

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,)
Petitioner,)
v.) No. 19-1434
ARTHREX, INC., ET AL.,)
Respondents.)

SMITH & NEPHEW, INC., ET AL.,)
Petitioners,)
v.) No. 19-1452
ARTHREX, INC., ET AL.,)
Respondents.)

ARTHREX, INC.,)
Petitioner,)
v.) No. 19-1458
SMITH & NEPHEW, INC., ET AL.,)
Respondents.)

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4 Petitioner,)

5 v.) No. 19-1434

6 ARTHREX, INC., ET AL.,)

7 Respondents.)

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9 SMITH & NEPHEW, INC., ET AL.,)

10 Petitioners,)

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15 ARTHREX, INC.,)

16 Petitioner,)

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18 SMITH & NEPHEW, INC., ET AL.,)

19 Respondents.)

20 - - - - -

21 Washington, D.C.

22 Monday, March 1, 2021

23 The above-entitled matter came on for

24 oral argument before the Supreme Court of the

25 United States at 10:00 a.m.

1 APPEARANCES:

2

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9 on behalf of Arthrex, Inc.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 19-1434, United
5 States versus Arthrex, Incorporated, and the
6 consolidated cases.

7 Mr. Stewart.

8 ORAL ARGUMENT OF MALCOLM L. STEWART

9 ON BEHALF OF THE UNITED STATES

10 MR. STEWART: Mr. Chief Justice, and
11 may it please the Court:

12 In Edmond versus United States, this
13 Court held that Coast Guard Court of Criminal
14 Appeals judges were inferior officers. The
15 Court based that conclusion on the combined
16 supervisory powers of the Coast Guard Judge
17 Advocate General and the Court of Appeals for
18 the Armed Forces.

19 Here, the mechanisms by which the
20 PTO's director can supervise administrative
21 patent judges substantially exceed the combined
22 powers of the supervising officials in Edmond.
23 The Judge Advocate General was authorized to
24 promulgate rules of procedure for the Court of
25 Criminal Appeals, and he could remove

1 individuals from their judicial assignments
2 without cause.

3 The PTO director can exercise those
4 same two powers, but he has other important
5 tools of control as well. The director can
6 promulgate binding guidance concerning
7 substantive patent law. He can designate
8 particular board opinions as precedential, thus
9 making those opinions binding on future panels.
10 He can also decide whether any particular review
11 will be instituted and which judges will sit on
12 the panel. And he can de-institute a review
13 even after it has been commenced.

14 Arthrex focuses primarily on the
15 purported absence of any mechanism by which the
16 director can review a panel's final written
17 decision. But the board can grant rehearing of
18 any such decision, and the director is a member
19 of the board and is authorized to decide which
20 members will sit on any panel.

21 The director, thus, can convene a new
22 panel that consists of himself and two other
23 members of his choosing to decide whether any
24 final written decision will be reheard.

25 The director's power over rehearings

1 is not plenary since he must exercise it jointly
2 with two other board members. But, in Edmond,
3 the review authority of the Court of Appeals for
4 the Armed Forces was not plenary either since
5 that court could not reassess the factual
6 findings of the court of appeals -- from the
7 Court of Criminal Appeals.

8 Taken together, the director's
9 supervisory powers are fully sufficient to
10 render administrative patent judges inferior
11 officers.

12 CHIEF JUSTICE ROBERTS: Mr. Stewart,
13 that was a long list of things that the director
14 can do, but, of course, the one thing that he
15 can't do is just change the decision of the APJ.
16 And the rest of those things -- deciding whether
17 to rehear, you know, stacking, in a
18 non-pejorative way, the panels, rehearing, you
19 know, guidance on hypothetical facts -- they all
20 seem to be more or less ways of twisting the
21 arms of the APJs. And so it is sort of direct
22 -- directly opposite to what the Appointments
23 Clause was designed to do, which is transparency
24 and make it clear who's responsible.

25 Here, you know, the director can

1 pressure the APJ, but, at the end of the day, he
2 can say: Well, that's not my fault. That's
3 what he wanted.

4 Why isn't that true?

5 MR. STEWART: I think -- I'd say two
6 things in response to that. The first are the
7 supervisory mechanisms that we've identified are
8 transparent. If the director issues binding
9 guidance that says here's how the patent laws
10 apply to particular fact patterns, that will be
11 done in the director's own name and the director
12 will have responsibility for it. But the --

13 CHIEF JUSTICE ROBERTS: Yeah, but the
14 -- the APJ is the one who's going to decide
15 whether that so-called hypothetical applies in
16 this particular case, and if he comes out with a
17 different result, that's the executive decision,
18 not the director's rule about hypotheticals.

19 MR. STEWART: Well, even if you focus
20 on the mechanisms that are available after a
21 final written decision is issued, the -- the
22 board panel's decision will be the decision of
23 the executive agency only if it is not reheard.

24 And as I said in my opening, the
25 director's power over rehearings is not plenary,

1 but it is substantial. And --

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas.

5 JUSTICE THOMAS: Thank you, Mr. Chief
6 Justice.

7 Mr. Stewart, you said it's not
8 plenary, but it's substantial. How would -- how
9 would we define -- discern what is substantial?

10 MR. STEWART: Well, I think what the
11 Court said in Edmond was that the mark of an
12 inferior officer is that the inferior has a
13 superior and is supervised at some level by
14 Executive Branch officials who are appointed by
15 the President and confirmed by the Senate.

16 And we don't have a bright-line test
17 for this. But the Court in Edmond said the fact
18 that the Court of Appeals for the Armed Forces
19 can't second-guess the factual determinations of
20 the lower court is not sufficient to make those
21 lower court judges principal officers.

22 Things can slip through the cracks and
23 supervision can, nevertheless, be sufficient.
24 And that's essentially what we have here. Even
25 if you just look at after-the-fact review, the

1 director has substantial control.

2 But I think the Court should focus
3 primarily on the mechanisms of control that are
4 available in the first instance, issuing binding
5 guidance and so forth, because the usual
6 hallmark of supervisory authority is that the
7 supervisor can tell the subordinate how to do
8 the job before the subordinate does it. And the
9 director has ample tools there.

10 JUSTICE THOMAS: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Breyer.

13 JUSTICE BREYER: I'm just curious, you
14 may not have thought about this, but maybe the
15 SG's office has, but, in PCAOB, if we go back to
16 that, I dissented and had a very long appendix
17 with dozens and dozens of people that I suddenly
18 thought were -- they -- they seemed to be like
19 here -- we used to call them hearing examiners,
20 and, really, they used to be civil servants.

21 All kinds of shapes and sizes in terms
22 of powers, and they suddenly all became officers
23 of the United States. But the majority said,
24 we're not saying they all are. We're just
25 talking about PCAOB.

1 So are these people officers of the
2 United States? Why, is my answer. I'd like a
3 line, if you've ever thought of one, between the
4 statement in PCAOB in the majority, don't worry,
5 they're not all officers of the United States.

6 Have you thought of a -- of a
7 distinction there between the long list in PCAOB
8 and would it apply here?

9 MR. STEWART: I mean, we -- we've
10 essentially acquiesced in the proposition that
11 the board -- that administrative patent judges
12 are officers rather than employees, as you'll
13 recall from --

14 JUSTICE BREYER: Yeah.

15 MR. STEWART: -- the brief in this
16 case. There was a --

17 JUSTICE BREYER: Yeah, yeah.

18 MR. STEWART: -- period -- there was a
19 period when they were appointed by the director
20 and were thought to be employees. Congress --

21 JUSTICE BREYER: Yeah.

22 MR. STEWART: -- changed the statute.
23 It -- it's not absolutely clear that that's so,
24 but the mechanism of appointment is sufficient
25 so long as they are inferior officers.

1 JUSTICE BREYER: Yeah, that -- I
2 thought you might have done that. And I wonder
3 if, in the course of doing that, you thought of
4 a line of some kind that might distinguish the
5 dozens of people I put in that appendix from
6 these people here and the majority in PCAOB.

7 MR. STEWART: Well, I think that
8 the -- the Court has drawn the line in terms --
9 between "officer" and "employee" in terms of
10 exercising substantial authority under the laws
11 of the United States. Obviously, that's
12 something very far from a bright line.

13 I think it is significant in this
14 regard that the removal provision that's
15 applicable to administrative patent judges is
16 the same removal provision that applies to
17 officers and employees of the -- the PTO
18 generally. The removal provision signals that
19 Congress didn't intend for these officers to
20 exercise any unusual level of independence from
21 the director.

22 CHIEF JUSTICE ROBERTS: Justice Alito.

23 JUSTICE BREYER: Thank you.

24 JUSTICE ALITO: Mr. Stewart, suppose
25 Congress enacted a statute providing that a

1 deputy solicitor general shall have the final
2 and unreviewable authority to decide whether the
3 United States will take an appeal in any case
4 involving the interpretation or application of
5 one particular provision of one particular
6 regulatory statute.

7 Suppose the SG can decide which deputy
8 is to review each case that falls into this
9 category, the SG or the attorney general can
10 issue guidelines on the meaning of the provision
11 and the standard to be applied in deciding to
12 take an appeal, but, once a deputy -- a deputy
13 makes a decision, let's say it's a decision not
14 to appeal, nobody, not the attorney general or
15 the President himself, can countermand that.

16 Would that be constitutional?

17 MR. STEWART: I mean, I -- I think it
18 would be a close call. You would obviously be
19 looking at Morrison versus -- Morrison versus
20 Olson in order to determine -- to assess the
21 significance of the fact that the deputy's
22 authority was limited to a narrow category of
23 cases, and, certainly, the fact that the
24 solicitor general could promulgate substantive
25 standards that would bind the deputy in making

1 his decision might lead you to conclude that
2 that person is still an inferior officer rather
3 than a principal officer.

4 But however that case would come out,
5 here, the decision of an ordinary PTAB panel is
6 not final and unreviewable within the agency.
7 It is subject to rehearing. The director is a
8 member of the board. The director can appoint a
9 panel that includes other board members in order
10 to determine whether rehearing shall be granted.

11 So that -- that authority, as I've
12 said, is not plenary but --

13 JUSTICE ALITO: Well, what if I change
14 my hypothetical so that the -- all of the
15 deputies collectively could review the decision
16 of the -- this one deputy? Would that -- would
17 that change it?

18 MR. STEWART: Well, if the solicitor
19 -- I -- I think that would change it somewhat.
20 I think it would change it more if you said the
21 solicitor general can sit on a panel that will
22 review the deputy's decision, and the solicitor
23 general may sit on a panel with two other
24 deputies and -- and theoretically could be
25 outvoted, but the solicitor general will not

1 only issue guidance before the fact but can sit
2 on the -- the board that determines whether the
3 deputy's decision will be overridden. That --
4 that would --

5 JUSTICE ALITO: All right. Thank you,
6 Mr. Stewart. Thanks.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor.

9 JUSTICE SOTOMAYOR: Mr. Stewart, the
10 other side's case comes down basically, I think,
11 to just saying you're not an inferior officer if
12 you can make final decisions that are
13 unreviewable by the director. That's a fairly
14 straightforward line.

