked discretionary authority to de-institute an IPR).

44. U.S. PATENT & TRADEMARK OFF., PATENT TRIAL & APPEAL BOARD: STANDARD OPERATING PROCEDURE 2 (REVISION 10): PRECEDENTIAL OPINION PANEL TO DECIDE ISSUES OF EXCEPTIONAL IMPORTANCE INVOLVING POLICY OR PROCEDURE: PUBLICATION OF DECISIONS AND DESIGNATION OR DE-DESIGNATION OF DECISIONS AS PRECEDENTIAL OR INFORMATIVE, pp. 1–2, <https://www.uspto.gov/sites/default/files/documents/SOP%20R10%20FINAL.pdf> [hereinafter SOP 2].

45. 35 U.S.C. § 6(c).

46. *Id.*

47. U.S. PATENT & TRADEMARK OFF., PATENT TRIAL & APPEAL BOARD: STANDARD OPERATING PROCEDURE 1 (REVISION 15): ASSIGNMENT OF JUDGES TO PANELS, pp. 1–2, <https://www.uspto.gov/sites/default/files/documents/SOP%20R15%20FINAL.pdf> [hereinafter SOP 1]; see also SOP 2, *supra* note 44, at 1–2.

48. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021); see also 35 U.S.C. § 6(c).

49. Memorandum for the United States at 6–7, July 22, 2020, *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021) (Nos. 19-1452, 19-1458, 19-1459), 2020 WL 4227873 (cert. granted

were unconstitutionally appointed, the Court would also consider whether the Federal Circuit's remedial holding was appropriate.<sup>50</sup> Under the Appointments Clause, the President has the power to appoint "Officers of the United States" with Advice and Consent of the Senate; however, by law Congress may relieve the President of the duty to obtain Congressional approval or delegate the appointment power entirely.<sup>51</sup> The Appointments Clause directly implicates separation of powers in that the requirement of Senate confirmation provides a check on the power of the Executive.<sup>52</sup> There are four routes of appointment: (1) by the President with Advice and Consent of the Senate and—without Senate confirmation—by appointment of (2) the President acting alone, (3) the Courts, and (4) Heads of Departments.<sup>53</sup> The last three routes are only available through Congressional approval by law, typically in the governing statute of the agency.<sup>54</sup> The language of the Appointments Clause provides for two classes of officers, (1) those appointed and confirmed by Congress, so-called "principal" officers, and (2) those who may be appointed by the President, a head of an executive department, or a court, who are "inferior Officers."<sup>55</sup>

Arthrex argued that the authority of panel of APJs to render patents invalid without later review by a principal officer made them unconstitutionally appointed principal officers.<sup>56</sup> However, rather than the question of appointment *status* that was asked, the Court considered whether the *power* of the APJs to grant a final hearing in an individual invalidation proceeding was

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as to questions 1 and 2); *see also* Petition for Writ of Certiorari of Smith & Nephew, Inc. & ArthroCare Corp. at I, *United States v. Arthrex*, 141 S. Ct. 1970 (2021) (No. 19-1452), 2020 WL 3651171; Petition for Writ of Certiorari of Arthrex, Inc. at ii, *United States v. Arthrex*, 141 S. Ct. 1970 (2021) (No. 19-1458), 2020 WL 3805820; Petition for Writ of Certiorari of the United States at I, *United States v. Arthrex*, 141 S. Ct. 1970 (2021) (No. 19-1434), 2020 WL 3545866.

50. Memorandum for the United States, *supra* note 49, at 6–7 (phrasing question 2 as conditional).

51. U.S. CONST. art. II, § 2, cl. 2 (“[The president] by and with the Advice and Consent of the Senate, shall appoint, . . . 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.”).

52. *Buckley v. Valeo*, 424 U.S. 1, 124 (1976).

53. U.S. CONST. art. II, § 2, cl. 2.

54. *Id.*

55. *United States v. Germaine*, 99 U.S. 508, 509–10 (1879) (“The Constitution for purposes of appointment very clearly divides all its officers into two classes.”); *see also* *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021).

56. Brief for Arthrex at 19–35, *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1983 (2021) (Nos. 19-1434, 19-1452, 19-1458), 2020 WL 7773426.



incompatible with their presumed status as “inferior officers” under the Appointments Clause.<sup>57</sup>

## 2. *Arthrex* as a Separation of Powers Issue

*Arthrex* is not really about the *appointment* of PTAB APJs; instead, the issue at the heart of the decision is one of separation of powers itself. Specifically, that PTAB APJs have final review power within the Executive branch raises the question: does Congress have the power to create agency adjudicators within the Executive Branch that the head of the Executive Branch, the President, cannot overrule and whose appointment was overseen by neither Congress nor the President? While the plurality opinion never uses the term “separation of powers” and declines to frame the issue as one of separation of powers, the focus on the *power* of the APJs, rather than their mode of appointment, belies the reality. The issue with PTAB APJs is that—under an expansive view of executive authority—their power appears to undermine the vesting of executive authority in the President and to break chains of accountability to the President.

In the *Arthrex* decision, the plurality opinion adopts this expansive view of executive authority holding that “only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in [IPR] proceeding[s].”<sup>58</sup> This view of executive authority is rooted in a formalist interpretation of the Constitution and motivates the Court’s remedy—requiring that the Director, a confirmed and removable officer, have final review over final decisions of PTAB APJs in post-grant proceedings.

The formalist view of separation of powers of the plurality opinion in *Arthrex* draws from a view of the Constitution requiring a strong “unitary executive.”<sup>59</sup> As presented in the seminal outline of the theory, the conclusion that executive power should be strongly unitary is drawn from interpretation of the text of the (Article II) Vesting Clause read in concert with the Take Care Clause.<sup>60</sup> Under this view, “the President alone possesses *all* of the executive

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57. See *Arthrex*, 141 S. Ct. at 1983.

58. *Id.* at 1985.

59. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165–68 (1992); see also Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 583 (1994). The term “strong” is used to connote a view of the Constitution that prioritizes unitariness over other interpretive principles. This terminology is drawn from Lawrence Lessig and Cass R. Sunstein, who acknowledge that “no one denies that in some sense the framers created a unitary executive; the question is in what sense.” See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 8 (1994).

60. Calabresi & Rhodes, *supra* note 59, at 1167 (referring to U.S. CONST. art. II, § 1 (“The executive Power shall be vested in a President.”) read in light of U.S. CONST. art. II, § 3 (“The President “shall take Care that the Laws be faithfully executed.”)).

power.”<sup>61</sup> In particular, the power of the President to supplant any non-trivial, decision by a subordinate is absolute, “notwithstanding any statute” that attempts to confine these powers.<sup>62</sup>

However, this expansive view of executive power is in tension with the text of the Appointments Clause. The Appointments Clause gives Congress the power to appoint inferior officers to Heads of Departments and the Courts, seemingly externally to the review of the President.<sup>63</sup> This tension between an expansive view of executive power and text of the Appointments Clause is acknowledged by the theory’s proponents, although the delegation of appointment to Heads of Departments is ultimately dismissed as “an insignificant housekeeping provision added at the last minute.”<sup>64</sup>

In practice, the scope of the President’s appointment power implicates the ability of Congress to create politically independent or politically insulated administrative officials and to construct agencies in a politically insulated or impartial way. In its most expansive form, the requirement of a strong “unitary executive” “renders unconstitutional independent agencies and counsels to the extent that they exercise discretionary executive power.”<sup>65</sup> In the context of agency adjudication, it implicates Congress’s ability to create politically independent agency adjudicators including PTAB APJs. As a matter of political reality, even Justice (then Professor) Kagan has written that “the current system of administration is not strongly unitary,”<sup>66</sup> which exposes and has exposed a host of agencies to constitutional challenges as the Court expands its view of executive power.<sup>67</sup>

The debate over the scope of executive power is political. This is partly because the scope of executive power is, in the abstract, a decision about what should be the domain of politics, and partly because, more concretely, the players tend to have distinct political affiliations. Some of the most influential early articles outlining the principles of a strong unitary executive were penned by prominent legal scholar and Federalist Society co-founder Steven Calabresi, and the unitariness of the executive has been an issue of interest to the Federalist Society since at least the late 1980’s.<sup>68</sup> Further, the early intellectual

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61. *Id.* at 1165 (emphasis in original).

62. *Id.* at 1166.

63. Lessig & Sunstein, *supra* note 59, at 9–10 n.21.

64. Calabresi & Rhodes, *supra* note 59, at 1168.

65. *Id.* at 1165–66.

66. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247 (2000).

67. *See, e.g.*, *Freytag v. Comm’r.*, 501 U.S. 868 (1991); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 496–97 (2010); *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020).

68. *See* Stephen Breyer, Laurence Silberman, E. Donald Elliot & Terry Eastland, *Panel I: Agency Autonomy and the Unitary Executive*, 68 WASH. UNIV. L.Q. 3 (1990); *see also* Amanda Hollis-

leaders in the movement had significant overlap with the Reagan Justice Department, whose aims of deregulation were furthered by less independent administrative agencies.<sup>69</sup> Proponents with the strongest views of executive power swing conservative.<sup>70</sup>

This debate is also modern. Prior to the 1970s, the line between principal and inferior officers was deferential to Congressional choice and did not always reflect a strong view of the inherent status or definition of the types of executive officers. For example, in 1925's *Steele v. United States*, the Court described the words "officer of the United States" as having "limited constitutional meaning."<sup>71</sup> Indeed, *Arthrex* appears to be the first time that the Supreme Court has ever not agreed with Congress's classification.<sup>72</sup> In this period, it was generally believed that Congress could statutorily limit the President's removal power.<sup>73</sup> Further, in what would become a high-water mark of the Court's jurisprudence limiting the President's removal powers, the Court held that Congress could remove from absolute Presidential control officers having "quasi-legislative" and "quasi-judicial" functions.<sup>74</sup>

In the 1980's, there was a change in the tides as both the Reagan administration and the legal academy began to reevaluate the relationship between the President and administrative agencies.<sup>75</sup> In 1988, the modern unitary executive theory first appeared in the jurisprudence of the Supreme

Brusky, *The Federalist Society and the "Structural Constitution": An Epistemic Community At Work* 26–37 (2010) (Ph.D. dissertation, University of California, Berkeley).

69. Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1452–53 (1992) ("This modern debate began with claims of executive authority advanced by President Reagan, whose administration continually questioned the constitutionality of independent agencies and of independent counsels."); see also Hollis-Brusky, *supra* note 68, at 17; Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 376–80 (2020).

70. Sitaraman, *supra* note 69, at 380 ("By the time of *Free Enterprise Fund* in 2010 and *Seila* in 2020, the unitary executive theory had become standard in separation of powers debates—particularly among conservatives.")

71. *Steele v. United States*, 267 U.S. 505, 507 (1925) (citing *Burnap v. United States*, 252 U.S. 512 (1920); *United States v. Mouat*, 124 U.S. 303 (1888); *United States v. Smith*, 124 U.S. 525 (1888)).

72. See *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1999–2000 (2021) (Thomas, J., dissenting) ("[T]he Court's opinions have traditionally used a case-by-case analysis. And those analyses invariably result in this Court deferring to Congress' choice of which constitutional appointment process works best.")

73. *Shurtleff v. United States*, 189 U.S. 311, 314–315 (1903) ("In the absence of constitutional or statutory provision, the President can, by virtue of his general power of appointment, remove an officer, even though appointed by and with the advice and consent of the Senate.")

74. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935).

75. KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* §§ 1.6–7 (6th ed. 2018).

Court in a strongly worded dissent by Justice Scalia in *Morrison v. Olson*, an Appointments Clause case addressing whether Congress could protect from removal an inferior officer.<sup>76</sup> The conservative shift in the Supreme Court has seen the rise of Justice Scalia's viewpoint with holdings in 2010's *Free Enterprise Fund* and 2020's *Seila Law* that reframed the powers of inferior and principal officers under the Appointments Clause through the lens of an expansive view of the President's powers under the Vesting Clause.<sup>77</sup> Between the majority opinion in *Seila Law* and the concurrence in part by Justice Thomas, Chief Justice Roberts and Justices Alito, Gorsuch, Kavanaugh, and Thomas have each joined opinions in support of the unitary executive theory, thereby cementing the theory as the Court's dominant view of the Constitution.<sup>78</sup>

The power of the APJs, however, conflicts with this view of strong executive oversight. Congress, in its creation of the IPR process, gave APJs final authority within the agency on decisions of patent validity, without a mechanism of later review by the director.<sup>79</sup> Further, APJs were given tenure protections that made them not removable but for cause.<sup>80</sup> The limited review powers of the agency head (and through them the President) appear to displace the vesting of executive power in the President under a unitary executive theory.