15 Yours is a bit more amorphous. I
16 think it's what the Chief was getting to. But I
17 think that what I want to understand is, what is
18 your final test being judged against? Is it --
19 I mean, I thought I heard a little bit of the --
20 of it when you said the director is setting the
21 policies and procedures. He is -- he or she is
22 the person who controls the outcome in the sense
23 of setting what the policies and procedures are.

24 Am I right that that's your baseline?

25 MR. STEWART: That -- that's certainly

1 part of it. And I would agree that we don't
2 have a bright-line test, but that's in part
3 because this Court has emphasized that there is
4 no exclusive criterion for determining inferior
5 versus principal officer status.

6 And what we are emphasizing is that
7 the director has really two different forms of
8 control. He can issue policy guidance that will
9 be binding on board panels in cases generally,
10 but the director also is a member of the board,
11 can participate in the board's decision-making
12 process in individual cases.

13 JUSTICE SOTOMAYOR: For my colleagues
14 -- and there are some who don't like amorphous
15 concepts or ones that don't have a -- a
16 yardstick by which to measure -- what is the
17 advantage of us keeping the Edmond's test?

18 MR. STEWART: I -- I think the
19 advantage is that the government is so
20 multifarious, there's such an enormous number of
21 officers and employees within the Executive
22 Branch that any attempt to -- to formulate a
23 bright-line test would almost inevitably lead to
24 anomalous results in some category -- categories
25 of cases.

1 Even in 1787, the framers were
2 concerned that it would be administratively
3 inconvenient to require Senate confirmation for
4 all officers. And since that time, the
5 Executive Branch has grown enormously, but
6 there's still just one President and there's
7 still just one Senate. And the Court --

8 JUSTICE SOTOMAYOR: Thank you,
9 counsel.

10 CHIEF JUSTICE ROBERTS: Justice Kagan.

11 JUSTICE KAGAN: Mr. Stewart, you put a
12 lot of weight on the ability of the director to
13 be part of a board that rehears a decision.
14 I -- I had thought that there was a -- a usual
15 mechanism for rehearing a decision that
16 didn't -- you know, that there's a sort of
17 permanent rehearing board, which the director
18 does not pick the other two members of.

19 MR. STEWART: Well, I think,
20 typically, the rehearing petition filed by one
21 of the parties would be addressed to the panel,
22 and the panel could decide whether to rehear the
23 case if it had -- if it believed that it had
24 overlooked something.

25 But, because the director is a member

1 of the board and chooses the composition of the
2 panel, the board -- the director can always
3 decide in an individual case, no, here, the
4 rehearing panel will be different.

5 JUSTICE KAGAN: I'm -- I'm -- I'm
6 sorry, you have to give me a little bit more
7 about how this exactly works. That there's a
8 decision of -- of a panel that the director
9 doesn't like, and what does the director do?

10 MR. STEWART: The director could sua
11 sponte convene a new panel, and what's called --
12 known as the Precedential Opinions Panel, or the
13 POP, is the acronym, is presumptively composed
14 of the director, the commissioner for patents,
15 and the chief administrative patent judge. And
16 that panel can sit to issue a binding decision,
17 presuming -- assuming that two members of the
18 panel vote to do so. That -- that's what --

19 JUSTICE KAGAN: Right. I think I was
20 talking about that, that -- that presumptive
21 panel with those particular three members. I
22 mean, the director doesn't merely have full
23 authority over the other two, doesn't -- does
24 he? He doesn't -- the other two might disagree
25 with him.

1 MR. STEWART: It -- it's -- it's true,
2 and in that sense, the director's authority is
3 not plenary. But, in Edmond as well, if the
4 Court of Appeals for the Armed Forces disagreed
5 with the factual findings of the Coast Guard
6 Court of Criminal Appeals, there was really
7 nothing that the CAAF could do about it.
8 Factual determinations could slip through the
9 cracks.

10 And, here, the director can not only
11 convene this panel; the director can issue
12 policy guidance that explain the -- the rules of
13 law as the director understands them, and other
14 panel members are obliged to -- to go along.

15 The only thing that really can slip
16 through the cracks in the PTO setting is factual
17 determinations with which the director might
18 disagree but other board members might invoke --
19 might -- might --

20 JUSTICE KAGAN: Thank you,
21 Mr. Stewart.

22 CHIEF JUSTICE ROBERTS: Justice
23 Gorsuch.

24 JUSTICE GORSUCH: Good morning,
25 Mr. Stewart. Last term, the Court, in Seila

1 Law, said that executive officials must always
2 remain subject to the ongoing supervision and
3 control of the elected President. Through the
4 President's oversight, the chain of dependence
5 is preserved so that low -- the lowest officers,
6 the middle grade, and the highest all depend, as
7 they ought, on the President and the President
8 on the community.

9 I -- I'm struggling to understand how
10 that interpretation of our Constitution squares
11 with your argument that not even the President
12 of the United States, either himself or through
13 his subordinates, can reverse a decision of
14 APJs. Where -- where is the chain of
15 dependence?

16 MR. STEWART: Well, the -- the
17 President obviously appoints the director
18 subject to Senate confirmation, and the director
19 can be removed by the President. The director
20 can --

21 JUSTICE GORSUCH: I understand the
22 removal, but I -- my question was focused on the
23 supervision and control language in Seila Law.

24 MR. STEWART: Well, the -- the -- the
25 President can issue kind of instructions to the

1 director and can terminate the director if the
2 -- the director doesn't comply. The director
3 has various supervisory mechanisms.

4 JUSTICE GORSUCH: Again, that's
5 removal, and my question was focused on
6 supervision. If the President disagrees with
7 the decision or one of his designees down the
8 chain of dependence disagrees with the decision,
9 there's no remedy that the President has,
10 correct?

11 MR. STEWART: Well, there -- there is
12 a prospective remedy in the sense that the --

13 JUSTICE GORSUCH: I'm talking about
14 the decision. I'm not talking about removal.

15 MR. STEWART: No, there is a -- there
16 is a right of appeals to the -- the Federal
17 Circuit. But I think --

18 JUSTICE GORSUCH: That's --

19 MR. STEWART: -- the same thing --

20 JUSTICE GORSUCH: -- that's a separate
21 branch of government. I'm -- again, I'm talking
22 within the Executive Branch, Mr. Stewart.
23 There's -- there's no chain of dependence
24 running to the President with respect to the
25 supervision of a particular decision, is there?

1 MR. STEWART: There -- there is no
2 ability to ensure that the factual findings of
3 two other members of the panels -- panel could
4 be overridden. But, certainly, Arthrex's
5 position wouldn't change any of that. That is,
6 holding that the APJs are principal officers who
7 must be appointed by the President with Senate
8 confirmation wouldn't give the President any
9 greater power of control over their decisions in
10 the event that they were inconsistent with the
11 policy of the agencies.

12 JUSTICE GORSUCH: We're -- we're back
13 to removal. Thank -- thank you, Mr. Stewart.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh.

16 JUSTICE KAVANAUGH: Thank you, Chief
17 Justice.

18 And good morning, Mr. Stewart. I'm
19 not sure this wolf comes as a wolf, Mr. Stewart,
20 but I still think it may be a wolf, as Justice
21 Scalia famously said, and he said, in those
22 cases, it can be discerned by careful and
23 perceptive analysis.

24 So here's why -- here -- here's the
25 sources of my concern on that front. First,

1 this structure is a real break from tradition,
2 which we've said in cases like Free Enterprise
3 Fund and many others, perhaps the most telling
4 indication of a constitutional problem is the
5 departure -- the lack of historical precedent.
6 The lack of agency review of the ALJ decision by
7 someone who's appointed by the President with
8 advice and consent of the Senate is absent here
9 and is ordinarily present and historically has
10 been present.

11 And then, second, the lack of
12 accountability, as the Chief Justice said and
13 Justice Gorsuch was just saying, these are
14 multimillion, sometimes billion-dollar decisions
15 being made not by someone who's accountable in
16 the usual way that the Appointments Clause
17 demands. And the director, on rehearing, does
18 not have the unilateral power to reverse.

19 So, you know, if Congress is going to
20 do that, they can eliminate agency review and
21 prevent removal at will, then it's easy to make
22 these AL -- APJs presidentially appointed and
23 Senate-confirmed. They haven't done that.

24 Where -- where in that analysis have
25 things -- has that analysis gone wrong?

1 MR. STEWART: I guess the -- the two
2 or three things I would say are, first, it isn't
3 unusual for administrative adjudicators to be
4 appointed in the manner that's appropriate for
5 inferior officers. Indeed, I think that --

6 JUSTICE KAVANAUGH: I -- I agree with
7 that, but it is very unusual for them not to
8 have agency review, as you well know.

9 MR. STEWART: It certainly is the norm
10 for the -- the agency head to have the capacity
11 to -- to review their decisions. But, as we
12 know from Edmond, that doesn't have to be
13 plenary review. The -- the Court in Edmond
14 specifically addressed the fact that the Court
15 of Appeals for the Armed Forces could not
16 revisit the factual determinations of the Coast
17 Guard Court of Criminal Appeals, and it said
18 what's more important is that there is review,
19 not that review is not plenary.

20 And, in addition, the director has
21 substantial authority to instruct the judges as
22 to matters of law, as to the director's own
23 interpretation of the patent laws, and can
24 insist that the judges comply with that, those
25 instructions.

1 The other thing I would say is, if you
2 think that that is the constitutional problem
3 and if you think the constitutional rule is some
4 Senate-confirmed official has to have plenary
5 authority to revisit the decisions of -- of the
6 underlings, then the appropriate remedy would be
7 to sever the provision in the statute that says
8 only the board can grant rehearings.

9 JUSTICE KAVANAUGH: Thank you,
10 Mr. Stewart.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett.

13 JUSTICE BARRETT: Good morning,
14 Mr. Stewart. On page 38 of your brief, you talk
15 about the strength of the removal power, and you
16 say that because there's an efficiency-of-
17 service standard applicable here and because the
18 director can promulgate regulations, the
19 violation of which might be cause for firing,
20 that those are ways in which the director can
21 exercise some back-end control of the APJs with
22 whom he's not happy with their performance.

23 But isn't it the case, you know, as
24 Arthrex points out, that APJs get the protection
25 of the MSPB, which means that, at the end of the

1 day, the director is actually not the official
2 in the Executive Branch that has the last word
3 on the continuation in service?

4 MR. STEWART: It's certainly true that
5 the APJs would have -- if they were removed from
6 federal service altogether, they would have the
7 protections of the MSPB. And I'd say two things
8 about removal. First, in addition to removing
9 APJs from federal service altogether, the
10 director can remove them from their judicial
11 assignments. And the Court in Edmond said that
12 was an important power of control, and that
13 doesn't carry with it a right to MSPB review.

14 JUSTICE BARRETT: Well, and I --
15 actually, I wanted to ask you about that. What
16 does that mean to remove them from their
17 judicial assignments when it's -- APJs' judicial
18 assignments are what they do? Are they just
19 benched without pay --

20 MR. STEWART: There are --

21 JUSTICE BARRETT: -- or benched with
22 pay?

23 MR. STEWART: -- there are two things
24 that could be done. First, they could be
25 assigned tasks such as rulemaking, training

1 other employees, and APJs do sometimes perform
2 those tasks.

3 The second thing is Arthrex appears to
4 concede that there's no constitutional problem
5 with the PTAB adjudicating direct appeals from
6 denial of patent applications. Arthrex
7 acknowledges there's sufficient director control
8 in that area that there's not a constitutional
9 problem. And so particular APJs could very
10 feasibly be assigned to that kind of
11 adjudicative work rather than to inter partes
12 review, and that would --

13 JUSTICE BARRETT: I mean, is that
14 sufficient control? The director is unhappy
15 with some of the decisions on review and
16 rehearing, and so he says, okay, well, from now
17 on, you can still do adjudicative --
18 adjudicatory work, but it's going to be, you
19 know, this kind instead?

20 MR. STEWART: Yes, I mean, especially
21 if the director thought the problem with these
22 officials is that in inter partes reviews they
23 are not being sufficiently compliant with the
24 director's instructions.

25 The other thing I would say about the

1 removal provision is that, in addition to
2 providing a practical tool for control, the fact
3 that the APJs are subject to the same removal
4 protection as officers and employees generally
5 indicates that Congress didn't intend for them
6 to -- to have any sort of special independence
7 from -- from the director.

8 CHIEF JUSTICE ROBERTS: A minute to --

9 JUSTICE BARRETT: Thank you,
10 Mr. Stewart.

11 CHIEF JUSTICE ROBERTS: -- a minute to
12 wrap up, Mr. Stewart.

13 MR. STEWART: Thank you, Mr. Chief
14 Justice.

15 This Court has emphasized that there
16 is no exclusive criterion for inferior officer
17 status, that the inquiry should examine all the
18 tools of control taken together. Here, the
19 director has substantial tools of control well
20 before a final written decision is issued.

21 The director has a power that the
22 Judge Advocate -- neither the Judge Advocate
23 General nor the Court of Appeals for the Armed
24 Forces had in Edmond, namely, the -- the ability
25 to issue binding instructions that will provide

1 rules of decision for administrative patent
2 judges as they decide cases.

3 Thank you, Mr. Chief Justice.

4 CHIEF JUSTICE ROBERTS: Mr. Perry.

5 ORAL ARGUMENT OF MARK A. PERRY

6 ON BEHALF OF SMITH & NEPHEW, INC., ET AL.

7 MR. PERRY: Mr. Chief Justice, and may
8 it please the Court:

9 Arthrex's proposal for a bright-line
10 administrative review requirement rests on a
11 single line from Edmond noting that the military
12 judges couldn't render a final decision unless
13 permitted to do so by other executive officers.

14 The Court in that sentence was not
15 announcing a requirement for inferior officer
16 status. It was commenting on the narrow scope
17 of CAAF review, which followed its observation
18 that the JAG could not provide advance guidance
19 to the military judges.

20 In sharp contrast, the PTO director
21 can and does give substantive guidance to APJs.
22 He also has unilateral institution and
23 assignment power, and he can order review of any
24 board decision.

25 Moreover, only the director takes

1 final actions by confirming or canceling patent
2 claims. APJs can't render any decision unless
3 the director permits them to do so. They are
4 inferior officers.

5 CHIEF JUSTICE ROBERTS: Mr. Perry, if
6 you won one of these adjudications, you know, in
7 a case involving a billion dollars, which you
8 can have, as Justice Kavanaugh pointed out, you
9 know, you're going to call your client and say,
10 we won the adjudication, and they're going to
11 celebrate. And the next day, you're going to
12 have to call him and say, ah, the director has
13 granted rehearing, he's appointed himself and
14 two others just that think the same way he does
15 to the panel, he's issued new guidance saying in
16 a so-called hypothetical case that looks like
17 ours it should come out the other way, and --
18 and the APJ who decided your case is sent to
19 Siberia.

20 You would say that that's not good
21 news, and I -- it would make something of a
22 charade out of the adjudication. Yet you're
23 relying on all those powers to say that
24 everything is -- is all right.

25 I mean, it -- it -- it really doesn't

1 sound like any kind of adjudication that we
2 would accept, you know, in a system
3 characterized by due process.

4 MR. PERRY: Mr. Chief Justice, whether
5 or not there are due process considerations in
6 any particular determination has nothing to do
7 with the Appointments Clause question here,
8 right? We have a structural allocation of power
9 from the President through the Secretary through
10 the director to the APJs that is being respected
11 and being followed in the chain of command.

12 Due process is a separate issue, not
13 presented in the petition, not presented in this
14 case. There may well be due process problems in
15 other cases, but that's not a reason to dilute
16 or pollute the Appointments Clause.

17 CHIEF JUSTICE ROBERTS: Justice
18 Thomas.

19 JUSTICE THOMAS: Thank you, Mr. Chief
20 Justice.

21 What would be your test for whether
22 someone is an -- an inferior officer? The -- it
23 seems to be almost a totality of the
24 circumstances.

25 MR. PERRY: Justice Thomas, the --

1 the -- the principal officers sit at the right
2 hand of the President. They -- the only ones
3 this Court has recognized are the ambassadors
4 and the cabinet officers, and the heads of
5 agencies --

6 JUSTICE THOMAS: Yes.

7 MR. PERRY: -- are one step removed.

8 These individuals are three steps
9 removed. So, you know, the Secretary definitely
10 is. The director may be. The APJs definitely
11 are not. And that's the chain of command that
12 the Court has described over and over again.
13 That would be one test.

14 The other, the -- the Edmond totality-
15 of-the-circumstances test is supervision and
16 control. And these officials are supervised and
17 controlled in everything they do.

18 JUSTICE THOMAS: And how much
19 supervision and control are you talking about?
20 Can it be partial supervision? Can it -- does
21 it have to be absolute supervision? I don't --
22 it's really difficult to discern how much would
23 be required under your test.

24 MR. PERRY: Your Honor, the -- the
25 ultimate test is whether the President and his

1 direct reports remain accountable for the
2 operations of the agency. So, if the Congress
3 were to give total free reign to a -- to a
4 sleeper agent embedded within the agency, that
5 might be a problem.

6 But where the chain of command is
7 preserved and the director and ultimately the
8 Secretary and the President bear the
9 responsibility and accountability, that is
10 sufficient. And the totality of the
11 circumstances here show that the latter is the
12 case with respect to the Patent Office.

13 JUSTICE THOMAS: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Breyer.

16 JUSTICE BREYER: I'm just curious if
17 you found other examples like the JAG example
18 where the -- say the -- the Senior Executive
19 Service, members of that have a lot of authority
20 in dozens of different areas and in different
21 kinds of officials, and did you find any good
22 examples which would help you where they do have
23 in certain areas authority that really seems
24 pretty unreviewable?

25 MR. PERRY: Well, Your Honor, many

1 executive officials, of course, have essentially
2 unreviewable authority over narrow things.
3 AUSAs, for example, get to make on-the-call
4 decisions every day in court.

5 And remember we're making very narrow
6 decisions here. The ultimate -- what the Board
7 decided in this case is that the priority date
8 of this patent was May 8, 2014. That is not a
9 decision that our constitution requires to be
10 made by a principal officer or even reviewed by
11 a principal officer.

12 It's a narrow, case-specific, factual
13 question that the board answered and we believe
14 answered correctly. So -- so the answer to your
15 question is, yes, there are many such officers,
16 but -- but they are generally given the
17 opportunity to decide narrow, case-specific,
18 application-specific questions rather than broad
19 questions of national policy. That -- that's
20 the dividing line in our government.

21 JUSTICE BREYER: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice Alito.

23 JUSTICE ALITO: Mr. Perry, your brief
24 has a very interesting metaphor. You say that
25 the test here is a Goldilocks test, is it -- is

1 it too hot? So -- and you also in your brief
2 tick off all the ways in which there is control
3 over -- over these APJs. So I -- I'm going to
4 go through these, go through your list and
5 eliminate them one by one, and you tell me
6 the -- when to stop, when we get to the point
7 where we've crossed the line and there's no
8 longer sufficient control.

9 All right. So let's say that the
10 director does not control whether to institute
11 IPRs in the first place. He does not control
12 how many and which APJs sit on which panels. He
13 does not provide exemplary applications of
14 patent law to fact patterns that are binding on
15 APJs.

16 He does not control whether a panel's
17 decision will be precedential. He does not
18 direct whether a panel's decision will be
19 reheard by controlling whether a Precedential
20 Opinion Panel on which he sits votes to rehear a
21 case.

22 He does not control how many and which
23 APJs rehear a case. He does not decide whether
24 to dismiss an entire APR proceeding rather than
25 allow a panel's decision to become final.

1 Where -- where along that line did --
2 did we cross the Rubicon?

3 MR. PERRY: Your Honor, of course, the
4 director has all those powers, and any one of
5 them might be removed. If all of them were
6 removed, then you'd have the sleeper agent I
7 described. And every case has to be determined
8 based on the powers Congress has actually
9 conferred.

10 And, here, the suite of powers
11 together, including one the Court didn't
12 mention, which is the director's final authority
13 to confirm or cancel the patent claims, ensure
14 that the political accountability rests at all
15 times with the director, not with the APJs.

16 JUSTICE ALITO: But you can't tell me
17 where along that line is the magic divider?

18 MR. PERRY: Your Honor, if you want a
19 magic divider, I would suggest it is the -- the
20 relationship to the President. An officer three
21 steps removed from the President is -- is never
22 or almost never going to be a principal officer
23 because he is a subordinate.

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor.

2 JUSTICE SOTOMAYOR: Counsel, Justice
3 Gorsuch asked a question of your -- of -- of the
4 assistant solicitor -- solicitor general about
5 the right or the need to have someone in the
6 direct control of the President.

7 I'm assuming that that -- as I've been
8 thinking about that question, I wonder, isn't
9 that totally at odds with an adjudicatory system
10 of any kind?

11 MR. PERRY: Justice Sotomayor, there
12 is a -- you know, an inherent tension in agency
13 adjudicatory-type proceedings between
14 adjudicative independence and presidential
15 control, and that balance can be struck by
16 Congress in many, many ways and throughout
17 history has been struck in many, many ways so
18 long as the channels of authority are preserved.

19 I'll come back to what Mr. Stewart
20 said, it's the advance offering of guidance is
21 more important in this context. For example,
22 the director can identify problems coming out of
23 PTAB panels and direct future PTAB panels not to
24 make those mistakes, preserves both the
25 political accountability and avoids those due

1 process-type problems that may arise in
2 individual circumstances. That is the essence
3 of supervision, which is carried out every day
4 at the PTAB and in the Patent Office.

5 JUSTICE SOTOMAYOR: Thank you,
6 counsel.

7 CHIEF JUSTICE ROBERTS: Justice Kagan.

8 JUSTICE KAGAN: Mr. Perry, Justice
9 Kavanaugh mentioned to you that this is an
10 unusual kind of structure with no automatic
11 opportunity for review in the agency head.