Ultimately, the issue at the heart of *Arthrex*—how far the powers of legislatively created agencies extend within the executive<sup>81</sup>—dovetails with the current legal and political debate over how the powers of agencies are checked

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76. *Morrison v. Olson*, 487 U.S. 654, 671–72 (1988) (holding that an independent counsel appointed by Congress was an inferior officer but protecting the independent counsel from political removal, because Congress's protection of the independent counsel from removal was within their discretion “as they think proper”); *see also id.* at 697–734 (Scalia, J., dissenting) (arguing for an unlimited power to remove the independent counsel and name checking the unitary executive theory twice).

77. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 496–97 (2010) (holding that the President is “responsible for the actions of the Executive Branch” and “cannot delegate [that] ultimate responsibility or the active obligation to supervise that goes with it”); *see also Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (emphasizing that Executive power “belongs to the President alone”).

78. *See Seila Law*, 140 S. Ct. at 2197 (Roberts, C.J., writing for the majority joined by Alito and Kavanaugh, JJ., and joined by Thomas and Gorsuch, JJ., concurring in part).

79. *See* 35 U.S.C. § 6(c) (“Only the Patent Trial and Appeal Board may grant rehearings.”).

80. 35 U.S.C. § 3(c) (making 5 U.S.C. § 7513's for cause removal provisions—“only for such cause as will promote the efficiency of the service”—applicable to APJs).

81. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1982 (2021) (“*Edmond* calls for exactly [a distinction between ‘inferior-officer power’ and ‘principal-officer power’]: an appraisal of how much power an officer exercises free from control by a superior.”).

by the judiciary.<sup>82</sup> The restraint in Chief Justice Roberts’s opinion shows a tentativeness and caution in dealing with the constitutionality of agency independence. Whatever the thoughts are of the Republican-appointed justices of the strength of “unitary executive,” there is an obvious hesitance to render independent agency adjudication unconstitutional. The degree of variation in the plurality, concurring, and dissenting opinions reflects the complexity of views of the role and powers of administrative agencies as well as the role of the Court in policing the “administrative state.”

### III. *UNITED STATES V. ARTHREX*

Though no single opinion garnered five votes, a majority of Justices agreed on the constitutional issue—that the PTAB APJs were unconstitutionally appointed in violation of the Appointments Clause.<sup>83</sup> A separate majority agreed that the appropriate remedy was creation of agency head final review,<sup>84</sup> but no majority could agree on the connection between the two. Justice Gorsuch agreed with the plurality opinion written by Justice Roberts that there was an Appointments Clause issue, but Justice Gorsuch felt that the plurality’s remedy did not go far enough.<sup>85</sup> Justice Breyer joined the plurality as to the remedy despite calling the decision on the Constitutional issue “unprecedented and unnecessary.”<sup>86</sup> Justice Thomas dissented as to both parts.<sup>87</sup> The result is a decision that says a lot and does comparatively little.

The following section summarizes each of the opinions in the Arthrex decision. Section A describes the lower court history. Section B addresses each opinion on the constitutional issue, and Section C addresses each opinion on the appropriate remedy.

#### A. PROCEDURAL HISTORY

Arthrex, Inc. sued Smith & Nephew, Inc. and ArthroCare for infringement of its U.S. Patent No. 9,179,907.<sup>88</sup> The defendants subsequently filed a petition of IPR, which was instituted.<sup>89</sup> In the IPR, the panel of APJs found that the

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82. See, e.g., *Chevron, U.S.A., Inc. v. Nat. Res. Def. Couns.* 467 U.S. 837 (1984); Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852 (2020); William Baude, *Adjudication Outside of Article III*, 133 HARV. L. REV. 1511 (2020).

83. *Infra* Section II.B.

84. *Infra* Section II.C.

85. *Infra* Section II.B.2; see also *infra* Section II.C.2.

86. *Infra* Section II.B.3; see also *Arthrex*, 141 S. Ct. at 1997.

87. *Infra* Section II.B.4.

88. *Arthrex, Inc. v. Smith & Nephew, Inc.*, Consolidated Civil Action Nos. 2:15-cv-01047 and 2:15-cv-01756 (E.D. Tex. 2016), 2016 WL 7049397.

89. Institution Decision, *Smith & Nephew, Inc. v. Arthrex, Inc.*, No. IPR2017-00275, 2017 WL 1969743 (PTAB May 10, 2017).

claims of Arthrex’s patent lacked novelty and determined that the patent should be invalidated.<sup>90</sup> Arthrex appealed the invalidation decision to the Federal Circuit, making for the first time the argument that the appointment of the PTAB APJs was unconstitutional.<sup>91</sup> The Federal Circuit agreed, holding that the APJs were acting as unconstitutionally appointed principal officers.<sup>92</sup> In an effort to make the APJs “inferior officers,” the Federal Circuit’s remedy ended the tenure provisions of the APJs, making them removable by the Director at-will, and remanded the case to the PTAB to be reheard by a constitutionally appointed panel.<sup>93</sup> After denial of en banc review,<sup>94</sup> Smith & Nephew and ArthroCare, Arthrex, and the United States each filed petitions for writ of certiorari.<sup>95</sup>

*United States v. Arthrex* was not the only suit involving the Appointments Clause argument at issue in *Arthrex*. As of the USPTO’s general stay order in May 2020, 103 appeals from PTAB final decisions also raised this argument and were remanded to the P.T.A.B after the Federal Circuit decision.<sup>96</sup> The PTAB issued a general order holding these cases in abeyance pending review by the Supreme Court.<sup>97</sup>

## B. FOUR OPINIONS ON THE APPOINTMENTS ISSUE

### 1. *A Majority Holds that PTAB APJs are Unconstitutionally Appointed*

The plurality opinion in *Arthrex* was authored by Chief Justice Roberts, who was joined by Justices Alito, Barrett, and Kavanaugh and by Justice Gorsuch as to the constitutional holding.<sup>98</sup> The main conclusion of the effective majority on the constitutional issue is that the APJs were unconstitutionally exercising executive power without sufficient “direction and

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90. Final Written Decision, *Smith & Nephew, Inc. v. Arthrex, Inc.*, No. IPR2017-00275, 2018 WL 2084866 (PTAB May 2, 2018).

91. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019) (appealing the final written decision of the PTAB).

92. *Id.* at 1335.

93. *Id.* at 1338.

94. *Smith & Nephew, Inc. v. Arthrex, Inc.*, 953 F.3d 760 (Fed. Cir. 2020) (en banc).

95. Petition for Writ of Certiorari of *Smith & Nephew, Inc. & ArthroCare Corp.* at I, *United States v. Arthrex*, 141 S. Ct. 1970 (2021) (No. 19-1452), 2020 WL 3651171; Petition for Writ of Certiorari of *Arthrex, Inc.* at ii, *United States v. Arthrex*, 141 S. Ct. 1970 (2021) (No. 19-1458), 2020 WL 3805820; Petition for Writ of Certiorari of the *United States at I, United States v. Arthrex*, 141 S. Ct. 1970 (2021) (No. 19-1434), 2020 WL 3545866.

96. U.S. Patent & Trademark Off., General Order in Cases Remanded Under *Arthrex, Inc. v. Smith & Nephew, Inc.* 941 F.3d 1320 (Fed. Cir. 2019) (PTAB May 4, 2020).

97. *Id.*

98. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1975–76 (2021).

supervision of an officer nominated by the President and confirmed by the Senate” in violation of the Appointments Clause.<sup>99</sup>

The opinion starts by distinguishing *Edmond v. United States*, which held that Coast Guard Criminal Appeals judges were inferior officers but acted constitutionally in adjudicating appeals.<sup>100</sup> *Edmond* articulates the modern line between a “principal” and an “inferior” officer— “[w]hether one is an ‘inferior’ officer depends on whether he has a superior” (who is not the President).<sup>101</sup> Further, *Edmond* provides the rule that inferior officers are those “whose work is directed and supervised at some level” by a principal officer.<sup>102</sup> The opinion concludes that while Coast Guard appeals judges had review within the executive by the Court of Appeal for the Armed Forces (C.A.A.F.), the APJs do not have review within the Executive Branch.<sup>103</sup> In distinguishing *Edmond*, the plurality twice quotes the line, “[W]hat 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 by other Executive officers.”<sup>104</sup>

Rationalizing the need for review of final decisions from the USPTO by the USPTO Director, the plurality argues for both the general and specific need for oversight. As a general matter, review by a confirmed officer preserves democratic accountability to individual decisions within the office.<sup>105</sup> Further, reviewing the powers of the Director in detail, the opinion rejects the suggestions that the Director’s existing powers allow significant enough control over decisions of the PTAB.<sup>106</sup>

In particular, Chief Justice Roberts’s opinion describes the indirectness of the Director’s levers of power over the PTAB APJs as not the solution, but the problem.<sup>107</sup> The Director had and has extensive powers to effect decision-making at the P.T.A.B including institution, deinstitution, and panel selections.<sup>108</sup> While each of these levers of control had been cited as cause for due process concerns, here the plurality holds that the Director does not have

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99. *Id.* at 1988.

100. *Edmond v. United States*, 520 U.S. 651, 662 (1997) (holding that Coast Guard Court of Criminal Appeals judges were inferior officers because: (1) they were supervised by the Judge Advocate General under the Secretary of Transportation and the Court of Criminal Appeals for the Armed forces and (2) questions of law were reviewed *de novo* while deference was given to findings of fact).

101. *Id.* at 662.

102. *Id.* at 663.

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

104. *Id.* at 1980–81 (quoting *Edmond*, 520 U.S. at 665).

105. *Id.* at 1981.

106. *Id.*

107. *Id.*

108. *See supra* notes 42–46 and accompanying text.

*enough* power to sway arbitration decisions.<sup>109</sup> While the Chief Justice acknowledges that these levers are a roadmap to avoid a statutory prohibition, their very indirectness blurs the lines of accountability to the President.<sup>110</sup>

The plurality also rejects the idea that the Federal Circuit provides adequate supervision of the APJs.<sup>111</sup> Drawing from the conclusion in *Oil States* that issuance of a patent is carried out by the executive department, the plurality opinion concludes that the APJs are exercising “executive Power” even though the form of the proceeding is judicial.<sup>112</sup> Because, the plurality asserts, decisions of patentability are fundamentally executive in nature, oversight by the President is required; in support, Justice Roberts’s opinion cites the Vesting Clause.<sup>113</sup>

The plurality opinion is also interesting for what it doesn’t do. The opinion doesn’t ever use the words separation of powers and declines to frame the issue as a violation of the Vesting Clause.<sup>114</sup> However, the language of the unitary executive appears throughout the opinion. First, the Court quotes the line from James Madison from which the term “unitary executive” is drawn: the “great principle of unity and responsibility in the Executive department.”<sup>115</sup> Further, the opinion appears to be reading the Vesting Clause in light of the Take Care Clause by implying that the concern should be for the President’s ability to “discharge his own constitutional duty of seeing that the laws be faithfully executed.”<sup>116</sup> Put more strongly, the whole opinion on agency head final review appears to rely on a separation of powers argument based on an expansive interpretation of the Vesting Clause. For example, “APJs ‘partake

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109. *See Arthrex*, 141 S. Ct. at 1981.

110. *See id.* at 1981–82.

111. *Id.* at 1982.

112. *Id.* (citing *Oil States Energy Servs., LLC v. Greene’s Energy Grp.*, 138 U.S. 1365, 1374 (2018)).

113. *Id.* (citing *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (citing U.S. CONST. art. II, § 1, cl. 1)).

114. *See id.* at 1982 (“The dissent pigeonholes this consideration as the sole province of the Vesting Clause, but *Edmond* recognized the Appointments Clause as a ‘significant structural safeguard[ ]’ that ‘preserve[s] political accountability’ through direction and supervision of subordinates—in other words, through a chain of command.” (citations omitted)); *see also id.* at 2005 (Thomas, J., dissenting) (“The Court appears to suggest that the real issue is that this scheme violates the Vesting Clause.”); *cf. id.* at 1988 (Gorsuch, J., concurring in part) (“On the merits, I agree with the Court that Article II vests the ‘executive Power’ in the President alone.”).

115. *Id.* at 1979 (quoting 1 ANNALS OF CONG. 499 (1789)).