12 And I was -- I was just wondering,
13 is -- is there a story behind this? I mean, how
14 did this come to be? And is there anything that
15 we should take from that, or is this just an
16 unaccountably strange bird?

17 MR. PERRY: It is the long and proud
18 history of the Patent Office, Justice Kagan.
19 The interference examiners, about whom Arthrex
20 never wants to talk, going back to 1836,
21 administrative agents have decided
22 interferences, conflicts between two private
23 parties over patentability, including priority
24 date, the issue in this case, and they have
25 always been appointed by the Secretary, in 1870,

1 in 1952, in 1975, in 2008. There's no question
2 that those issues have always been decided by
3 inferior officers, much of that time, since
4 1939, in the interference context, without
5 director review. And -- and that's what has
6 been carried forward into the modern tradition.

7 So we have a patent-specific
8 tradition. It comes out of the examination
9 process, right? These are sort of super
10 examiners or review examiners or second-level
11 examiners, and that's -- and the examiners, of
12 course, decide these same questions in the first
13 line, and they're employees, not even officers.

14 So the tradition we think that's
15 relevant is that of the Patent Office. And the
16 modern APJs are very much in line with a long,
17 long history that, in fact, stretches all the
18 way back to the founding.

19 JUSTICE KAGAN: And has Congress ever
20 taken a look at this? Do we know that Congress
21 has considered this and -- and knows what's
22 going on? And has it ever reached a
23 determination on the Appointments Clause
24 question?

25 MR. PERRY: We do know, Justice Kagan.

1 Congress for a brief period vested the
2 appointment in the director and then changed it
3 to the Secretary to avoid Appointments Clause
4 problems -- there's a provision in the statute
5 speaking of that -- and -- and specifically
6 decided that they are inferior officers who can
7 and should be appointed by the Secretary. And
8 that determination, we think, is entitled to a
9 certain amount of deference.

10 JUSTICE KAGAN: Thank you, Mr. Perry.

11 CHIEF JUSTICE ROBERTS: Justice
12 Gorsuch.

13 JUSTICE GORSUCH: Mr. Perry, I
14 understand you and your colleagues from the
15 other side disagree a little bit over the patent
16 interference question and the history here, but,
17 in answer to Justice Kagan, is it -- is it fair
18 to say that, yes, this is a rare bird in that in
19 this area, maybe for historically contingent
20 reasons maybe considered, maybe not, this is an
21 unusual animal in the sense that there isn't
22 final review in the agency head?

23 MR. PERRY: Well, there is
24 reviewability in the agency head, but, Justice
25 Gorsuch, to directly answer your question, since

1 the APA was enacted in 1946, most agency
2 adjudications follow either the APA 556, 557
3 categories or a close proxy. And the Patent
4 Office doesn't.

5 Of course, before that, there were
6 many others. That's why the APA was enacted.
7 And we would submit that the Appointments Clause
8 is not a super APA. It doesn't require the
9 President or Congress to follow the APA in any
10 particular case.

11 JUSTICE GORSUCH: Is that a long way
12 of saying yes, that this area is, if not sui
13 generis, very, very unusual?

14 MR. PERRY: It is unusual, but it is
15 also well and historically founded and -- and,
16 until now, unchallenged.

17 JUSTICE GORSUCH: Okay. And with
18 respect to the soft power that -- that is
19 sometimes emphasized that the director may have
20 over appointing different APJs or extracting
21 promises from certain APJs about how they'll
22 rule, do you admit that there might well be due
23 process problems there?

24 MR. PERRY: We certainly think that
25 the PTAB structure and -- and the decisions are

1 subject to due process constraints, and that
2 would be a legitimate source of concern if those
3 kinds of issues arose. There is no such
4 question or allegation or concern in this case.

5 This is -- this is only a structural
6 Appointments Clause question. Absolutely, they
7 are, of course, subject to the Due Process
8 Clause and all of its constraints.

9 JUSTICE GORSUCH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh.

12 JUSTICE KAVANAUGH: Thank you, Chief
13 Justice.

14 Good morning, Mr. Perry. You
15 mentioned that the other side's argument rests
16 on a single line from Edmond. That, of course,
17 is the critical line from Edmond about the
18 administrative judge context.

19 Just to pick up on Justice Gorsuch,
20 this does seem, and I think you acknowledged, a
21 -- a significant departure from general
22 historical practice since the APA, which is a
23 yellow flag, if not a red flag.

24 And then your test to try to deal with
25 that seems to resurrect Morrison v. Olson's

1 test. I thought we'd gotten away from that in
2 -- in Edmond. Justice Alito's questions pointed
3 that out.

4 And what I'm worried about -- this is
5 the wolf. What I'm worried about is this gives
6 a model for Congress to eliminate agency review
7 of ALJ decisions and kind of fragment and take
8 away from agency control going forward, because
9 this -- however this came about, to Justice
10 Kagan's question, this would be a model going
11 forward, and that would allow Congress to give
12 extraordinary power to inferior officers, which
13 is not how our government is ordinarily
14 structured.

15 And then, to Justice Sotomayor's
16 question, it seems like ALJs, there's two --
17 there's two fixes. You can go with the
18 executive model of ALJs, which is the
19 traditional have ALJs and have agency review or
20 removability, it's usually agency review, not
21 removability with ALJs; or you can make the APJs
22 principal officers with presidential appointment
23 and Senate advice and consent if you want a more
24 judicial model.

25 But, here, the -- this hybrid gives

1 enormous power to inferior officers, and it's
2 really just out of the norm. Your response?

3 MR. PERRY: Two responses, Justice
4 Kavanaugh.

5 First, this system fits neatly within,
6 we would submit, Justice Scalia's dissent in
7 Morrison versus Olson, particularly Footnote 4
8 and the surrounding text describing the role of
9 subordinate officers and the interplay with
10 removal powers.

11 Second, I cannot emphasize enough that
12 the director maintains the final authority under
13 318(b) to confirm or cancel any patent. The
14 APJs do not cancel patents. The patent in this
15 case is still valid. The board has declared it
16 to be unpatentable, but the director has not
17 canceled it. So, to this day, three years
18 later, nothing has happened because the
19 director, the politically appointed directly
20 accountable to the President individual, has not
21 taken the action specified by statute.

22 The Congress has made a different
23 determination here, but it is absolutely
24 consistent with the dictates of the Appointments
25 Clause.

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett.

4 JUSTICE BARRETT: Good morning,
5 Mr. Perry. So I want you to assume for the
6 purposes of my question that you lose on the
7 Appointments Clause issue, and I want to ask you
8 about remedy.

9 So, you know, the federal -- well,
10 think about -- one unusual thing about the
11 remedy here is that it's not one specific
12 provision in this statutory scheme that's being
13 challenged as unconstitutional. It's the way
14 that they work together.

15 You know, so we could, if we decided
16 that it was unconstitutional, perhaps make all
17 of the APJs subject to -- say they're principal
18 officers, and so they have to be subject to
19 presidential appointment, senatorial
20 confirmation. We could say, listen, we're going
21 to strike the provision in the statute that says
22 only the PTAB may grant rehearings so that the
23 director has that authority. We could make them
24 maybe at-will employees, so they're removable at
25 the discretion of the director without having to

1 go through the full process that we discussed
2 before.

3 That's a lot of discretion to give us
4 in trying to shape a remedial -- a remedy here.
5 Why should we even assert the authority to do
6 that, to sever?

7 MR. PERRY: Justice Barrett, the --
8 the -- from my perspective from -- from, you
9 know, where we think the statute, of course, is
10 constitutional -- and I don't mean to be flip --
11 but, if you tell me how we lose, we can tell you
12 what the remedy is.

13 So, for example, if the real problem
14 here is the lack of agency reviewability, then
15 the most direct line to a solution would be to
16 sever the provision requiring board rehearing so
17 that the director could unilaterally review.

18 And there may be other remedies
19 depending on where, if anywhere, the Court were
20 to find a constitutional violation. It is not
21 where the Federal Circuit found it.

22 And it's certainly not where Arthrex
23 has identified it, which is to take down this
24 whole system. You know, they don't actually
25 want presidential confirmation. They don't

1 actually want director review. What they want
2 is for the Court to -- to blow up the whole
3 thing because of a structural problem that,
4 again, not to fight the hypothetical, we think
5 doesn't exist.

6 JUSTICE BARRETT: Thank you.

7 CHIEF JUSTICE ROBERTS: A minute to
8 wrap up, Mr. Perry.

9 MR. PERRY: Mr. Chief Justice,
10 principal executive officers sit at the right
11 hand of the President and make national policy.
12 They are the ambassadors, the cabinet members,
13 and the agency heads who have no superior other
14 than the President.

15 The APJs here are three steps away
16 from the President. The chain of command runs
17 through the Secretary of Commerce and the PTO
18 Director.

19 This Court has consistently recognized
20 subordinate officials in general and
21 administrative adjudicators in particular to be
22 inferior officers. APJs carry out policy. They
23 do not make it. Findings like these have been
24 made by inferior officers since the Patent
25 Office was created, and APJs carry on that

1 tradition. They are inferior officers.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Lamken.

6 ORAL ARGUMENT OF JEFFREY A. LAMKEN
7 ON BEHALF OF ARTHREX, INC.

8 MR. LAMKEN: Thank you, Mr. Chief
9 Justice, and may it please the Court:

10 Administrative patent judges do one
11 thing: decide cases. Their decisions are the
12 executive's final word resolving billion-dollar
13 disputes affecting the innovation landscape.
14 They can even overturn earlier decisions by
15 their own agency head to grant a patent.

16 No superior in the executive has
17 authority to review their decisions, to overturn
18 their exercise of government authority.
19 Accountability suffers. If a principal officer
20 has review authority but refuses to exercise it
21 and overrule subordinates, the President and the
22 public can hold him accountable for that choice.

23 But the principal is not accountable
24 if the answer is, I have no authority. Congress
25 made my supposed underlings the final word.

1 Punishing APJs for decisions or guidance to
2 prevent future error doesn't undo decisions
3 already made. For parties, the decision remains
4 the executive's final word.

5 In 200 years, this Court has never
6 upheld such a scheme. Edmond emphasizes review
7 by presidentially appointed, Senate-confirmed
8 officers. It's hard to imagine the Coast Guard
9 judges there would be inferior officers if none
10 of their decisions could ever be countermanded
11 by a superior, which is why the Federal
12 Circuit's remedy striking APJ tenure protection
13 is no remedy at all. APJs would still be the
14 final word of the executive for the cases they
15 decide, and it subjects APJs to unseen,
16 behind-the-scenes pressures through which
17 superiors could evade accountability.

18 How to fix the statute is for
19 Congress. Solutions point in the opposite
20 direction. Congress might want APJs to be
21 presidentially appointed and Senate-confirmed,
22 as examiners-in-chief were for 114 years.
23 Congress might want to grant the director
24 express authority to read board panel decisions.
25 That's how Congress fixed the problem for the

1 Trademark Trial and Appeals Board, the TTAB,
2 last year.

3 But this Court can't pencil in those
4 solutions. It's more respectful of Congress to
5 allow Congress to choose how to structure the
6 agency.

7 I, of course, welcome the Court's
8 questions.

9 CHIEF JUSTICE ROBERTS: Thank you, Mr.
10 Lamken.

11 Why isn't it okay -- we've -- we -- I
12 think Justice Gorsuch referred to this as the
13 soft power of review. Why isn't -- under our
14 precedents and basic principles, why isn't it
15 okay that the executive allow the adjudicators a
16 significant degree of leeway because they're
17 just that? They're adjudicators, they're coming
18 up with particular factual determinations, and
19 you don't want the politically accountable
20 people to have the authority to overturn those
21 in -- in situations where billions of dollars
22 are at stake, but, at the same time, in terms of
23 basic patent rules and approaches and guidance,
24 you do want them to have that responsibility.

25 Why -- why isn't that a fair balance?

1 MR. LAMKEN: Well, Mr. Chief Justice,
2 the Constitution permits adjudication in the
3 Executive Branch in part because some
4 adjudication is executive in nature. But
5 placing that function in the executive means
6 that the key protections against executive
7 overreach, which is accountability to the people
8 for the decisions, has to be observed.

9 Allowing unaccountable officers to
10 decide those cases finally, stripping any
11 accountable principal of authority to overturn
12 them, defeats that structural protection.

13 Now the standard model for agency
14 structure achieves both the impartiality of the
15 initial decision and allows for principal
16 officer review, and it ensures that the
17 principal officer review after the fact has a
18 principal officer taking responsibility for his
19 decision to overturn the impartial adjudicator.

20 This, by contrast, comes up with a
21 situation where you really -- it doesn't make
22 sense because you really can't be an inferior
23 officer. You cannot be an inferior adjudicator
24 when there's no superior who can review any of
25 your decisions ever.

1 CHIEF JUSTICE ROBERTS: Well, not any
2 of your actual decisions, but can certainly take
3 actions that would redirect any mistakes that
4 the director sees in how a particular case was
5 handled for the implementation of patent policy
6 according to the President's directives, the
7 President's responsibilities.

8 MR. LAMKEN: A regulation or -- or
9 punishment of the APJ after the fact simply
10 doesn't change the fact that the APJ's decision
11 is the final word in the case, the final word of
12 the executive.

13 So, for the parties aggrieved by the
14 loss of valuable rights, there's no superior
15 they can go to to ask them to countermand that
16 bad decision. For the public and aggrieved
17 parties wanting to know who to hold accountable
18 for the decision, there's just nobody.

19 The principal office -- officer's
20 response is, I have no authority to overturn
21 those bad decisions, Congress stripped me of
22 that power. That's the opposite of
23 accountability. It's the nature of adjudication
24 that you decide individual cases. If we're
25 going to have accountability in adjudication, it

1 has to be accountability for individual cases.

2 Structural protections like these
3 protect individual liberty, so they have to
4 apply in individual cases.

5 CHIEF JUSTICE ROBERTS: What about the
6 argument that, as a matter of practicality,
7 which is something that the government has to
8 take into account, what you're supposing is --
9 is really quite impractical?

10 Hundreds and hundreds of
11 administrative hearing examiners, as at least
12 they used to be called, making these sorts of
13 decisions, the notion of meaningful review of
14 each one seems to me to be fanciful.

15 MR. LAMKEN: Mr. Chief Justice,
16 because the account -- the Appointments Clause
17 is about accountability, what matters is legal
18 authority. If the director thinks he's too busy
19 to review a decision, if the director thinks
20 they're too numerous to merit his attention, the
21 public and the President can hold him
22 accountable for that decision.

23 But, if the director's answer is, I
24 have no legal authority to review those
25 decisions, then he is not accountable at all.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Thomas.

4 JUSTICE THOMAS: Mr. Lamken, why does
5 that accountability matter in this case? Are
6 you saying that you would actually get a better
7 decision from the director?

8 MR. LAMKEN: Your Honor, yes, we
9 believe we would get a better decision from the
10 director. But what matters is for individuals
11 to understand when they are making these
12 decisions that they are subject to potential
13 review and reversal by -- by their principal
14 officer.

15 Absent that oversight, there isn't
16 sufficient guidance and control to ensure that
17 they are inferior officers. In the end, we're
18 ultimately entitled to a decision where a
19 principal officer appointed by and accountable
20 to the President has authority to review the
21 decision. Absent that --

22 JUSTICE THOMAS: So how much review
23 are you talking about? Is it -- can it be just
24 pro forma review? Rubber-stamp review? How
25 much review are you talking about to address

1 your concerns?

2 MR. LAMKEN: I -- I think the -- it's
3 the availability of review. This Court -- the
4 lower federal courts don't cease to be inferior
5 courts merely because this Court denies
6 certiorari in the vast majority of cases. It is
7 the availability of review that makes them
8 inferior courts and this Court the Supreme
9 Court. And so it doesn't have to be actual
10 review in any case.

11 But, in Ed -- in Edmond, for example,
12 review is limited to issues of law, and if there
13 is -- so long as there is sufficient evidence on
14 every element of the offense, then the -- the
15 higher court couldn't overturn it. And so,
16 presumably, under proper circumstances, that
17 would be an appropriate standard.

18 But what you can't have is what we
19 have here, which is not only can you not remove
20 the lower -- the supposedly lower officers, but
21 the director simply does not have authority to
22 overturn their decisions no matter how
23 vehemently he may disagree with -- he may
24 disagree with them.

25 In fact, he, at most, in any rehearing

1 sits on a panel of two -- three, where he is
2 outnumbered two to one by other inferior
3 officers.

4 JUSTICE THOMAS: So, if I understand
5 you, if Congress amended the relevant provision
6 and gave discretion to the director, you -- that
7 would solve your problem?

8 MR. LAMKEN: That's exactly how --
9 yes, that's exactly how Congress fixed the
10 problem for the Trademark Trial and Appeals
11 Board. It provided -- inserted an express
12 provision saying that the director has authority
13 to overturn board decisions with which the
14 director disagrees.

15 But this Court can't pencil in that
16 sort of authority. The government attempts to
17 get there by asserting that the Court should
18 strike, for example, the -- the provision that
19 says that only the board can grant a rehearing,
20 but that wouldn't fix the problem at all.

21 The only person that would --

22 JUSTICE THOMAS: Well, let me ask you
23 one more question then. The -- assuming that
24 Congress addresses the problem by providing the
25 director with discretion, could the director

1 then delegate that authority to the APJs and the
2 various structures within the organization to
3 basically the way it exists now by statute, but
4 the -- the director accomplishes that by
5 delegation? Would that be okay?

6 MR. LAMKEN: Your Honor, I think,
7 since the statute authorizes his review, that
8 would be permissible so long as it's consistent
9 with the statute, because the public and the
10 President could hold the director accountable
11 for his --

12 JUSTICE THOMAS: So, I mean, if you
13 could be in the exact same posture that you're
14 in right now, as long as he does it by
15 delegation rather than by statute?

16 MR. LAMKEN: Well, it wouldn't be the
17 exact same posture, Your Honor, because, if it's
18 by delegation, he could always withdraw that
19 delegation. If it's by delegation, he is
20 accountable for having done the delegation. He
21 cannot point his finger at Congress and say:
22 Congress deprived me of the power to overturn
23 that decision. It would be his choice to not
24 review the decision, his choice to delegate, his
25 choice for which he is accountable to the

1 President and the people of the United States.

2 JUSTICE THOMAS: Thank you.

3 MR. LAMKEN: What's missing --

4 CHIEF JUSTICE ROBERTS: Justice
5 Breyer.

6 JUSTICE BREYER: But following up on
7 what Justice Thomas says, I mean, I don't -- why
8 is this an unusual matter of delegation? I
9 mean, after all, the government is filled with
10 all kinds of different people. Doctors in
11 practice may have final authority to decide at
12 the Veterans Administration whether you're on
13 your right day for an appointment. Sergeants
14 will decide what hill to take in the Army.

15 Inspectors general may decide who is a
16 whistleblower and have absolutely unreviewable
17 authority to send something over to Congress to
18 say what that whistleblower said. There are
19 many shapes and sizes.

20 And some -- and Congress -- I mean,
21 you're saying Congress can't restrict their
22 authority at all, no matter what the shape and
23 what the size? Or can they do it --

24 MR. LAMKEN: Justice --

25 JUSTICE BREYER: -- sometimes and not

1 do it other times? And if so, when?

2 MR. LAMKEN: So, Justice --

3 JUSTICE BREYER: I mean, it's just
4 pretty complicated.

5 MR. LAMKEN: -- Justice Breyer, I
6 think when you're talking about an adjudication,
7 what's critical is the authority of a principal
8 officer to be able to overturn that -- the
9 decision --

10 JUSTICE BREYER: But not for a doctor,
11 not for a whistleblower?

12 MR. LAMKEN: No, for -- for policy
13 decisions --

14 JUSTICE BREYER: Ah.

15 MR. LAMKEN: -- that sort of
16 regulatory decision, it's often sufficient for
17 you to have removal authority or the threat of
18 removal, because those decisions can be
19 overturned --

20 JUSTICE BREYER: True, but --

21 MR. LAMKEN: -- even once the --

22 JUSTICE BREYER: -- I mean, what about
23 the inspector general? Can the Congress there
24 give him some unreviewable authority, send him a
25 letter with a whistleblower?

1 MR. LAMKEN: So, of course, anybody
2 who has oversight can always overturn any --
3 that -- that sort of --

4 JUSTICE BREYER: Let's say --

5 MR. LAMKEN: -- executive authority.

6 JUSTICE BREYER: -- Congress delegates
7 to the inspector general the unreviewable power
8 to decide whether to send a letter to Congress
9 at the request of a whistleblower.

10 MR. LAMKEN: Yeah, I don't think --

11 JUSTICE BREYER: Can Congress do that
12 or not on your theory?

13 MR. LAMKEN: So I think that sending a
14 letter to Congress may or may not be substantial
15 governmental authority of the sort that would be
16 --

17 JUSTICE BREYER: Oh, okay, okay. But
18 --

19 MR. LAMKEN: -- be an issue here.

20 JUSTICE BREYER: -- now we've got --
21 we're finding out what you're looking for, the
22 other side is saying this: Given the complexity
23 of the federal government, of course, there are
24 going to be vast numbers of different cases, so
25 we have three basic things to look at: What's

1 the position in respect to the President of the
2 individual? What's the nature of that job? And
3 what is the nature of the delegation of
4 non-reviewable authority?

5 I mean, even magistrates and lower
6 court judges decide things without review, such
7 as a denial of summary judgment. What's the
8 nature of the authority delegated, what's the
9 nature of the job, what's the distance from the
10 President, and it all comes under the rubric
11 policy.