116. *Id.* at 1983 (quoting *Myers v. United States*, 272 U.S. 52, 135 (1926)); *see also* U.S. CONST. art II, § 3.



of a Judiciary quality as well as Executive,’ APJs are still exercising executive power and must remain ‘dependent on the President.’”<sup>117</sup>

Despite penning an opinion full of language on the expansiveness of executive power, the holding is profoundly restrained. The Court does not embrace a general rule that no inferior officer can bind the Executive Branch. Instead, it caveats its rule repeatedly: “many decisions by inferior officers do not bind the Executive Branch to exercise executive power in a particular manner, and *we do not address supervision outside the context of adjudication*”<sup>118</sup> and “only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch *in the proceeding before us.*”<sup>119</sup> The Court also declines to further delineate the line between a principal and an inferior officer.<sup>120</sup> The Court even declines to rule as to the constitutionality of other decisions *within* the Patent Office stating that “[w]e do not address the Director’s supervision over other types of adjudications conducted by the PTAB, such as the examination process for which the Director has claimed unilateral authority to issue a patent.”<sup>121</sup> As discussed further below, the plurality carries this restraint into its remedy.

## 2. Justice Gorsuch Concurring and Raising a Due Process Issue

While Justice Gorsuch concurs with the plurality opinion on the constitutional holding, he takes the plurality’s conclusions a step further. First, Justice Gorsuch points out the separation of powers issue that the plurality opinion dances around.<sup>122</sup> He specifically cites Calabresi and Prakash and their interpretation of the Vesting and Take Care Clauses.<sup>123</sup> However, on the same line of argument, he revives his dissent in *Oil States* to argue that the Appointments Clause issue also creates a Due Process Clause problem.<sup>124</sup> Because Justice Gorsuch believes that a patent has the predominant character of a vested, private property right, a view that the Court rejected in *Oil States*, he argues that the Due Process Clause requires that an Article III court to hear the issue under expansive view of the “private rights” doctrine.<sup>125</sup>

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117. *Arthrex*, 141 S. Ct. at 1982 (quoting James Madison, 1 ANNALS OF CONG. 611–12 (1789)).

118. *Id.* at 1985–86.

119. *Id.* at 1985.

120. *Id.* (“We do not attempt to ‘set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes.’” (quoting *Edmond*, 520 U.S. at 661)).

121. *Id.* at 1987.

122. *See id.* at 1990 (Gorsuch, J., concurring in part).

123. *Id.* at 1989.

124. *Id.* at 1988.

125. *See id.* at 1994.

3. *Justices Breyer, Kagan, and Sotomayor Dissenting as to the Constitutional Holding*

The second concurrence in part written by Justice Breyer, joined by Justices Kagan and Sotomayor and partially joined by Justice Thomas, argues that the APJs were constitutionally appointed.<sup>126</sup>

First, Justice Breyer, joined by Justices Kagan and Sotomayor, argues that the language of the Appointments Clause affords a degree of deference to Congress by the words “as they think proper.”<sup>127</sup> The second concurrence in part argues that deference should be given here (1) because the Constitution explicitly grants authority to Congress in the Patent Clause, (2) because the Executive exercises significant supervision, while *Edmond* doesn’t provide a ruling on exactly *how much* supervision is required only that there is some, and (3) because there is clear legislative intent to give APJs independence.<sup>128</sup>

Second, the concurrence offers a functionalist interpretation of the Appointments Clause, which interprets the constitutionality of a law in light of the purposes and consequences of the statutory limitation.<sup>129</sup> Based on this principle, the opinion identifies several reasonable legislative objectives for the statute including: providing procedural safeguards for the party that had prevailed in the earlier hearing, giving deference to the expertise of the PTAB, and avoiding political interference.<sup>130</sup> These practical concerns, the concurrence argues, prevail over concerns about limits on the Director’s control of policy, which it deems to be weak.<sup>131</sup>

The second concurrence in part also addresses *Arthrex*’s role in the Court’s separation of powers jurisprudence, calling the formalist turn in *Seila Law* and *Free Enterprise Fund* “a mistake.”<sup>132</sup> Again, from a functionalist perspective, the concurrence argues that the consequences of the constitutional holding impede the function of the PTAB, which “calls for technically correct decisions... that fact calls for greater, not less, independence.”<sup>133</sup> Further, administrative adjudication generally calls for expertise without political influence. Justice Breyer’s concurrence also argues that “the Constitution is not a detailed tax code,” and that the Constitution must adapt to the country’s changing needs.<sup>134</sup> Finally, the concurrence argues that Congress and the

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126. *Id.* at 1994 (Breyer, J. concurring in part).

127. *Id.* (quoting U.S. CONST. art. II, § 2, cl. 2).

128. *Id.* at 1994–95.

129. *Id.* at 1995.

130. *See id.* at 1996.

131. *See id.*

132. *Id.*

133. *Id.*

134. *Id.* at 1997.

Executive Branch are the more competent institutions to determine how to implement laws made by Congress and that includes giving individual officers the discretion to do perform their duties.<sup>135</sup>

4. *Justice Thomas Dissenting as to the Constitutional Holding, Joined in Part by Justices Breyer, Kagan, and Sotomayor*

Justice Thomas's dissent also argues that the APJs were properly appointed.<sup>136</sup> Viewing the question asked of the court narrowly—whether the APJs were properly appointed—Justice Thomas would hold that the APJs are inferior officers, and, therefore, their appointment was proper.<sup>137</sup>

First, Justice Thomas points out that no party has identified a case where the Supreme Court didn't defer to Congress on whether an officer was a principal officer or an inferior officer.<sup>138</sup> While *Edmond*, *Free Enterprise Fund*, and *Seila Law* each added description as to what constitutes the power of a principal and inferior officer, as a practical matter, the Supreme Court has always deferred to Congress. Further, the majority holding appears to agree that the APJs are inferior officers.<sup>139</sup>

Second, drawing comparison to *Edmond*, Justice Thomas concludes that PTAB APJs are formally and functionally inferior officers like the Judges of the Court of Criminal Appeals.<sup>140</sup> He writes that the APJs are lower on the organizational ladder, and he argues that the APJs have even greater oversight than the Coast Guard Judges in *Edmond*, pointing to the panel stacking and deinstitution powers of the Director.<sup>141</sup> Justice Thomas criticizes the rule the plurality gleaned from *Edmond* as “boiling down ‘inferior officer’ status to the way Congress structured a particular agency's process for reviewing decisions.”<sup>142</sup> He points out that the review powers of the C.A.A.F. in *Edmond* gave deference to lower “court” factfinding; therefore, the review powers in *Edmond* were not even as expansive as the majority appears to require.

Third, the dissent criticizes the plurality for “polic[ing] the dispersion of executive power among officers.”<sup>143</sup> Drawing from text of the Appointments Clause, Justice Thomas points out that there is no discussion of the power of appointees. Justice Thomas criticizes the holding of the majority as creating a form of *intra*-branch separation of powers law by creating doctrines of

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135. *Id.*

136. *Id.* at 1998 (Thomas, J. dissenting).

137. *Id.* at 1999.

138. *Id.* at 1999–2000.

139. *Id.* at 2002.

140. *See id.* at 2000–02.

141. *See id.* at 2002.

142. *Id.*

143. *Id.* at 2003.

“principal-officer power” and “inferior-officer power” for which he sees no support for in the text of the Appointments Clause.<sup>144</sup>

Finally, Justice Thomas argues that the majority is really making a Vesting Clause argument or at least reading the Appointments Clause in light of the Vesting Clause.<sup>145</sup> He criticizes the effective majority for ruling on an issue that no lower court presented, for remedying a Vesting clause issue by removing *more* power from the President, and for making a decision without historical precedent.<sup>146</sup> Ultimately, the dissent sees no issue with the appointment of APJs and would keep the Appointments Clause to appointments issues and the Vesting Clause to the power of the president and, further, cautions against “star[ing] deeply into the penumbras of the Clauses to identify new structural limitations.”<sup>147</sup>

### C. THE REMEDY: AGENCY HEAD FINAL REVIEW

#### 1. *Justice Roberts’s Plurality (with Justices Breyer, Kagan, and Sotomayor Joining)—the Director Must Have Final Say*

The effective majority’s opinion on the remedy is quite short.<sup>148</sup> The remedy section of the opinion approaches the Appointments Clause issue by severing the statutory provision with the constitutional flaw, 35 U.S.C. § 6(c), which states “only the Patent Trial and Appeal Board may grant rehearings.”<sup>149</sup> Further, a majority of the Court requires that the Director of the USPTO be given the discretionary ability to rehear final decisions within the PTAB<sup>150</sup> Finally, the Court remands the case to the Director to determine whether he would like to institute a rehearing.<sup>151</sup>

#### 2. *Justice Gorsuch—Agency Head Final Review isn’t Enough*

Justice Gorsuch argues in his dissent that the remedy was not enough to resolve the constitutional question because significant due process issues remain. Justice Gorsuch’s largest contribution to the *Arthrex* opinion is in this criticism of the remedy. Justice Gorsuch doesn’t disagree with severance in

144. *See id.* at 2004 (“Nowhere does the Constitution acknowledge any such thing as ‘inferior-officer power’ or ‘principal-officer power.’ And it certainly does not distinguish between these sorts of powers in the Appointments Clause.”).

145. *See id.* at 2005.

146. *See id.*

147. *Id.* at 2005–06.

148. *Id.* at 1986–88.

149. *Id.* at 1987.

150. *Id.*

151. *Id.*

principal;<sup>152</sup> however, because there isn't a clear fall back from the language of the statute, he argues that severance absent clear legislative intent is effectively the judiciary absorbing the legislative power of the Congress.<sup>153</sup> Further, he argues that, if anything, the legislative intent was to make the APJs independent in contrast to the Court's severability analysis.<sup>154</sup> Therefore, the concurrence concludes that severance here amounts to "raw speculation" and does not comport with traditional notions of justice.<sup>155</sup>

In the second part of the concurrence, Justice Gorsuch re-raises his dissent in *Oil States*, which argued that patents were a vested private property right and should not be adjudicated outside of an Article III court.<sup>156</sup> Justice Gorsuch argues that the IPR process still raises due process issues, which were acknowledged but not addressed in *Oil States*. Further, it is Justice Gorsuch's view that the Due Process Clauses themselves require adjudication of any vested property right in an Article III court.<sup>157</sup> This goes a step further than the traditional "private rights" doctrine. In particular, Justice Gorsuch cites with approval Nathan Chapman and former Tenth Circuit Judge Michael McConnell who argue that the Due Process Clauses carry with them notions of separation of powers and that they render unconstitutional any legislative action that would remove of the power to adjudicate private rights from Article III courts.<sup>158</sup>

Justice Gorsuch goes on to say that "any suggestion that the neutrality and independence the framers guaranteed for courts could be replicated within the Executive Branch was never more than wishful thinking."<sup>159</sup> He then discusses what he sees as abuses by PTAB APJs, including presiding over cases where there are clear conflicts of interest.<sup>160</sup> He also cites panel stacking as a clear due process problem.<sup>161</sup> While Justice Gorsuch agrees that the remedy offered by the majority improves the situation, his clear implication is that he believes the Court should have held the IPR process unconstitutional.<sup>162</sup>

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152. *Id.* at 1990 (Gorsuch, J. concurring in part) ("I don't question that we might proceed this way in some cases.").

153. *Id.* at 1991 ("[The Court's] severability analysis seemingly confers legislative power to the Judiciary.").

154. *Id.* at 1992.

155. *Id.*

156. *Id.* at 1993 (Gorsuch, J. concurring in part); *see also* 138 S. Ct. 1365, 1374–75 (Gorsuch, J., dissenting).

157. *Arthrex*, 141 S. Ct. at 1993.

158. *Id.*; *see also* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1801–04 (2012).

159. *Arthrex*, 141 S. Ct. at 1993.

160. *Id.*

161. *Id.*

162. *Id.* at 1993–94.

3. *Justice Thomas—No Remedy for an Almost Constitutional Violation*

Justice Thomas criticizes the remedy as inappropriate to the constitutional violation identified by the majority. First, if the APJs were principal officers and were improperly appointed, then the appropriate remedy is rehearing before a panel that was properly appointed, not a remand to be reheard by another executive functionary.<sup>163</sup> Second, if the issue is that Appointments Clause inherently gives the Director power to review, then Arthrex should have asked the Director for review before appealing.<sup>164</sup> There is no suggestion that Arthrex asked for review and was denied, so Justice Thomas argues that no constitutional violation has actually occurred.<sup>165</sup> As such, Justice Thomas argues that no remedy is due because Arthrex is not entitled to “a bounty for . . . almost identifying a constitutional violation.”<sup>166</sup>

#### IV. AFTER *ARTHREX*

At a high level, the *Arthrex* decision reflects a conflict of values between promoting impartiality and expertise on one hand and preserving political accountability to the democratic process on the other. The plurality decides that “preserving political accountability” is the design of the Appointments Clause.<sup>167</sup> In other words, the Appointments Clause ensures that the person making final decisions is elected or confirmed by someone who is elected. However, as alluded to in Justice Breyer’s concurrence, there is also a compelling argument that the Appointments Clause reflects a need for expertise beyond that of a single person, and that executive appointments are no mere “administrative convenience” but a necessity reflecting the human limitations of federal officers—limitations like knowledge, interest, and time.<sup>168</sup>

However, by focusing on the philosophical issues underpinning *who* gets to decide, the Court only cursorily addresses the procedural issues underpinning *how* its philosophical project would be implemented in practice. The plurality opinion ignores important due process concerns created by requiring that a political actor be able to reverse an individual arbitration decision. Further, the remedy adds additional procedural hurdles for litigants, does not bear a clear relationship to the substantive issue raised, and undoes a

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163. *Id.* at 2006 (Thomas, J., dissenting).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 1982.