12 Is it taking too many policy matters
13 away from the President? So an adjudicator will
14 have more authority, possible. And so will a
15 whistleblower, inspector general. And maybe
16 somebody else won't. Maybe somebody in the
17 Nuclear Regulatory -- do you see -- do you see
18 what they're driving at? So what's your
19 response to that?

20 MR. LAMKEN: Justice Breyer, I think,
21 when you have adjudications, it's just in the
22 nature of adjudications that you decide
23 individual cases. And if you're going to have
24 accountability in those decisions, which you
25 must if you're in the Executive Branch, that

1 accountability has to be for individual
2 decisions.

3 And if you -- if you have an -- a
4 supposed underling with unreviewable authority
5 to decide the matter, you do not have
6 accountability of a superior. You simply can't
7 be an inferior adjudicator if there is no
8 superior who can review any of your decisions
9 ever.

10 The Constitution uses the word
11 "inferior" only in the -- the context of the
12 lower federal courts. Those courts are inferior
13 because their decisions are subject to this
14 Court's review.

15 If there were courts out there where
16 this Court would have no authority to review
17 their decisions ever, under any circumstances,
18 they might be lesser or coordinate courts. They
19 wouldn't be inferior courts.

20 For adjudication, being an inferior
21 means having a superior who can review and
22 overturn your decisions.

23 CHIEF JUSTICE ROBERTS: Justice Alito.

24 JUSTICE ALITO: Mr. Lamken, let's
25 assume that we agree with you that this current

1 scheme violates the Appointments Clause. You
2 say in your brief we shouldn't go any further;
3 we should leave it to Congress to decide what to
4 do to fix the problem.

5 But that really doesn't answer the
6 question of what relief you should get in this
7 case. I -- I assume you would not be satisfied
8 if, at the end of this case, the only thing that
9 you obtain is a declaration that the current
10 scheme is unconstitutional, but nothing is done
11 to disturb the decision of the board, right?
12 You wouldn't be satisfied with that?

13 MR. LAMKEN: Correct. That would be
14 essentially an advisory opinion for us. Because
15 the Court -- because the IPR system is
16 unconstitutional, this case can't proceed,
17 there's no constitutional mechanism to which
18 this case can be remanded. Accordingly, the IPR
19 really should be dismissed.

20 JUSTICE ALITO: Well, you -- you want
21 us to go beyond simply saying that there was a
22 violation and, Congress, you fix it as you see
23 fit. You want us to grant -- you want the
24 judiciary to grant you a form of relief, namely,
25 a decision vacating the decision of the board.

1 That is a form of relief.

2 Why is that a more modest form of
3 relief -- a more modest form of relief than some
4 of the alternatives, such as saying that you are
5 entitled to have the director review the
6 decision of the board?

7 MR. LAMKEN: Your Honor, I think the
8 -- the Court couldn't create that mechanism
9 without rewriting the statute. And --

10 JUSTICE ALITO: We wouldn't -- we
11 wouldn't rewrite the statute. What the Court
12 would say is this is what the Constitution
13 requires. The law is -- I mean, Professor
14 Harrison makes this point repeatedly, and it
15 seems like a convincing point. The law is a
16 combination of what the Constitution requires
17 and any statutory additions to what the
18 Constitution requires.

19 So, if the Constitution requires some
20 alteration of the current statutory scheme, so
21 be it. And that is an alteration that would
22 possibly bring this into compliance with the
23 Constitution.

24 MR. LAMKEN: I think -- Your Honor, I
25 believe there's, you know, the choice of how to

1 have these decisions made. Whether or not you
2 elevate APJs to have them appointed by the
3 President, to make them true principal officers,
4 or, conversely, whether you would instead
5 subordinate them to the director by making their
6 decisions reviewable by the director, is a sort
7 of fundamental policy choice this Court does not
8 make. Congress --

9 JUSTICE ALITO: But -- but somebody
10 has to make a choice about -- somebody in the
11 judiciary has to make a choice about how this
12 case ends. And I -- I -- I don't think you can
13 -- I don't think it's an answer to say don't
14 make any choice at all, just say that we win.
15 That is a choice. That is a form of relief, is
16 it not?

17 MR. LAMKEN: Yes, yes. And it is a
18 form of relief, for example, this Court gave in
19 Sorrell. It said there's multiple possibilities
20 of how the statute could be changed, but we are
21 not the institution to be -- to doing it. The
22 legislature has to make that change.

23 And I think that's precisely the case
24 here because the possible solutions point in
25 diametrically opposite directions. One is to

1 make the officers -- to -- to make the APJs
2 appointed by the President so that you have --
3 so they're true principal officers. The other
4 would be to make them truly subordinate to the
5 director by making their decisions not final and
6 at least subject to the possibility of review by
7 the director.

8 But, since those and the multiple
9 other possibilities point in such diametrically
10 opposed directions, this Court should hold that
11 this IPR cannot proceed because the system is
12 not constitutional. And then any remedy beyond
13 that, any revision to the statute would be a
14 matter for Congress to -- to address.

15 JUSTICE ALITO: All right. Thank --
16 thank you.

17 MR. LAMKEN: It's far more --

18 JUSTICE ALITO: Thank you, Mr. Lamken.

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor.

21 JUSTICE SOTOMAYOR: Counsel, I find it
22 odd -- not odd to protect Congress's
23 prerogative, but it's nothing that we do will
24 tie Congress's hands. And one thing we do know
25 is that they can change anything we do as a

1 temporary remedy, assuming we were to rule in
2 your favor.

3 But I -- I have a problem with our
4 jurisprudence as -- as it's developed in this --
5 in -- in these cases. And the founding
6 generation conceived of principal officers as
7 synonymous with heads of departments. In early
8 debates and enactments that structured executive
9 department, heads of the department were -- were
10 referred to as principal officers and other
11 members as inferior officers. There's a whole
12 history that many of those inferior officers
13 took final decisions in a wide variety of areas.
14 Yet that's the way we proceeded.

15 The history also shows that early
16 statutes gave non-principal officers the power
17 to make final adjudicatory decisions on behalf
18 of the executive.

19 Your opposing counsel pointed out that
20 as early as 1793, non-principal officers were
21 given the power to adjudicate patent disputes,
22 and in 1803, land commissioners were given the
23 power to make final determinations as to a
24 claimant's right to a tract of land.

25 I personally read this history as

1 suggesting that principal officers were intended
2 to be policymakers, and individuals who merely
3 adjudicated claims based on said policies were
4 not principal officers.

5 So, for me, the person that has to be
6 held responsible is not the individual ILJ -- or
7 ALJ who is making a decision. It's the person
8 who creates the policy.

9 And for me, it's clear that APJs are
10 not policymakers. All the policies are vested
11 in the director. Precedential power is put in
12 the director. The ALJs cannot influence the
13 course of the law. That's only the director.

14 So please tell me why the individual
15 decision based on a quasi-law precedent and
16 policy set by the director is a final decision
17 that that director won't be held responsible
18 for.

19 MR. LAMKEN: Well, Your Honor, I think
20 the short answer is, if the director has no
21 authority to over -- overturn it, then the
22 director isn't responsible for it. It's not his
23 fault. And I think that in terms of history --

24 JUSTICE SOTOMAYOR: I -- I -- I'm
25 having a problem with that. If the APJ makes a

1 mistake under the policy set by the director,
2 that is going to be reviewed by the courts.

3 MR. LAMKEN: Your Honor, it's -- these
4 aren't -- these require applications of law to
5 facts. There's credibility determinations. It
6 doesn't make you an inferior officer simply
7 because somebody in a coordinate branch could
8 review your decisions.

9 If that were the test, then the heads
10 of departments and the members of the cabinet
11 would be inferior officers also because their
12 decisions can be reviewed by the courts.

13 Under Edmond, to be an imperial --
14 inferior officer, you have to be subject to the
15 supervision and control of a principal officer.
16 That doesn't mean that you can only have one
17 single head of agency principal officer in any
18 -- in any agency.

19 Madison, as we pointed out in our
20 brief, expressly recognized the fact that you
21 could have other principal officers --

22 JUSTICE SOTOMAYOR: Counsel --

23 MR. LAMKEN: -- subordinate to the
24 heads of department.

25 JUSTICE SOTOMAYOR: -- just one last

1 point. I just ignore the history under your
2 view and --

3 MR. LAMKEN: No.

4 JUSTICE SOTOMAYOR: -- what it teaches
5 us.

6 MR. LAMKEN: No, quite the opposite.
7 I think the history, when -- of the arbitrators
8 that you mentioned, they would decide just a
9 single case, and that has two consequences.

10 First, because an arbitrator doesn't
11 have a continuing position, historically, they
12 would not be treated as an officer at all, as
13 the Alfarm and the 2007 OLC opinion made clear.
14 They're like jurors. Jurors have important
15 responsibilities for cases, but they're not
16 officers.

17 Second, because the role is only
18 temporary and for a single case, such an
19 arbitrator wouldn't be -- would at most be an
20 inferior officer, as under Morrison.

21 CHIEF JUSTICE ROBERTS: Justice Kagan.

22 MR. LAMKEN: But whatever one thinks
23 about --

24 JUSTICE KAGAN: Mr. Lamken, suppose
25 that there was review by the director in this

1 case, but the review was under a clear error
2 standard. Would that be enough?

3 MR. LAMKEN: Your Honor, I think,
4 consistent with Edmond, a clear error standard,
5 legal, would probably be sufficient in light of
6 the other means of control that the director
7 has.

8 JUSTICE KAGAN: And -- and how about
9 if it was under an egregious error standard?

10 MR. LAMKEN: I think, Your Honor, at
11 some point, where the authority of the director
12 is so cut off that he is not able to say with
13 any accountability that the final decision of
14 the APJ represents the views of the United
15 States, that this is a decision that he is
16 willing to stand behind as the word of the PTO
17 --

18 JUSTICE KAGAN: Well, then let's --

19 MR. LAMKEN: -- then I think, at that
20 point, you've got to --

21 JUSTICE KAGAN: -- let's think about
22 what you just said in reference to Edmond.

23 In Edmond, as you said -- and this is
24 why you said a clear error standard would have
25 to suffice -- the standard was is there

1 competent evidence in the record.

2 Now, if I think about that standard, I
3 mean, when is there not competent evidence in
4 the record?

5 So I guess I'm wondering how Edmond is
6 at all consistent with some of the statements
7 that you've been making this -- this morning?
8 You said that, you know, it's -- it's -- if --
9 if the head of the agency can say he had no
10 authority, the head of -- if the head of the
11 agency can say it's not his fault, then that
12 is -- then that dooms the system.

13 But the CAAF could have said all those
14 things: we have no authority, it's not our
15 fault, there was competent evidence in -- in --
16 in the record. I mean, it wasn't very good
17 evidence and the evidence in our view was
18 outweighed by much better evidence, but it was
19 competent, so it's not our fault.

20 MR. LAMKEN: Your Honor, of course,
21 the CAAF could also review all errors of law,
22 and we would think that the PTO director would
23 have to be able to do that as well.

24 JUSTICE KAGAN: Well, but with --

25 MR. LAMKEN: But the one --

1 JUSTICE KAGAN: -- respect to many
2 decisions, the -- the -- the critical question
3 is what the evidence says, and, you know,
4 putting aside whether there's -- there's de novo
5 legal authority, you know, many decisions the
6 CAAF would be able to say, you know, this was in
7 the end a decision about the evidence, and we
8 basically have no authority with respect to
9 judgments about how good the evidence is. As
10 long as there's, like, something there, we have
11 to go along, it's not our fault.

12 MR. LAMKEN: Well, Your Honor, I think
13 the answer is that one thing that Congress can't
14 do and still maintain you as an inferior officer
15 is to say that your adjudicative decisions are
16 not subject to review by any principal officer
17 under any circumstances.

18 That simply goes too far. And that's
19 what we have here. Plus, where the case --

20 JUSTICE KAGAN: I mean, I -- I guess
21 what I'm just wondering is whether this doesn't
22 suggest that this question of review is
23 something that's not an on/off switch as to this
24 single issue but something that needs to be put
25 into the mix and needs to be considered along

1 with all the other evidence of -- of -- of
2 control that the agency head has.

3 The reason why this competent evidence
4 standard was okay in Edmond was not that, you
5 know, it itself was there because, you know,
6 competent evidence standard doesn't give you
7 much. It was because it was combined with a
8 raft of other things.

9 MR. LAMKEN: I think Your Honor is
10 correct in the sense that the ability to
11 review -- of a principal officer to review the
12 supposed inferior's decision is a critical but
13 perhaps not always sufficient condition.

14 But you really can't call them an
15 inferior officer if the answer is for the
16 superior, I have no authority to review your
17 decisions at all under any circumstances.

18 JUSTICE KAGAN: If we're being --

19 MR. LAMKEN: That wouldn't --

20 JUSTICE KAGAN: -- honest, Mr. Lamken,
21 wouldn't you think that the director can
22 probably get the precise result he wants in a
23 higher percentage of these cases than the CAAF
24 could have gotten in Edmond?

25 MR. LAMKEN: No, Your Honor, I don't

1 think so, because, you know, for example, he
2 cannot conceivably anticipate every conceivable
3 factual scenario, every conceivable distinction,
4 every single thing that an -- an adjudicator
5 might come up with along the way.

6 JUSTICE KAGAN: Thank you, Mr. Lamken.

7 MR. LAMKEN: Just --

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch. Justice Gorsuch?

10 JUSTICE GORSUCH: Oh, I'm -- I'm
11 sorry.

12 Mr. Lamken, if you'd like to finish
13 that answer, I'd -- I'd -- I'd be grateful to
14 hear it.

15 MR. LAMKEN: Yes. He couldn't
16 possibly conceive -- come up with every
17 conceivable along the way. And the idea of, you
18 know, the fact that the government seems to try
19 and contrive together ways that the government
20 -- that -- excuse me, that the director could
21 possibly control the outcomes, for example,
22 front-running APJ decisions with pay-specific
23 guidance, manipulating panel size or panel
24 composition to achieve results, de-instituting
25 to try and avoid bad decisions, all those

1 contrivances to try and give the director some
2 sort of control just show that Congress didn't
3 give the director the critical authority you
4 need for adjudications: the authority to review
5 and overturn decisions so he can stand behind
6 them as the final word of the United States.

7 JUSTICE GORSUCH: So, Mr. Lamken, in
8 our last couple of cases, Seila Law and Free
9 Enterprise, we were able to get in and get out
10 rather cleanly, severing only the removal
11 provisions, and, of course, that took care of
12 the -- the constitutional problem there.

13 Here, you -- you indicate that
14 supervision is a real problem and more
15 machinations are required. But the SG offers us
16 a -- a -- what it thinks is a clean answer on I
17 think it's about page 40 of its brief that we --
18 we just sever the provision in Section 6(c) that
19 says only the PTAB may grant rehearing.

20 Why -- why isn't that sufficient?

21 MR. LAMKEN: Well, Your Honor, first,
22 that's, of course, one of multiple options that
23 point in opposite directions, but it wouldn't
24 even fix the problem.

25 Even if the director -- that would

1 somehow give the director the ability to grant a
2 rehearing, despite the rule that the body with
3 authority to decide cases initially usually has
4 the authority to grant a hearing, not somebody
5 else, but the director still wouldn't have
6 unilateral authority to decide cases on
7 rehearing. The statute still says decisions are
8 issued in panels of three in which the director
9 is, at best, outnumbered two to one.

10 JUSTICE GORSUCH: All right. So we'd
11 have to --

12 MR. LAMKEN: So any --

13 JUSTICE GORSUCH: -- we'd have to --
14 we'd have to blue-line not only that language in
15 6(c) that says only the PTAB, but you're also
16 pointing out that first part of Section 6(c)
17 that says shall be heard by three members, fine.

18 Is -- is that -- would -- would --
19 would that do it?

20 MR. LAMKEN: So, Your Honor --

21 JUSTICE GORSUCH: Would that solve the
22 problem.

23 MR. LAMKEN: Right. I think, you
24 know, Congress could rewrite the statute that
25 way. But trying to take the director and re --

1 and insert him above the board, where Congress
2 made him only one member, trying to insert the
3 director as a single decision-maker, where
4 Congress provided for people to sit in panels of
5 three, that isn't a surgical solution. That's
6 vivisection.

7 JUSTICE GORSUCH: Are there other --

8 MR. LAMKEN: Congress --

9 JUSTICE GORSUCH: -- are there other
10 portions of the statute we'd have to eliminate
11 or add to?

12 MR. LAMKEN: No, but it would still
13 rep -- I think that you would have to strike at
14 least those two, but that would be a radical
15 alteration of the scheme Congress established.

16 Panels of three were an important
17 protection against idiosyncratic thinking. They
18 ensure a necessary breadth of expertise. They
19 provide a check ensuring just -- that you have
20 decision-makers with different backgrounds. And
21 it would be a departure from historical practice
22 of having the -- having the APJs sit in panels
23 of three.

24 But, ultimately, the problem is
25 there's two opposite ways that one can go here.

1 One can elevate the APJs and provide for them to
2 be presidentially appointed and be true
3 principal officers, as examiners-in-chief were
4 for 114 years, or you can try and subordinate
5 them by making the director the final
6 decision-maker and give him capacity to overturn
7 decisions with which he disagrees.

8 JUSTICE GORSUCH: Well, one --

9 MR. LAMKEN: But that's --

10 JUSTICE GORSUCH: -- one option you've
11 given -- one option you've given us is to simply
12 set aside the IPR determination, remand the case
13 to the agency, and then wait for Congress to fix
14 the problem. I'm sure some would argue that,
15 well, that could take a long time. What --
16 what's your response to that?

17 MR. LAMKEN: Well, Your Honor, so
18 Congress, when it addressed the problem, it has
19 already addressed the problem with respect to
20 the Trademark Trial and Appeals Board. In
21 addition, it -- Congress has already held
22 hearings. It has before it ready-made
23 solutions, one historical, more -- one more
24 recent with the TTAB available, and there's only
25 750 of these IPRs currently pending,

1 approximately, which is a little more than three
2 per IPJ. Congress could readily make it
3 possible for these to be re-filed if it chose in
4 a new and constitutional system.

5 Ultimately, it's more deferential,
6 it's more respectful of Congress to give
7 Congress the ultimate authority and give
8 Congress the choice of what it believes is the
9 right answer for the structure for an agency
10 responsible for technological innovation and
11 important property rights.

12 This Court shouldn't be placing a
13 thumb on the scale and giving judicial
14 imprimatur to one of multiple diametrically
15 opposed solutions.

16 JUSTICE GORSUCH: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Kavanaugh.

19 JUSTICE KAVANAUGH: Thank you, Chief
20 Justice.

21 Good morning, Mr. Lamken. I want to
22 follow up on some other of my colleagues'
23 questions and then turn to severability.

24 First, following up on the Chief's
25 questions, my understanding of your position is

1 that you take the position that ALJs within the
2 Executive Branch may be somewhat of an uneasy
3 constitutional solution, but it's historically
4 settled, we have tenure protection, plus agency
5 review, and that gives due process but also
6 gives ultimate agency control of policy. That's
7 kind of the historically settled solution.

8 You want to preserve that, correct?

9 MR. LAMKEN: That's exactly right.
10 And it was also that type of solution that
11 persisted for hundreds of years in -- with
12 respect to initial examinations and with -- with
13 respect to interferences as well --

14 JUSTICE KAVANAUGH: Okay. Here --

15 MR. LAMKEN: -- and with respect --

16 JUSTICE KAVANAUGH: -- here, the
17 problem is Congress departed from that tradition
18 by keeping the due process part without the
19 agency review part, and you can either keep the
20 review if you want to keep them as inferior
21 officers, or if you want to avoid agency -- any
22 agency review, Congress can do that too, but
23 that, they'd have to do presidential appointment
24 and Senate confirmation of the APJs, correct?

25 MR. LAMKEN: That's right. If -- if

1 history means anything, this is an outlier.
2 It's an aberration and an unconstitutional one
3 at that.

4 JUSTICE KAVANAUGH: Okay. And then
5 Justice Thomas asked about how it would be
6 different if delegated, in other words, if the
7 power of review were granted to the director and
8 then it's delegated.

9 Your answer to that, I think, was
10 accountability, is that correct?

11 MR. LAMKEN: I think that's right.
12 When a principal officer has authority and then
13 chooses to delegate it to another, assuming that
14 that's consistent with the statute, that
15 principal officer is then accountable for the
16 choice to delegate. If the attorney general
17 says, I am too busy to review these, I want
18 somebody else to do it for me, the public and
19 the President can hold him accountable for that
20 choice.

21 JUSTICE KAVANAUGH: And then Justice
22 Breyer asked about inspector generals. He asked
23 about other officers too, but, on inspector
24 generals, my understanding is those are
25 presidential-appointed and Senate-confirmed, and

1 there actually would be a pretty big problem if
2 they were not -- at least if they had tenure
3 protection and were not presidential-appointed
4 and Senate-confirmed.

5 Do you have any different
6 understanding of that?

7 MR. LAMKEN: No, I wouldn't.

8 JUSTICE KAVANAUGH: Is the Morrison
9 test still alive after -- for -- Morrison test
10 for Appointments Clause purposes still alive
11 after Edmond?

12 MR. LAMKEN: So Morrison relied
13 heavily on the fact that the officer was
14 appointed for a limited duration and for a
15 single task, a single investigation. Whatever
16 one might think of that, it's a completely
17 different matter entirely to have an entire
18 branch of an agency with 200 or more permanent
19 positions that are adjudicating case after case
20 after case without the possibility, without
21 authority and a principal officer to overturn
22 their decisions.

23 JUSTICE KAVANAUGH: And in Edmond --

24 MR. LAMKEN: And that's in the
25 Executive Branch.

1 JUSTICE KAVANAUGH: -- just in Edmond
2 -- just to clarify one thing, I think this comes
3 from Justice Kagan's questions -- in Edmond,
4 there was both review of some sort -- she asked
5 you to pinpoint that -- but review of some sort
6 but also removability at will, correct?