168. *Id.* at 1996 (“Given the technical nature of patents, the need for expertise, and the importance of avoiding political interference, Congress chose to grant the APJs a degree of independence.”).

Congressionally enacted statute all to protect an interest that may be overwritten on appeal. In response, the Director should take affirmative steps to improve fairness.

Section III.A discusses agency head review as a remedy to the constitutional issues in *Arthrex* and shows why no issue raised in *Arthrex* is actually resolved by its remedy. Section III.B discusses the tension between strong executive oversight and due process protections for litigants. It argues that agency head final review implicates important due process considerations and ultimately weakens the guarantees of fairness afforded to parties. Section III.C argues that greater deference was owed to Congress's statutory scheme. It argues that the Court creates a power that Congress had expressly declined to give, that the original statutory scheme had actually reserved discretionary executive power from the APJs, and that the interest vindicated by agency head final review is not so clearly an executive entitlement. Section III.D turns to the practical realities of the remedy in *Arthrex* and provides suggestions to improve fairness of the IPR process. The Director can regulate their own discretion, and this section argues that to preserve fairness and consistency in the IPR process, they should.

A. THE COURT'S REMEDY DOES NOT RESOLVE THE COURT'S  
CONSTITUTIONAL ISSUE

Perhaps the most striking thing about the decision in *Arthrex* is how little its remedy does to ameliorate the issues identified in the case. Because the Justices forming a majority on the remedy are different from those forming a majority on the constitutional holding, the former doesn't truly answer the latter. However, even as to the plurality opinion itself, from the narrowest to the broadest view of the constitutional issue, the remedy does not appear to solve what the plurality might see as the problem.

First, the court's remedial holding effectively ordered final review by an inferior officer to remedy an improper final decision by another inferior officer. This issue was raised before the Court's decision was rendered.<sup>169</sup> From the release of *Arthrex* decision in June 2021 until the Confirmation of Kathi Vidal in April 2022, the Commissioner for Patents, Drew Hirshfeld, was "performing the functions" of the Director.<sup>170</sup> The Commissioner neither claims to be the "interim" nor the "acting" Director for the purposes of the Federal Vacancies Reform Act, rather he was acting under the delegated

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169. See, e.g., Appellant New Vision Gaming & Dev., Inc.'s Brief in Response to Order of June 23, 2021 at 8, *New Vision Gaming & Dev., Inc. v. SG Gaming, Inc.*, 996 F.3d 1378 (Fed. Cir. 2021) (No. 20-1399), BL-104 (July 7, 2021).

170. See Executive Biography: Drew Hirshfeld, U.S. PATENT & TRADEMARK OFF., <https://www.uspto.gov/about-us/executive-biographies/drew-hirshfeld> (last visited Apr. 11, 2023).

authority of the vacant seat of the Director.<sup>171</sup> The Commissioner for Patents is not confirmed by Congress; rather, the Commissioner is appointed by the Secretary of Commerce, a congressionally confirmed officer.<sup>172</sup> On remand, the Federal Circuit held that the Commissioner, an inferior officer, may exercise the Director's new review power on the basis that the Supreme Court's opinion in *Arthrex* ratifies this exact outcome but also because to do otherwise would seriously hinder administrative agencies.<sup>173</sup> While the Federal Circuit's decision is certainly correct, the common situation of administrative vacancies only illustrates the practical difficulty of vindicating the principle that final decisions must be made by appointed and confirmed officers.

Second, inferior officers, APJs, are still making final decisions on other patent matters, such as appeals of *ex parte* examination and re-examination decisions. Justice Roberts's Opinion in *Arthrex* states the general principle that "[d]ecisions by APJs must be subject to review by the Director."<sup>174</sup> However, the opinion arguably confined the holding to its facts by stating "[w]e do not address the Director's supervision over other types of adjudications conducted by the PTAB, such as the examination process for which the Director has claimed unilateral authority to issue a patent."<sup>175</sup> The USPTO has taken this statement into account and indicated that Director review will not be available for appeals from examination decisions but that it will be available for other A.I.A. post-grant proceedings such as post grant review and the few remaining covered business method reviews.<sup>176</sup>

This incongruity could be explained by the practical distinction between A.I.A. post grant proceedings and appeals from examination decisions. The rights of the patent holder in an appeal from an examination decision have either not yet "vested" into a patent right (in the case of an appeal from an examination decision), or the patent right has been offered for surrender by the patent holder (in the case of *ex parte* reexamination).<sup>177</sup> Whether the Court's principle of agency head review applies to these APJ decisions may well turn on whether the vesting of the patent property right is of importance.

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171. See *Notice of Delegation of Functions and Duties at the USPTO*, U.S. PATENT & TRADEMARK OFF., <https://www.uspto.gov/trademarks/trademark-updates-and-announcements/notice-delegation-functions-and-duties-uspto> (last visited Apr. 11, 2023).

172. 35 U.S.C. § 3(b)(2)(a).

173. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328, 1333–35 (2022).

174. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1986 (2021).

175. *Id.* at 1987.

176. U.S. PATENT & TRADEMARK OFFICE, *Boardside Chat: Arthrex and interim Director review process*, U.S. PATENT & TRADEMARK OFF., at 13:40 (July 1, 2021), <https://www.uspto.gov/patents/ptab/procedures/2020-ptab-boardside-chat> [hereinafter *Boardside Chat*]. Derivations are not addressed by the USPTO, and the line here may also be unclear because one party's rights have vested and the other party's rights have not.

177. 37 C.F.R. § 1.178.



If the broad constitutional principle is that all “[d]ecisions by APJs must be subject to review by the Director,”<sup>178</sup> the vesting distinction seems to be a hollow one; however, if the underlying issue dominating the separation of powers inquiry is one of due process as suggested by Justice Gorsuch,<sup>179</sup> then this distinction is crucial because it determines the patent applicant’s claim of entitlement to a property interest.

Finally, if *Arthrex* is to be thought of broadly as an extension of the Court’s separation of powers jurisprudence, it’s unclear how this decision will bind other agencies.<sup>180</sup> First, the Court rejects a general rule that “no inferior officer can bind the Government.” In so doing, it limits the reach of its holding repeatedly: “many decisions by inferior officers do not bind the Executive Branch to exercise executive power in a particular manner, and *we do not address supervision outside the context of adjudication.*”<sup>181</sup> It further caveats its rule to just IPRs stating “only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch *in the proceeding before us.*”<sup>182</sup> Taking this statement with the opinion’s explicit exemption of patent examination decisions from agency head review makes it even more unclear how far this rule extends outside the USPTO.

In summary, from the broadest view to the narrowest view of the constitutional interest in *Arthrex*, the remedy doesn’t answer the supposed violation. Taking the broadest view of the issue, though the language of the opinion sounds in separation of powers principles, the plurality opinion declined to use the words “separation of powers,” let alone frame its decision as one about the delineation of powers between the branches. At a slightly narrower level, if the plurality truly believes that no inferior officer can bind the Executive branch, that is pointedly not what it holds. Even narrower, the Court doesn’t seek to affect the decisions of all *agency adjudicators*, and even further, it doesn’t seek to bind the full scope of final decisions of *APJs*. Taking the narrowest view, even on the very issue resolved in the opinion—that *IPR* decisions require final review by a principal officer—an inferior officer can still, in some cases, make final decisions in IPRs.

In view of the strange relationship between the constitutional violation and the ultimate remedy, it’s unclear what the plurality was trying to resolve in the

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178. *Arthrex*, 141 S. Ct. at 1986.

179. *Id.* at 1988 (Gorsuch, J., dissenting) (referring to the dissent in *Oil States* and arguing that patents are a private property right that should not be adjudicated outside of Article III under Due Process Clause considerations).

180. *See* Walker, *supra* note 2 (“This constitutional challenge is narrow and only affects administrative adjudication systems where the agency head lacks final decision-making authority—a very small subset of adjudicative systems.”).

181. *Arthrex*, 141 S. Ct. at 1986.

182. *Id.* at 1985.

first place. It is unlikely that this strange relationship results from an inability to get enough votes for a stronger remedy because Justice Gorsuch was largely in agreement and was clearly ready to vote for the unconstitutionality of IPR. Alternatively, a lack of sufficient consensus as to the constitutional issue itself might seem likely. However, there seems to be a strong consensus as to the underlying constitutional principles at least because Chief Justice Roberts, and Justices Alito, Gorsuch, Kavanaugh, and Thomas have each joined or written opinions embracing a strong view of executive powers.<sup>183</sup> More likely, the Justices see a disconnect between the degree of disruption caused by the remedy that a strong view of executive powers would demand, which would be far reaching, and the real discretionary authority of the administrative patent judges, which is slight. This disconnect is particularly pronounced in light of the silence of the Constitution itself on the *powers* of executive appointees.

B. AGENCY HEAD FINAL REVIEW AND THE TENSION BETWEEN THE DUE PROCESS CLAUSE AND THE APPOINTMENTS CLAUSE

The conflict of values at the center of *Arthrex* is between promoting impartiality and expertise and the preserving political accountability to the democratic process through the oversight of the President. This conflict of values manifests in *Arthrex* as a conflict between the Due Process Clause and an expansive reading of the Appointments Clause read in light of the (Article II) Vesting Clause and the Take Care Clause. By limiting the independence of agency adjudicators, *Arthrex* weakens due process protections in IPR by creating a greater opportunity for biased adjudication used to effectuate the President's political interests. This Section explores the interrelation between strong due process protections and executive control through the removal power and agency head review. It concludes by arguing that agency head final review increases the risk of as-applied due process challenges.

1. *Patents are Protected by a Procedural Due Process Protection Against Biased Adjudication*

As a preliminary matter, it's worth asking to what extent the Due Process Clause case law is relevant to patent invalidation proceedings. In *Oil States*, the majority affirmed that patents have the character of a "public franchise,"<sup>184</sup> however, the majority caveated that "our decision should not be misconstrued as suggesting that patents are not property for the purposes of the Due Process Clause or Takings Clause."<sup>185</sup> While the holding denies a negative, it doesn't affirm that a party is sufficiently entitled to a patent such that its revocation is

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183. See *supra* note 78 and accompanying text.

184. *Oil States Energy Servs., LLC v. Greene's Energy Grp.*, 138 S. Ct. 1365, 1374 (2018).

185. *Id.* at 1379.

subject to procedural due process protections.<sup>186</sup> The opinion explicitly left this issue unaddressed because no party had specifically raised a Due Process Clause challenge.<sup>187</sup>

However, that at least some due process protections apply to patent post-grant proceedings is a running assumption, if not an explicit statement, in the opinions of Supreme Court Justices and at the Federal Circuit, albeit with some variety as to the extent of due process protections. For example, Justice Gorsuch's concurrence in *Arthrex* reflects a particularly strong—and ultimately rejected—view of patents as a private property right.<sup>188</sup> Under his view, procedural due process protections should be strongly protected and would further demand a hearing in an Article III court and deeming the IPR process unconstitutional.<sup>189</sup> However, such a strong view is not required for at least some due process protections to apply. In concurrence in *Oil States*, Justices Breyer, Kagan, and Sotomayor take care to clarify that private rights may be adjudicated outside of Article III courts when public interests are involved, further implying that private property rights are at least implicated in patent invalidation proceedings.<sup>190</sup> In oral arguments for *Oil States*, Chief Justice Roberts and Justices Kennedy and Ginsburg each connected PTAB “panel stacking” to due process concerns.<sup>191</sup> According to these justices, if a procedure can raise due process issues, there must have been a protected interest. Finally, Federal Circuit precedent seems to hold affirmatively that “fair opportunity for judicial review and full respect for due process” are required in patent post-grant proceedings.<sup>192</sup> Further, the Federal Circuit has also considered Due Process Clause challenges to IPR procedures, such as

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186. *See* Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) (“To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”).

187. *Oil States*, 138 S. Ct. at 1379.

188. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1993 (2021) (Gorsuch, J. concurring in part); *see also* 138 S. Ct. 1365, 1374–75 (Gorsuch, J., dissenting).

189. *See Arthrex*, 141 S. Ct. at 1993; *see also infra* at II.C.2.

190. *Oil States*, 138 S. Ct. at 1379–80 (Breyer, J., concurring).

191. John M. Golden, *PTO Panel Stacking: Unblessed by the Federal Circuit and Likely Unlawful*, 104 IOWA L.R. 2447, 2460 n.100 (2019) (citing Transcript of Oral Argument at 32–33, 45, *Oil States Energy Servs., LLC v. Greene’s Energy Grp.*, 138 S. Ct. 1365 (2018) (No. 16-712) (remarks of Roberts, C.J.) (asking whether changing panels partway through proceedings violates due process) and further citing *id.* at 34 (remarks of Kennedy, J.) (asking counsel whether his view of the situation would change if panel stacking “were rampant”), *id.* at 36–37 (remarks of Gorsuch, J.) (asking about the constitutionality of adjudicatory proceedings “subject to packing by a director who’s unhappy with the results”), and *id.* at 64–66 (remarks of Ginsburg, J.) (asking with respect to panel stacking, “Wouldn’t that be an obvious due process flaw?”)).

192. *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 604 (Fed. Cir. 1985).

whether use of the same panel in institution and IPR violated the due process right to an impartial adjudicator.<sup>193</sup> It has also considered whether adequate notice was given in IPR.<sup>194</sup>

Taking as an assumption that an IPR implicates a protectable interest under the Due Process Clause, at least the procedural protections of notice and a hearing are required.<sup>195</sup> However, the same degree of process protections provided in an Article III court are not necessarily required in agency adjudication; instead, due process is flexible.<sup>196</sup> In practice, there is quite a bit of variety as to how both the notice and hearing rights are protected within the context of agency adjudication.<sup>197</sup>

Nevertheless, even within agency adjudication, “due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities.”<sup>198</sup> The right to an impartial adjudicator includes a right to an adjudicator without a substantial pecuniary interest,<sup>199</sup> and a right to an adjudicator that has not prejudged the case,<sup>200</sup> which includes a consideration of whether the adjudicator has been exposed to “extrajudicial” sources of

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193. *See, e.g., Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1029 (Fed. Cir. 2016) (holding the challenge did not raise risk of actual bias but acknowledging that there is a protection against bias); *see also, In re Alappat*, 33 F.3d 1526, 1531–32 (Fed. Cir. 1994) (en banc) (dismissing the due process argument for lack of standing).

194. *See Genzyme Therapeutic Prods. LP v. Biomarin Pharm., Inc.*, 825 F.3d 1360, 1367 (2016) (considering whether Genzyme received adequate notice of the issues to be considered in IPR).

195. *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 313 (1950) (“There can be no doubt that at a minimum [Due Process] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing.”); *see also In re Murchison*, 349 U.S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases.”).

196. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (“Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands. Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected.” (citations and quotations omitted)).

197. *See* ADMIN. CONF. U.S., FEDERAL ADMINISTRATIVE ADJUDICATION DATABASE, <https://www.acus.gov/research-projects/federal-administrativeadjudication> (last visited Apr. 11, 2023) (providing a public database of administrative procedures).

198. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982).

199. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (barring a “direct, personal, substantial, pecuniary interest”); *see also Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (holding that the requirements of *Tumey* and *Ward* apply “with equal force” to agency adjudicators under the standard of “substantial pecuniary interest”).

200. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

information.<sup>201</sup> The standard has been described as “endanger[ing] the appearance of neutrality”<sup>202</sup> and as an intolerable probability of actual bias.<sup>203</sup>

However, the standard for finding a Due Process Clause violation based on prejudgment in the adjudicatory context is fairly high because agency adjudicators enjoy “a presumption of honesty and integrity.”<sup>204</sup> Further, the Supreme Court has repeatedly found that a mixed role as investigator and adjudicator does not per se raise issues of unconstitutional bias.<sup>205</sup> Indeed one commentator has observed that “due process impartiality principles must have some kind of exception or slack for administrative adjudication or else they would cease to exist in their current form.”<sup>206</sup> Another commentator has noted the Supreme Court’s hesitance to use the Due Process Clause to regulate impartiality except in extreme cases out of a preference for legislative deference and constitutional avoidance.<sup>207</sup>

## 2. *Executive Control Through the Appointments Clauses Implied Removal Power as and the Adjudicator’s Personal Pecuniary Interest*

The tension between the Due Process Clause’s protection against a biased adjudicator and strong executive removal powers should be apparent.<sup>208</sup> An agency adjudicator has a pecuniary interest in their own job. If they reasonably believed, for example, by an explicit statement that they would be fired if they rule a certain way, the outcome of the proceeding would depend on the direct, personal, substantial, pecuniary interest of the agency adjudicator whose job was threatened, under the standard in *Tumey*.<sup>209</sup> If an agency adjudicator can be fired or awarded a bonus for failure to rule in the manner that the head of the Agency or the President desires, then there is a risk of bias created by internal pressures.<sup>210</sup> This fear of bias motivates removal protections for agency adjudicators.

However, removal protections appear to have implied constitutional limits from the Appointments Clause. Under the precedent in 2020’s *Seila Law*, when

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201. *Liteky v. United States*, 510 U.S. 540, 551 (1994).

202. *Williams v. Pennsylvania*, 579 U.S. 1, 14 (2016).

203. *See Caperton v. A.T. Massy Coal Co.*, 556 U.S. 868, 872 (2009) (citing *Withrow*, 421 U.S. at 47).

204. *Withrow*, 421 U.S. at 47.

205. *See, e.g., id.* at 46; *Richardson v. Perales*, 402 U.S. 389, 410 (1971); *Sims v. Apfel*, 530 U.S. 103 (2000).

206. Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695, 1705 (2020).

207. *See* Louis J. Virelli, III, *An Ethical Gap in Agency Adjudication*, 69 BUFF. L. REV. 1329, 1349–50 (2021).

208. *See* Barnett, *supra* note 206, at 1704 (calling it “obvious”).

209. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

210. *See* Barnett, *supra* note 206, at 1704.

the final reviewing authority is the single-member head of an agency, that adjudicator as the final authority is *required* to be removable without cause by the President.<sup>211</sup> Similarly, if the head of the agency is a multi-member board whose members are insulated from removal, inferior adjudicators within the agency cannot also have protections from removal under 2010's *Free Enterprise Fund*'s prohibition on double insulation from removal.<sup>212</sup>

After these two cases, there seemed to be a remaining opening for agency adjudicators with tenure protections within agencies led by a single member head. The PTAB has such a structure.<sup>213</sup> At the intermediate appellate court stage in *Arthrex*, the Federal Circuit attempted to address the Appointments Clause issue by severing the APJs' removal protection,<sup>214</sup> an effort rejected by the Supreme Court.<sup>215</sup> The Supreme Court's decision in *Arthrex* leaves unresolved whether adjudicators in agencies led by a single-member agency head can be constitutionally protected from removal. While this issue was argued on remand, the Federal Circuit found no need to reach the issue.<sup>216</sup> The sum of *Seila Law*, *Free Enterprise*, and *Arthrex* leave little room of independent adjudication.

### 3. *Executive Control Through Agency Head Final Review as a Vector for "Extrajudicial" Information and Prejudgment*

Like executive removal, executive control through final review by the agency head creates a new source of tension with the Due Process Clause by weakening due process protections against a biased adjudicator. Existing critiques of "panel stacking" illustrate this tension between executive control and fair adjudication. While agency head review does remove the incentive for the Director as a non-party to manipulate the proceedings, agency head final review arguably poses the same risks to due process as panel stacking. If the

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211. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197–98 (2020) (“[T]o hold otherwise would make it impossible for the President . . . to take care that the laws be faithfully executed.”).

212. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010).

213. 35 U.S.C. § 3(a)(1) (vesting the power of the USPTO in a single Director who is appointed with advice and consent); *see also* 35 U.S.C. § 3(c) (making 5 U.S.C. § 7513's cause removal provisions—“only for such cause as will promote the efficiency of the service”—applicable to APJs).

214. *See Arthrex, Inc. v. Smith & Nephew, Inc.* 941 F.3d 1320, 1337 (2019) (attempting to cure the constitutional violation in the same manner as *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010)).

215. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1987–88 (2021) (vacating the lower court judgment and instead severing the last sentence of 35 U.S.C. § 6(c)).

216. *See Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328, 1333–40 (2022) (“Although the President must have cause to remove the Commissioner from [the Director's] position, he needs no cause to remove the Commissioner from his role as the Director's temporary stand-in”).

concern with panel stacking is that executive control could raise issues of unconstitutional bias due to prejudgment or extrajudicial influence, then agency head final review increases that control.

Briefly, “panel stacking” is used with criticism to denote the discretionary power of the Director to choose which APJs sit on a panel either initially or during rehearing.<sup>217</sup> For example, the Director could handpick favorable APJs for a rehearing after an initial PTAB decision that was unfavorable to their views.<sup>218</sup> The Director could even put himself on the three-member panel in rehearing in an effort to cement a majority.<sup>219</sup>

The concern with panel stacking derives from a concern over a due process protection for a meaningful hearing before an impartial adjudicator. In an article discussing due process issues caused by panel stacking, John Golden puts forward two arguments for a Due Process Clause violation. First, he argues that panel stacking might violate the due process right to an impartial adjudicator in a “strong form,” i.e., an instance where the panel was stacked specifically to achieve a result.<sup>220</sup> As a second argument, he suggests that “strong form” panel stacking may violate the right to a meaningful hearing under the principle that “the one who decides must hear.”<sup>221</sup>

By way of context, panel stacking is uncommon enough that it’s typical to discuss the problems of panel stacking by first positing that that it happens more often.<sup>222</sup> However, panel stacking has occurred.<sup>223</sup> This practice has been criticized. For example, within the judiciary, between *Arthrex* and *Oil States*, Chief Justice Roberts and Justices Ginsburg, Gorsuch, Kennedy, and Thomas

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217. *See* *Arthrex*, 141 S. Ct. at 1981; *see also In re Alappat*, 33 F.3d 1526, 1531–32 (Fed. Cir. 1994) (en banc) (partially abrogated on other grounds) (“We hold that § 7 grants the Commissioner the authority to designate the members of a panel to consider a request for reconsideration of a Board decision. This includes, as in this case, the Commissioner designating an expanded panel made up of the members of an original panel, other members of the Board, and himself as such, to consider a request for reconsideration of a decision rendered by that original panel.”).

218. *See* *Arthrex*, 141 S. Ct. at 1981.

219. *Id.*

220. Golden, *supra* note 191, at 2461.

221. *Id.* at 2468 (citing *Morgan v. United States*, 298 U.S. 468, 481 (1936)).

222. *Id.* at 2460 n.100 (citing Transcript of Oral Argument at 34, *Oil States Energy Servs., LLC v. Greene’s Energy Grp.*, 138 S. Ct. 1365 (2018) (No. 16-712) (remarks of Kennedy, J.) (asking counsel whether his view of the situation would change if panel stacking “were rampant”)).

223. *See, e.g., In re Alappat*, 33 F.3d 1526, 1531–32 (Fed. Cir. 1994) (en banc); Oral Argument at 47:20, *Yissum Rsch. Dev. Co. v. Sony Corp.*, 626 F. App’x. 1006, 1007 (Fed. Cir. 2015), *reproduced in* Saurabh Vishnubhakat, *Disguised Patent Policymaking*, 76 WASH. & LEE L. REV. 1667, 1678–80 (2019); *Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, 868 F.3d 1013, 1019 (Fed. Cir. 2017) (Dyk, C.J., concurring).

have all cited panel stacking as a possible Due Process Clause issue.<sup>224</sup> This concern is also present in the academic literature.<sup>225</sup> Given the due process concerns, it is odd that panel stacking by the Director is discussed as if it is a *good* thing in the opinion of the plurality and the opinions written by Justice Breyer and Justice Thomas.<sup>226</sup>

Panel stacking is also a means of indirectly maintaining executive control. In an article by Christopher J. Walker and Melissa F. Wasserman which was cited in both Chief Justice Roberts's opinion and Justice Gorsuch's opinion in *Arthrex*, agency head review was advocated as a means of harmonizing the USPTO with formal adjudication procedures under the APA.<sup>227</sup> Their article specifically addresses and questions the due process argument against panel stacking by pointing to the presence of statutory avenues for executive control as a foil to the argument that such strong process protections would be required. For example, they argue that because agency head review is the "standard federal model" and because the APA expressly contemplates *de novo* agency head review in 5 U.S.C. § 557(b) that it would be "counterintuitive to conclude that it offends constitutional due process for the head of an agency to impose her policy preference."<sup>228</sup> They further argue that the USPTO's lack of a broad grant of substantive rulemaking authority creates a particular need for agency head review as an avenue for patent policymaking.<sup>229</sup>

Professors Walker & Wasserman's argument is not necessarily inconsistent with Professor Golden's. While Professor Walker & Wasserman argue for the facial allowability of agency head review on statutory grounds, Professor Golden's argument can be viewed as an *as-applied* violation on Constitutional grounds. Without factual context, neither argument is exclusive of the other.