7 MR. LAMKEN: That's right. They could
8 be removed from their position and they have --
9 there was review of some sort. And, here, we
10 have exactly the opposite --

11 JUSTICE KAVANAUGH: Let me --

12 MR. LAMKEN: -- the absence of review.

13 JUSTICE KAVANAUGH: -- let me turn
14 because I -- I've got to turn quickly to
15 severability. So, if we agree with you on the
16 merits, you want to then take down the whole
17 system, and we've frowned upon that repeatedly.
18 And severability, I mean, maybe something of a
19 misnomer in some respects, really follows from
20 the nature of the constitutional problem. We
21 declare what the nature of the constitutional
22 problem is. We say -- then we enter judgment,
23 and then stare decisis means that that
24 constitutional problem exists for all cases.

25 Isn't the nature of the constitutional

1 problem here the lack of director review, which
2 would mean us saying 6(c) is the constitutional
3 problem?

4 MR. LAMKEN: No, Your Honor, because
5 the problem stems also from the fact that the
6 officers are not appointed by the President and
7 Senate-confirmed. Either one would be
8 sufficient to address the problem.

9 And it's not like separation-of-power
10 cases where the officers just -- the single
11 problem is the officer is not subject to
12 presidential control, and, therefore, all the
13 remedies involve subordinating the official,
14 clipping their wings, so to speak, or striking a
15 novel restriction on removal.

16 Here, the problem is --

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Barrett.

20 JUSTICE BARRETT: Mr. Lamken, I want
21 to pick up where Justice Kavanaugh left off on
22 the remedy here and severability.

23 So, on pages 56 and 57 of your brief,
24 you cite Sorrell and Bowsher and Free
25 Enterprise, and you cite them all for the -- the

1 proposition that if there are multiple ways to
2 cure a constitutional problem in a statutory
3 scheme, then the judiciary ought not be
4 blue-penciling it.

5 Can you think of any situation in
6 which we have said, okay, well, there are
7 multiple flaws in this scheme, but, you know, as
8 Justice Kavanaugh was just saying, 6(c) seems to
9 be the big problem, so we're going to think it's
10 the cleanest to go that route? Are -- are you
11 -- can you tell me the negative, that we've
12 never done it?

13 MR. LAMKEN: Oh, quite the contrary,
14 Your Honor. In Sorrell, that's exactly what
15 this Court did. It said there was at least five
16 different things that are problematic combined,
17 and it would be a matter of judicial
18 policymaking in order to determine which of
19 those should be removed.

20 This -- it's exactly the same problem
21 here because you have the --

22 JUSTICE BARRETT: Well, no, no, no,
23 counsel, I -- I understand that we did that in
24 Sorrell, but my question is, have we ever done
25 what we didn't do in Sorrell?

1 MR. LAMKEN: Which is to make a --

2 JUSTICE BARRETT: Yes --

3 MR. LAMKEN: -- judicial policy
4 choice?

5 JUSTICE BARRETT: -- to make one that
6 makes sense. I mean, let's say that Justice
7 Kavanaugh is right and that it seems very
8 sensible and makes a lot of sense to solve this
9 problem, assuming that we say there is one, by
10 saying 6(c) is the problem, so that's -- that's
11 the locus of the constitutional problem here,
12 and we're going to say that that's what we're
13 holding unconstitutional so that going forward,
14 it's just that the PTAB can't have the final
15 word.

16 MR. LAMKEN: Well, the Court could
17 just as easily say the locus of the
18 constitutional problem is the fact that these
19 officers are not appointed --

20 JUSTICE BARRETT: I understand that --

21 MR. LAMKEN: -- by the President and
22 Senate-confirmed.

23 JUSTICE BARRETT: -- Mr. Lamken, but
24 what I'm asking is, can you cite a case -- or
25 are you telling me that there is none? Can you

1 cite a case for the proposition where we have
2 done just that? Understanding that that runs
3 against what you want us to do here, I'm just
4 asking, is there a negative? Is it the case
5 that we've always had the position that we had
6 in Sorrell and we've never said that when there
7 might be multiple provisions working together
8 that create a problem or multiple ways of
9 solving it, that we haven't just chosen one that
10 makes sense?

11 MR. LAMKEN: Well, I think the -- the
12 -- you're right, Your Honor, in the sense that
13 this Court doesn't make that sort of judicial
14 policy decision when the possibilities are
15 multiple and they point in -- and they point in
16 complete opposite directions.

17 This Court recognizes that it's
18 respectful of Congress to let Congress make the
19 policy choice. And even if this Court could
20 somehow decide that, as a policy matter, it
21 wanted to do one thing or the other -- strike
22 the -- the appointment mechanisms for the ALJs
23 or somehow slice up the statute to try and
24 reinsert the PTO director above the board --
25 it's not a matter of -- of surgical relief then.

1 JUSTICE BARRETT: Okay, Mr. Lamken --

2 MR. LAMKEN: It is --

3 JUSTICE BARRETT: -- let me -- let me
4 pivot to the Appointments Clause issue.

5 So Justice Kagan was pointing out
6 there are many way in which we would say that
7 APJs are subordinate to the director, and it
8 seems to me that one way to look at this case is
9 to say that at a 10,000-foot level, if you look
10 at front-end controls, you know, if you look at
11 hiring and -- and firing and the ability of the
12 director to set policy that the APJs must
13 follow, in many respects, they're inferior
14 officers, and we might say that Congress has
15 given them this one authority, this
16 case-specific review authority, that is one that
17 is inconsistent with the inferior officer role.

18 But it does -- it does seem odd,
19 doesn't it, to say that they are principal
20 officers because they exercise this one piece of
21 authority that seems to go beyond what an
22 inferior officer can do?

23 MR. LAMKEN: Well, that, Your Honor,
24 is Freytag. Freytag held that it may well be
25 that a single officer has many responsibilities

1 to those of inferior officers, but if that
2 officer has authority that goes beyond that for
3 an inferior officer, if the officer is the final
4 decision-maker for the Executive Branch where
5 no -- he has no superior in that context, that
6 officer is then a principal officer for all
7 purposes and cannot continue in that office
8 absent a proper appointment. That is Freytag's
9 holding.

10 JUSTICE BARRETT: Thank you, Mr.
11 Lamken.

12 CHIEF JUSTICE ROBERTS: A minute to
13 wrap up, Mr. Lamken.

14 MR. LAMKEN: Certainly.

15 For adjudicators to be officers and
16 inferior officers, they have to have a superior
17 who can overrule their decisions before they
18 become the final word of the Executive Branch.

19 Because APJs don't have that superior,
20 they cannot be appointed as inferior officers.
21 The current IPR regime is, as a result,
22 unconstitutional. I know that Mr. Perry pointed
23 to Section 318(b) and the fact that the director
24 does the final action, but Section 318(b) points
25 out that, in fact, the director is made

1 subordinate to the APJs because it says that the
2 director shall issue and publish the certificate
3 canceling any claim if the board finds the
4 patent unpatentable.

5 Severing APJ removal protections
6 doesn't solve the problem because they still
7 have no superior in the exercise of government
8 authority. But how to fix this problem is a
9 question for Congress because the possible
10 solutions point in opposite directions.

11 Congress might want them to be Senate-
12 confirmed, as they were -- as examiners-in-chief
13 were for 114 years, or it might want to
14 subordinate them to the director, as Congress
15 ordered for -- as Congress provided for
16 trademark judges last year.

17 Congress can provide an approach by
18 amending the law, but this Court cannot simply
19 rewrite the statute, and it shouldn't allow the
20 Executive Branch to try and jerry-rig a solution
21 through contriving a remedy. The respectful
22 thing here is to let Congress to choose the path
23 forward.

24 The Court should hold the IPR regime
25 unconstitutionally constituted. The IPR

1 proceedings against Arthrex, therefore, cannot
2 continue and the IPR should be dismissed.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Rebuttal, Mr. Stewart?

7 REBUTTAL ARGUMENT OF MALCOLM L. STEWART
8 ON BEHALF OF THE UNITED STATES

9 MR. STEWART: Thank you, Mr. Chief
10 Justice.

11 Mr. Lamken referred to this Court's
12 ability to supervise lower courts by reviewing
13 their judgments. But the principal means by
14 which this Court supervises the lower courts is
15 not by affirming or reversing a few dozen lower
16 court judge -- judgments every year.

17 The principal means of supervision is
18 this Court issues precedential opinions that
19 bind lower courts in future cases, and the Court
20 typically tries to exercise its certiorari
21 jurisdiction in such a way that the legal
22 rulings and issues will address questions of law
23 that are both important and recurring.

24 And -- and similarly, in this case,
25 it's important not to ignore the front-end

1 mechanisms that are available to the director to
2 influence the outcome of board decisions. That
3 -- that's so both because they are the most
4 practically efficacious means of using the
5 director's resources and because these are the
6 means that are most often characteristic of the
7 exercise of supervisory power.

8 But, second, Mr. Lamken said that the
9 director can't be held accountable if the board
10 issues a decision that people believe are wrong
11 -- is wrong, and that -- that's incorrect. The
12 losing party in an IPR can always ask the
13 director to convene a new panel to grant
14 rehearing and to put the director himself on
15 that panel, and if the director declines to take
16 that step, he can be held accountable for
17 allowing the panel decision to remain in place.

18 That -- the only imperfection in the
19 director's accountability and review authority
20 is that the director could be outvoted by the
21 other two members of the panel that he convenes,
22 but those other two members of the panel would
23 be bound by any directives of law that the
24 director had issued.

25 The only practical fear is that those

1 two people will disagree with the director's
2 view of the facts, and to that extent,
3 accountability is limited.

4 But, as Justice Kagan's questions
5 pointed out, that's exactly what was going on in
6 Edmond, that in Edmond, people who thought that
7 the facts had been determined incorrectly could
8 only blame the Coast Guard Criminal -- Court of
9 Criminal Appeals judges. They couldn't blame
10 any Senate-confirmed officer.

11 The -- the last thing I'd say is Mr.
12 Perry referred to AUSAs and people in positions
13 like that. They'll -- they'll go into court
14 conducting trials. They'll have to make snap
15 decisions about whether to object to particular
16 evidence, how to respond if the judge
17 disapproves their proposed line of questioning.

18 As -- as a practical matter, these are
19 decisions that often can't be undone after the
20 fact, and so a blanket rule that an officer is a
21 principal officer if he or she can do anything
22 that binds the United States without being
23 subject to -- to being countermanded by a
24 Senate-confirmed officer, that would be
25 unworkable.

1 Mr. Lamken attempts to confine the
2 rule he is advocating to adjudicative officials,
3 but there's really no principled basis for
4 striking that limitation. Edmond makes clear
5 that administrative adjudicators are subject to
6 the same Appointments Clause principles as other
7 federal officers.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. The case is submitted.

11 (Whereupon, at 11:29 a.m., the case
12 was submitted.)

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