In its own "strong form," agency head final review arguably raises the same risks of bias as panel stacking by obviating the need for the Director to stack a panel. Agency head final review gives the Director the power to review the findings of the APJ *de novo* and thereby, if desired, undo a decision in an agency adjudication based on their policy preference. After *Arthrex*, why would a "rogue" Director, with a desire to achieve a particular result, even bother to stack a panel if they can just redo the decision themselves by instituting review *sua sponte*? By removing the need to act indirectly through panel stacking,

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224. See, e.g., *id.*; see also Vishnubhakat, *supra* note 223, at 1678–80.

225. Golden, *supra* note 191, at 2460 n.100 and accompanying text.

226. United States v. Arthrex, Inc., 141 S. Ct. 1940, 1995 (2021) (Breyer, J., concurring) (citing panel stacking as evidence of "considerable control"); see also *id.* at 2002 (Thomas, J., dissenting) (also citing panel stacking as evidence of control).

227. See Walker & Wasserman, *supra* note 39, at 184–87.

228. *Id.* at 185.

229. *Id.* at 176.



agency head final review increases executive control over patent policy, but it also increases the opportunity for bias against the politically disfavored.

The constitutional line between due process and executive control depends on what “policy” means. Sometimes policymaking is, in fact, rulemaking. Sometimes it’s a preferred interpretation. Other times, it’s a statement of values. In still other instances, it is a choice to act or not. A policy doesn’t necessarily favor one side over another. For example, it would be counterintuitive to conclude that it offends constitutional due process for the head of an agency to correct an issue of fact or law, to remedy a procedural deficiency, or take another facially neutral action. However, on another extreme, if “policy” means “the outcome has to be X, regardless of the facts, otherwise my boss will fire me for jeopardizing their election,” that denies the parties a meaningful hearing in violation of the Constitution.

Using an adjudication as a vehicle for rulemaking or to articulate a new policy as to all is allowable and, indeed, common in administrative adjudication,<sup>230</sup> but it can raise issues of fairness to the parties in the adjudication in which rule or policy changed.<sup>231</sup> While using adjudication to affect policy mixes quasi-judicial and traditionally executive roles, a combination of functions is not a problem per se.<sup>232</sup> It does, however, create an opportunity for bias if not necessarily an unconstitutional risk of bias.<sup>233</sup> *Withrow* and its progeny tolerate a combination of functions by noting that “special facts and circumstances” may raise due process concerns but nonetheless allowing that combination of functions in deference to congressional intent and executive necessity.<sup>234</sup> Despite the need to effectuate executive policy, the requirements of the Due Process Clause define the constitutional limits.

The *Arthrex* opinion continues a trend of increasing restrictions on adjudicator independence within Article II. Without independence, the risk of bias increases. While agency head review is likely not facially problematic, a set of facts which overcomes the “presumption of honesty and integrity” would

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230. *See* *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (“The choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”) *followed by*, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

231. *See id.* (considering whether applying a rule retroactively would cause “mischief”).

232. *See Withrow v. Larkin*, 421 U.S. 35, 58 (1975) (pointing to investigative and adjudicative functions).

233. *See id.* at 47.

234. *See id.* at 58; *see also* *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 292–94 (1974) (analogizing to *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) in finding statutory authority to make rules and noting that rulemaking outside of the adjudication would “would make the administrative process inflexible and incapable of dealing with many of the specialized problems”).

support a finding that agency head review was unconstitutional as applied. If the Director's policy preference in an individual adjudication amounts to a prejudgment to the benefit of one side or another, i.e., "strong form" panel stacking, that would violate due process. Any opinion in Director Review that appears to take sides is, therefore, vulnerable to an as-applied due process challenge, though the burden of proof to show that unconstitutional bias had occurred would be heavy under current law.

C. "AS THEY THINK PROPER": *ARTHREX* AS A LIMIT TO CONGRESS'S STATUTORY CONTROLS

The plurality takes the view that the power of the President to "see that the laws be faithfully executed" encompasses a requirement that the agency head have final review in an IPR<sup>235</sup> However, the Constitution also grants to Congress the power to vest the appointment power "as they think proper" and, of course, the power to grant patents themselves.<sup>236</sup> Under the latter authority, Congress granted the power to review patents post-grant to the executive under statutory provisions designed to minimize the use of IPRs in patent policy making.<sup>237</sup> In view of this limited statutory delegation and because that statutory delegation defines the law that the President is to faithfully execute, a greater deference to Congressional intent should have been owed.

As to the provisions of the APA, these rules are defaults and were allowably displaced by the governing statute.<sup>238</sup> While the APA default rules in formal adjudication provide for agency head final review, indeed this is referred to in the Plurality opinion in *Arthrex* the "standard way," *requiring* agency head final review distinct from prior case law in that it *creates* additional powers for the Director where Congress had intended to limit them. The Plurality erred in *creating* authority resembling a statutory provision that Congress had superseded.

As to the statutory grant of authority in the governing statute of the USPTO, the IPR process lacks a clear executive interest because it was designed to be responsive and non-prosecutorial, seemingly to exclude the use of IPR as an executive enforcement action.<sup>239</sup> Further, as to rulemaking through adjudication, an individual APJ never had discretionary authority to

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235. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1983 (2021) (citing *Myers v. United States*, 272 U.S. 52, 135 (1926)).

236. U.S. CONST. art. II, § 2, cl. 2; *see also* U.S. CONST. art. I, § 8, cl. 8.

237. *See Arthrex*, 141 S. Ct. at 1992 (Gorsuch, J., concurring) (describing amicus briefs which attest to the independence of APJs as statutory design).

238. *See infra* Section III.C.1 and associated discussion.

239. *See infra* notes 261 and 262 and associated discussion.

make new rules because their decisions aren't precedential by default.<sup>240</sup> Director review, by contrast, may well be precedential. As to the issues considered within the adjudication itself, the APJs consider only whether contents of the claim was already available to the public and whether a person of skill in the art would have understood the claim to be obvious.<sup>241</sup> APJs are charged with no broad consideration of public policy or economic analysis.

Finally, absent a statutory grant, the President's power to see that the laws be faithfully executed does not admit a grant of inherent power to vindicate a policy interest in the outcome of an *individual* agency adjudication. The Plurality's view of executive discretion finds no precedent even in case on which it relies and, further, fails to comport with traditional notions of justice.<sup>242</sup>

1. *The A.I.A. Allowably Displaced the Administrative Procedure Act Default for Agency Head Review*

While the Plurality opinion in *Arthrex* calls "higher level agency reconsideration" the "standard way,"<sup>243</sup> the APA's framework for adjudication is flexible. While § 557(b) contemplates the availability of *de novo* review by the agency in formal adjudication,<sup>244</sup> the APA nowhere requires it from all agencies at all times; instead, Congress can supersede provisions of the APA by statute so long as it does so expressly.<sup>245</sup> As to adjudication, Congress is allowed by statute to require additional procedures, so long as they meet or exceed the requirements of the Due Process Clause.

The Plurality recasts the purpose of § 557(b) from procedural protection to a means of "maintaining political accountability and effective oversight."<sup>246</sup> This interpretation of the statute is wrong at least because § 557 does not apply to all agency adjudication, just formal adjudication.<sup>247</sup> Further, § 557(d)(1)(A) also provides a ban on *ex parte* communication, which would seem to limit this same oversight.<sup>248</sup> Indeed, the Ninth Circuit has explicitly read this provision to preclude strong executive control.<sup>249</sup> Instead, the review provision of § 557(b) is *procedural* protection for parties to administrative adjudication

240. See SOP 2, *supra* note 44, at 1–2.

241. See 35 U.S.C. § 311(a)–(b).

242. See *infra* Section III.C.3 and associated discussion.

243. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1984 (2021).

244. 5 U.S.C. § 557(b).

245. 5 U.S.C. § 559; see also *Dickenson v. Zurko*, 527 U.S. 150, 154–55 (1999) (interpreting § 559 as requiring a clear "statutory intent").

246. See *Arthrex*, 141 S. Ct. at 1984.

247. 5 U.S.C. § 557(a).

248. 5 U.S.C. § 557(d)(1)(A).

249. See *Portland Audubon Soc. v. Endangered Species Comm'n*, 984 F.2d 1534, 1543–48 (1993) (citing *Myers v. United States*, 272 U.S. 52, 135 (1926)).

assuring that they receive a fair level of process in agency proceedings. Not every agency adjudication is entitled to judicial review;<sup>250</sup> therefore, § 557(b) assures that there is something like an appeal within the agency in formal, but not informal, proceedings.

The pre-*Arthrex* provisions of 35 U.S.C. § 6(c) expressly supersede 5 U.S.C. § 557(b)'s agency head review procedure. Section 6(c) reads "each . . . *inter partes* review shall be heard by at least three members of the Patent Trial and Appeal Board," and the now-severed portion of the statute reads "[o]nly the Patent Trial and Appeal Board may grant rehearings."<sup>251</sup> This is quite clearly in conflict with § 557(b)'s text: "[w]hen the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule."<sup>252</sup> The plain language of both statutes cannot be followed. Because Congress could not have intended both statutes to be controlling, there is clear statutory intent to displace review by "the agency" for final review by the PTAB Agency head final review, as imposed by the *Arthrex* decision, creates authority that Congress had statutorily excluded.

## 2. *The Limited Statutory Authority Granted to PTAB APJs Lacks a Clear Executive Interest*

The view of the majority on the constitutional issue frames the separation of powers ruling in rigidly formalist terms. It holds that the power wielded by the PTAB to cancel a patent is executive power because of the PTAB's location within the Executive Branch;<sup>253</sup> however, viewed through the lens of the governing statute, the discretionary authority of APJs is not so clearly an executive entitlement. While adjudicators within Article II occupy a variety of roles, some of which take on legislative or executive character in addition to adjudicatory functions, a PTAB APJ by its governing statute does not have a mixed role. As to rulemaking, APJs have little power to shape office procedures let alone substantive patent law. As to traditionally executive functions, APJs have no prosecutorial or investigative role in the IPR proceeding itself. Further, APJs have limited enforcement power. APJs exercise discretion that is singularly adjudicatory and entirely overseen by the CAFC. None of this is to say that patents or the USPTO is divorced from politics, only that the powers of APJs themselves lack a clear executive interest beyond a general interest in the application of a particular set of facts to law.

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250. 5 U.S.C. § 701.

251. 35 U.S.C. § 6(c).

252. 5 U.S.C. § 557(b).

253. *See* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1982 (2021).

APJs don't have rulemaking authority, but agency-wide, the USPTO has some rulemaking authority. The USPTO has two separate sources of rulemaking authority: the general provisions under § 2(b)(2) and rulemaking specific to IPRs in § 316.<sup>254</sup> The Supreme Court has held that § 316 rulemaking authority includes the ability to set the claim construction standard in IPR consistent with a broader public policy interest in seeing that patents have legitimate scope.<sup>255</sup> Section 2(b)(2) refers to "proceedings" and has never been interpreted to grant a broad substantive rulemaking authority.<sup>256</sup> Much of the substantive patent law is judge-made.

While adjudication can be used as a venue for rulemaking in agencies in general, an IPR reserves rulemaking power from the APJs. A decision from the panel of APJs in IPR does not by default have the force of precedent within the agency.<sup>257</sup> Instead, consistent with the statutory grant of rulemaking to "the Director," the Director has the power to designate particular opinions of the PTAB to have the force of precedent within the USPTO, and any other opinion is only persuasive authority.<sup>258</sup> In practice, the Precedential Opinion Panel (POP), a group of senior APJs and the Director, recommends that certain decisions have the force of precedent within the USPTO, which the Director may then approve.<sup>259</sup> There are, as of this writing, 101 PTAB opinions which have achieved this designation.<sup>260</sup> Chances are that any individual proceeding won't be deemed precedential and, when they are, it is with the Director's oversight. APJs, therefore, do not have discretion to set standards that determine the relationship between the agency and parties outside the particular IPR that they preside over.

APJs don't have investigative or prosecutorial power. Starting at the level of the USPTO itself, the agency's enforcement power in IPR is limited. USPTO has no power to affirmatively investigate and cancel bad patents. Instead, an IPR is requested by a person who is not the owner, rather than being instigated by the agency.<sup>261</sup> And once a request is filed, an administrative hearing within the USPTO is not guaranteed. Instead, institution decisions in

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254. 35 U.S.C. §§ 2(b)(2), 316.

255. *See* *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 279–81 (2016) (explaining that "[i]nter partes review helps protect the public's paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope") (citation omitted).

256. *See id.* at 277 (citing as an example *Cooper Techs. Co. v. Dudas*, 536 F.3d 1330, 1335 (Fed. Cir. 2008)).

257. SOP 2, *supra* note 44, at 3.

258. *Id.* at 2–3, 11.

259. *Id.* at 4.

260. *Alphabetical Listing of Precedential Decisions*, U.S. PATENT & TRADEMARK OFF., <https://www.uspto.gov/patents/ptab/decisions-and-opinions/precedential> (last visited May 1, 2023).

261. 35 U.S.C. §§ 311–12; *see also* *Uniloc 2017 LLC v. Facebook Inc.*, 989 F.3d 1018, 1027–28 (Fed. Cir. 2021); *supra* note 20 and accompanying text.

IPR are within the discretion of the Director.<sup>262</sup> Once the adjudication commences, the USPTO does not take the role of “prosecutor” in an IPR; instead, the action is an adversarial action between the petitioner and the patent owner. Because enforcement is fundamentally responsive and non-prosecutorial, the USPTO has limited power to “target” patents that it believes are invalid.

Within the agency, APJs do play a role in the institution of IPRs, but the Federal Circuit has specifically held that institution decisions do not mix adjudicative and executive functions.<sup>263</sup> The Director’s power to institute IPRs is delegated to the PTAB which institutes an IPR on behalf of the Director.<sup>264</sup> In practice, the decisions to institute and ultimately hear the IPR are given to the same panel of three APJs.<sup>265</sup> The Federal Circuit has held that “the decision to institute and the final decision are adjudicatory decisions and do not involve combining investigative and/or prosecutorial functions with an adjudicatory function,” likening the institution decision to a district court determination of likelihood of success on the merits and then deciding the merits.<sup>266</sup> In the same case, the Federal Circuit also upheld the Director’s authority to delegate these decisions.<sup>267</sup>

As to the enforcement of judgments, the USPTO has no power to award or collect fines or fees in response to a decision in IPR. If a patent is deemed invalid, the only available remedy is a loss of the ability of the former patent owner to enforce the rights that the agency itself created in error.<sup>268</sup> Further, invalidity only takes effect after the owner’s opportunity for judicial review has ended.<sup>269</sup> In the Federal Circuit’s view, the remedy in an IPR releases to the public the content of a patent that was void ab initio.<sup>270</sup> The USPTO does not order injunctions. No damages are awarded or penalties collected; no property is impounded. Neither the USPTO nor the APJs exercise discretion in the size or character of a judgment or whether or how it should be collected.

Regarding the specific legal standards considered in IPR—the application of statutory standards of novelty and obviousness to the claims based on prior

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262. 35 U.S.C. § 314.

263. *Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1030 (Fed. Cir. 2016).

264. 37 C.F.R. § 42.4.

265. *Ethicon Endo-Surgery*, 812 F.3d at 1028 (“The PTO has determined that, in the interest of efficiency, the decision to institute and the final decision should be made by the same Board panel.”).

266. *Id.* at 1030.

267. *Id.* at 1032–33.

268. 35 U.S.C. § 318(b).

269. *Id.*

270. *Fresenius USA, Inc. v. Baxter Int’l Inc.*, 721 F.3d 1288, 1346 (Fed. Cir. 2009).

patents and printed publications<sup>271</sup>—neither § 102 nor § 103 of Title 35 includes an explicit consideration of a broader patent policy interest.

Much of what is considered in an IPR is strictly factual, which would seem to preclude consideration of a broader patent policy. For example, novelty is considered to be a question of fact rather than law. It would seem odd to consider whether it was good “policy” that something was found to be new. Similarly, obviousness is a legal determination based on a set of factual predicates. A determination of obviousness requires: consideration of the scope and content of the prior art, the differences between the prior art and the claims at issue, and the level of ordinary skill in the pertinent art. Further, so long as there is an adequate “nexus” with the claimed invention, the office may also consider secondary factual showings of non-obviousness including: commercial success of the invention, long felt but unsolved need for the invention, failure of others, licensing and copying by others, praise for invention, unexpected results created by the claimed invention, unexpected properties of the claimed invention, and skepticism of skilled artisans before the invention.<sup>272</sup> None of these factual showings support an articulation or consideration of a public policy interest.<sup>273</sup> Insofar as there is a public interest in proper patent scope, that is fully aired by increasing the likelihood of a proper factual determination, something the Director is, at least for most art-spaces, worse at achieving.

Even if questions of fact aren’t a clear vehicle for policymaking, patent validity still involves legal determinations. Obviousness involves a legal determination, as does claim construction. If there is a broader policy interest to be vindicated in an IPR, this is where it would be found. Nevertheless, as discussed above, the USPTO’s power to change substantive legal standards is limited and APJs do not exercise it.

Insofar as the Director has rulemaking authority, the Director is free to promulgate rules before or after an IPR. Further, if the Board makes a decision that the Director particularly approves, that decision may be designated as precedential after the fact. If the panel makes a decision that the Director doesn’t approve, that decision does not bind anyone else. The Director may respond by directly designating a standard. While rulemaking through adjudication is common within agencies, there is nothing in the APA that *requires* “hybrid” rulemaking or even a particular set of procedures for hybrid rulemaking. Instead, by giving rulemaking power to the Director but not giving

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271. 35 U.S.C. § 311(a)–(b).

272. *Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, 711 F.3d 1348, 1368 (Fed. Cir. 2013).

273. *See id.* at 1356 (describing these as “objective evidence” and “factual showings”).

the Director final review of IPR, it would seem that the statute does not allow an IPR to be used as a rulemaking *except* by later designation by the Director.

In summary, the discretion of APJs in an IPR is not discretion in determining how the agency's rules will apply to the public at large, nor is it discretion in determining who the U.S.P.T.O believes is worthy of its attention and resources. Instead, the discretion inherent in determining whether a particular claim is unpatentable is the discretion in applying the law to the parties' individual interests. While patents are certainly not divorced from politics, the discretionary power wielded by APJs in an IPR is far less clearly an executive entitlement because of the absence of traditionally executive functions.

3. *A General Public Policy Interest in the Application of Law to Facts is Not an Executive Interest*

Though declining to explicitly frame its view through the lens of the Article II Vesting Clause, the majority on the constitutional holding in *Arthrex* suggests that the vesting of Executive power should include a President's discretionary policy interest in the outcome of an *individual* agency adjudication. Both as to agency adjudication in general and particularly with respect to issues considered in IPR, this expansive view of executive discretion finds no precedent even in the case on which the Plurality relies. Further, this expansive view of executive discretion fails to comport with traditional notions of justice.

As to agency adjudication in general, even the Supreme Court's most expansive views of executive power appear to reserve an interest in the outcome of an individual adjudication from executive discretion. Citing *Myers v. United States*, Chief Justice Roberts's Opinion criticizes the dissent for its lack of "any concern for the President's ability to 'discharge his own constitutional duty of seeing that the laws be faithfully executed.'"<sup>274</sup> It seems that the duty to be discharged is that the President can see that the laws are faithfully executed in an individual agency adjudication. However, though notable for its view of the expansive powers of the executive, the *Myers* opinion itself in dicta rejects what Chief Justice Roberts's Opinion cites it for and reads "there may be duties of a quasi-judicial character imposed on executive officers and *members of executive tribunals* whose decisions after hearing affect interests of individuals, the discharge of which the President *cannot in a particular case properly influence or control*."<sup>275</sup>

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274. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1983 (2021) (citing *Myers v. United States*, 272 U.S. 52, 135 (1926)).

275. *Myers*, 272 U.S. at 135 (further suggesting that later removal after adjudication *would allow* the President to "see that the laws be faithfully executed" (emphasis added)).



The *Myers* decision, once regarded as the “apex of constitutional doctrine favoring presidential power,”<sup>276</sup> reserves power over adjudication from the President because the outcome of a single adjudicatory proceeding is not something conventionally thought of as a political power. This principle is not absent from the foundations of administrative law.<sup>277</sup> The *Londoner* and *Bi-Metallic* distinction between rulemaking and adjudication creates a division, though not always a clear one, between controversies that affect broad groups and discrete claims affecting individuals.<sup>278</sup> The former are the domain of rulemaking, whose fairness is overseen by notice, comment, and the presidential vote rather than individual procedural protections. The latter affect individual interests and have greater due process protections because they rely on the participation of distinct parties.<sup>279</sup> As a result, an adjudication is focused on individual, and there is less room to affect policy. Despite being a former President and one of the Supreme Court’s great advocates of Presidential power, even Justice Taft found limits to the President’s ability to try to influence or control an adjudication.

The discretion in applying facts to law in an individual case is the discretion given generally to adjudicators. If this were in the Article III context, it would be called judicial discretion. This discretion is the same discretion that is passed to the CAFC if either party appeals and is overwritten by their opinion. As discussed in the preceding section, agency head final review upsets the statutory scheme of the A.I.A.—which limited the access of APJs to rulemaking and to functions associated with the executive. By creating a new executive power, the *Arthrex* remedy seems to imply that an adjudicative proceeding in Article II has a due process ceiling, because the decision maker is entitled to only so much independence and, implicitly, impartiality.

Further, requiring executive oversight in IPR upsets the internal separation of functions within the USPTO. The remedy in *Arthrex* seems to require an opportunity to make policy, implying that a combination of functions in agency adjudication is a *requirement* of the Appointments Clause. After *Arthrex*, Congress is effectively forbidden from creating a form of intra-agency separation of powers which segregates adjudication from the policy interests of the Director. This seems to run counter to the very separation of powers principles that the Court had intended to vindicate.

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276. Kagan, *supra* note 66, at 2363.

277. *Id.* (citing *Londoner v. Denver*, 210 U.S. 373 (1908) and *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915)).

278. *Id.*

279. *See id.*

#### D. PRESCRIPTIONS REGARDING AGENCY HEAD FINAL REVIEW

Agency head final review strains constitutional fairness in IPR, lacks a clear relationship to the supposed constitutional violation, directly contradicts the agency's governing statute, inefficiently adds a new hurdle to appeal, and protects a weak executive interest that is overwritten entirely on judicial review. The Court, however, does not require the Director to use their new power. In fact, it places squarely within the Director's power the ability to decide to what degree they will allow independent adjudication and what procedures will be used. This Section proposes various measures that the Director can take to improve fairness and efficiency in the new Director Review process.

Section III.D.1 summarizes the interim procedures for Director Review released by the USPTO in response to *Arthrex*. The Supreme Court's opinion instructed the USPTO that it must provide a route to request review of the Director, but it left exactly how to implement that directive to the USPTO. Since Director review is unlikely to go away, the USPTO can take affirmative measures to improve process protections within the agency. Section III.D.2 discusses the issues caused or left open by the interim guidance and offers some suggestions.

##### 1. *The USPTO's Interim Guidance*

Filing a request for *Arthrex* review is available following a final decision in an IPR, post grant review (PGR), covered business method review (CBM), or following a final decision after a panel rehearing by the Board.<sup>280</sup> The USPTO has indicated that requests will be subject to the requirements of 37 C.F.R. § 42.71(d).<sup>281</sup> After an unfavorable final written decision in an IPR or P.G.R., a party has the 30 days to request either Director review or a rehearing by the board.<sup>282</sup> A party may not request both Director review and rehearing by the board.<sup>283</sup> Only a party to the proceeding may file a request; however, the Director may authorize a third-party briefing similar to other proceedings before PTAB.<sup>284</sup> The filing of the request resets the timeline to appeal to the Federal Circuit.<sup>285</sup>

Institution of a Director review is a discretionary decision of the Director, and the Commissioner for Patents has indicated that a review may be instituted

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280. *Arthrex Q&A's*, U.S. PATENT & TRADEMARK OFF., Question A9 (Dec. 4, 2021) [hereinafter *Arthrex Q & A's*] <https://www.uspto.gov/patents/patent-trial-and-appeal-board/procedures/arthrex-qas>; see also Boardside Chat, *supra* note 176, at 31:40.

281. *Arthrex Q & A's*, *supra* note 280, at Question A2; see also 37 C.F.R. § 42.71(d).

282. *Arthrex Q & A's*, *supra* note 280, at Question A2, A3.

283. *Id.* at Question A3.

284. *Id.* at Question B4, B5.

285. *Id.* at Question A2; see also 37 C.F.R. § 90.3(b).

*sua sponte* even without prior filing of a request.<sup>286</sup> If the burden of reviewing requests becomes significant, the Office has indicated that review of requests may be aided by an advisory board similar to the existing POP; however, ultimate decision-making power would rest with the Director.<sup>287</sup> POP members include the Director, the Commissioner for Patents, the Chief Judge, and operational Chief Judges.<sup>288</sup>

Once instituted, the Director will review the request *de novo* on the existing record, and no new evidence or argument will be considered.<sup>289</sup> There may be an opportunity for briefing and oral arguments, but no briefing or oral arguments will be given as a matter of right.<sup>290</sup> Consistent with the requirements of *Arthrex*, after a decision is rendered, it is considered the final decision of the agency, and no further requests for review within the agency will be heard.

## 2. Prescriptions for the Agency Head Review Process

The preliminary guidance leaves a number of issues open. The USPTO is currently taking comments from the public on updates and changes to the Director review procedure, and no formal rulemaking has yet been announced.<sup>291</sup> Further, there has been some discussion of updating the law in response to *Arthrex*.<sup>292</sup> A brief summary of open questions and proposed changes are summarized below. The takeaway from these suggestions is that the Office in implementing Director reviews has—at least normatively—an obligation to be clear, consistent, quick, and ethically sound.

What are the Director's obligations in terms of a written opinion? The USPTO has made no commitments on this issue.<sup>293</sup> Further, the PTAB has in the past received criticism from the Federal Circuit for opinions that are too short or are insufficiently comprehensive.<sup>294</sup> In the first review taken, rather

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286. *Arthrex Q & A's*, *supra* note 280 at Question A1, A6.

287. Boardside Chat, *supra* note 176, at 39:41 and 53:50.

288. SOP 2, *supra* note 44, at 1–2.

289. *Arthrex Q & A's*, *supra* note 280, at Question A1, A7.

290. *Id.*

291. *Id.* at Question C4 (calling informally for feedback); *see also*, Request for Comments on Director Review, Precedential Opinion Panel Review, and Internal Circulation and Review of Patent Trial and Appeal Board Decisions, 87 Fed. Reg. 43249 (July 20, 2022) (calling formally for comments which closed September 19, 2022).

292. Restoring the America Invents Act, S.2891, 117th Cong. (as introduced to the Senate, Sept. 29, 2021) (taking a position on Director review among other proposals).

293. Boardside Chat, *supra* note 176, at 48:05.

294. *See, e.g.*, Pers. Web Techs., LLC v. Apple, Inc., 848 F.3d 987, 993 (Fed. Cir. 2017) (“The Board’s decision here is inadequate. The Board did not sufficiently explain and support the conclusions . . .”); *Arista Networks, Inc. v. Cisco Sys., Inc.*, 726 F. App’x 787, 788 (Fed. Cir. 2018) (“Because the Board did not adequately explain its reasoning on a point that was central to its analysis, we vacate the Board’s determination.”).

than dismissed, by the Director in November 2021, the substantive analysis spanned one paragraph but was directed to a relatively simple issue.<sup>295</sup> While Director Vidal's opinions since taking office have once reached over sixty pages, only four of fifteen have crossed the ten page mark.<sup>296</sup> However, page counts alone are a poor measure of quality. Of fifteen opinions since the transition, more than half of director reviews related to the board's institution decision, which is already committed to the Director's discretion by statute, and several others relate to procedural defects.<sup>297</sup> Neither issue merits a marathon opinion. Thus far, only one decision has involved modifications to the board's final written decision, which decision was among the longer written opinions.<sup>298</sup> In summary, the quality of the written record has not been an issue.

Nevertheless, the Office should acknowledge a requirement of a written record supported by substantial evidence and accompanied by its reasoning in Director review orders, as required under the reviewability provisions for formal adjudications under the APA<sup>299</sup> This requirement is equivalent to that required by other final decisions of the PTAB.<sup>300</sup> Further, this requirement is motivated by traditional principles of administrative law and judicial review. The written record reviewed by the Federal Circuit should be complete. Without a full articulation of the Director's reasoning, it will be unnecessarily difficult to reconstruct the line of the reasoning that motivated the Director's decision. This is particularly true if the Director is overturning some aspect of the PTAB's decision. While the USPTO should proactively provide full and complete reasoning for any decision made using different reasoning than the PTAB, acknowledgement of the statutory mandate of the APA or, alternatively, a similar or higher statutory mandate in Title 35 would improve these protections.

How long will a Director Review take? While the USPTO has acknowledged that there is a need to resolve issues quickly, the agency has indicated that resolution will be complete within 18 months by agency *policy*,

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295. Decision in Response to Request for Director Review, Ascend Performance Materials Operations LLC v. Samsung SDI Co., No. IPR2020-00349 (PTAB, Paper No. 57, Nov. 1, 2021).

296. *Status of Director Review Requests*, U.S. PATENT & TRADEMARK OFF., <https://www.uspto.gov/patents/patent-trial-and-appeal-board/status-director-review-requests> (last visited May 1, 2023).

297. 35 U.S.C. § 314; *see also* 37 C.F.R. § 42.4 (delegating the institution decision to the PTAB).

298. Status of Director Review Requests, *supra* note 296; *see also* Decision granting rehearing and modifying the Final Written Decision, Nested Bean, Inc. v. Big Beings Pty Ltd, No. IPR2020-01234 (PTAB, Paper No. 42, Feb. 24, 2023).

299. *See* 5 U.S.C. § 706.

300. *See Pers. Web Techs.* 848 F.3d at 992.

though not by statutory mandate.<sup>301</sup> In its discussion of the statutory 18-month rule, the USPTO appears to have interpreted that the deadline applies to the final written decision by the Board, not inclusive of any rehearing or Director review.<sup>302</sup> Director review adds another procedural hurdle for parties, and there is a risk that Director review could be used as a delaying tactic depending on the state of parallel District Court proceedings. Further, because the predicted speed of administrative proceedings is a factor in whether a District Court grants a stay,<sup>303</sup> it is crucial to set expectations. While the USPTO's policy is a good one, to avoid delaying tactics and provide predictability for all parties, the statute should be amended to clarify that 18-month rule is inclusive of completion of Director review.

What are the ethical obligations of the Director and PTAB judges? While the scathing criticism of PTAB judges regarding conflicts of interest from Justice Gorsuch will likely motivate the Office to proactively strengthen and enforce its current ethical standards, Title 35 should be amended to statutorily require a basic set of ethical standards for PTAB judges mirrored on those the USPTO has already adopted. Senators Leahy and Cornyn propose amending the language of Title 35 to restrict *ex parte* communication between the Director and the empaneled PTAB judges during post-grant reviews;<sup>304</sup> however, a more comprehensive ethical rules should be implemented. While the PTAB has voluntarily adopted recusal rules,<sup>305</sup> there is a statutory gap because the federal recusal statute does not apply to administrative adjudicators.<sup>306</sup> Codification of recusal and ethical rules could also be modeled on the A.B.A.'s Model Code of Judicial Conduct for Federal Administrative Law Judges, which is modeled on the Model Code of Conduct for United States Judges.<sup>307</sup> These standards should also extend to the Director when acting the capacity of a PTAB judge. While the ethical issues raised by Justice Gorsuch are rare, codification of ethical standards is a good idea regardless of the frequency of issues.

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301. Boardside Chat, *supra* note 176, at 49:25; *see also* 35 U.S.C. § 316(a)(11) (providing a requirement for a final determination within 18 months).

302. Boardside Chat, *supra* note 176, at 49:25.

303. *Universal Elecs., Inc. v. Universal Remote Control, Inc.*, 943 F. Supp. 2d 1028, 1030–31 (C.D. Cal. 2013) (considering the state of parallel administrative proceedings in each of the three significant factors in deciding whether to stay an action: (1) whether discovery is complete and whether a trial date has been set; (2) whether a stay will simplify the issues in question and trial of the case; and (3) whether a stay would unduly prejudice or present a clear tactical disadvantage to the nonmoving party) (quotations omitted).

304. Restoring the America Invents Act, S.2891, 117th Cong., p.13 ln. 4–14 (as introduced to the Senate, Sept. 29, 2021).

305. SOP 1, *supra* note 47, at 3–4, 13–14.

306. Virelli, *supra* note 207, at 1355.

307. *Id.* at 1359.

On what grounds should the Director institute review? A request for a panel rehearing is available on a “misapprehension of fact or law.”<sup>308</sup> The USPTO has indicated that Director review is available on a wider variety of issues, and it has given no indication that the misapprehension of fact or law standard will apply to Director reviews.<sup>309</sup> The decision in *Arthrex* appears to grant the Director extensive discretion, so statutorily limiting the Director’s review to a misapprehension of fact or law may be impossible. However, the Director should hold to such a standard proactively. First, this will improve efficiency by limiting the scope of the Director’s burden to produce a written opinion only to the issue on review. Second, when the Director allows briefing by the parties, narrowing the scope of review will reduce the cost of producing briefing and improve the focus of the arguments. Third, it will make it easier for the Director to choose which cases to review if the Director requires the parties to articulate the issue they want reviewed. Therefore, the Director should proactively maintain the “misapprehension of fact or law” standard.

What is the validity of the POP or, put another way, to what extent are the Director’s powers non-delegable? The validity of the POP arguably re-raises the issue that the *Arthrex* decision meant to stop, and at least one litigant has argued as much.<sup>310</sup> The USPTO has indicated that the POP will continue, that precedential opinions will not bind the Director,<sup>311</sup> and that at least to some extent the Director may use a body like the POP to filter cases for review should a backlog of requests develop.<sup>312</sup> In my opinion, the POP is generally a good thing. It provides notice as to what rules the PTAB will apply, and it provides a structured avenue for decision-making. Further, it does not appear to violate *Arthrex*’s mandate for Director discretion because the Director has final authority. The POP should continue, but the standard operating procedures for the POP require updating to clarify how the POP will be adapted for Director reviews.

How often should the Director take reviews? Admittedly, predictions are difficult this early on; however, it seems like review by the Director won’t affect many patent cases. In the first year of Director Vidal’s tenure, she granted director review in 15 cases, 13 of which were taken *sua sponte*.<sup>313</sup> For context, of the relatively small number of Requests for Rehearing by the board that are

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308. 37 C.F.R. § 41.52(a)(1).

309. Boardside Chat, *supra* note 176, at 44:25.

310. Brief of Appellant Cellspin Soft, Inc. Regarding How This Case Should Proceed in Light of *Arthrex* at 6–7, *Cellspin Soft, Inc. v. Canon U.S.A., Inc.*, No. 20-1947 (Fed. Cir July 7, 2021), BL-70.

311. Boardside Chat, *supra* note 176, at 45:38.

312. *Id.* at 39:41, 53:50.

313. Status of Director Review Requests, *supra* note 296.

asked for about 5% are heard.<sup>314</sup> This amounts to about a dozen per year.<sup>315</sup> It is interesting that, at least initially, the review power is being used most often *without* prior request.

## V. CONCLUSION

Justice Breyer's concurrence asks the most important lingering question after *Arthrex*: "Are the President and Congress, through judicial insistence upon certain mechanisms for removal or review, to be denied the ability to create independent adjudicators?" At least Justice Gorsuch's opinion on this issue is clear. Viewing the issue through a lens strict separation of powers and expansive executive authority, his opinion suggests that due process demands adjudication of any proceeding even implicating a private property right in an Article III court. Justices Breyer's opinion provides a different resolution. He would hold that proceedings implicating private property rights can be arbitrated in Article II by independent adjudicators but under a less expansive view of executive authority. However, the opinions of the remaining Justices are less clear. The *Arthrex* Plurality declines to explain how its view of strict separation of powers comports with independent adjudication in Article II if it even does at all.

While agency head final review puts the final decisions of the USPTO under the direct review of the Director, increasing political control has the potential to weaken the quality of process afforded in IPR and to increase the potential for bias in the name of "policy." The Director should not get final review over individual PTAB decisions, not because individual PTAB decisions are somehow menial or trivial or because individual PTAB decisions are entirely lacking in political salience, but because issues of fact and law predominate in an individual IPR, overshadowing issues of policy. Moreover, Congress should be able to set limits on what "policy" interests can be furthered by an agency in an adjudication. The A.I.A.'s internal division of powers, protections of APJs from political interference, and provisions for direct judicial review explicitly center process and minimize policy. Accordingly, validating the policy interest underlying an individual arbitral proceeding with agency head review at the expense of independent adjudication is unwarranted.

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314. Mock & Houston, *supra* note 33.

315. *Id.*

