A MATTER OF "PRINCIPAL": A CRITIQUE OF THE FEDERAL CIRCUIT'S DECISION IN *ARTHREX V. SMITH & NEPHEW, INC.*

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ABSTRACT

The Supreme Court recently granted certiorari in United States v. Arthrex. *In that case, the Court of Appeals for the Federal Circuit held that administrative patent judges are principal officers of the United States under the Appointments Clause, and therefore must be appointed by the President and confirmed by the Senate. This Note provides a critique of the Federal Circuit's opinion in* Arthrex *by arguing that the Federal Circuit misunderstood the substance of the three-part test articulated by the Supreme Court in* Edmond v. United States.

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TABLE OF CONTENTS

INTRODUCTION

Like most cases that present questions of constitutional structure, this case is about power. It is yet another piece of the ongoing puzzle that is the proper equilibration of power amongst the three branches of the federal government. In *Arthrex v. Smith & Nephew, Inc.*, the Court of Appeals for the Federal Circuit held that administrative patent judges ("APJs") are principal officers under Article II of the Constitution, and therefore must be nominated by the President and confirmed by the Senate.[1] In analyzing the statutory structure of the Patent Trial and Appeal Board, the court concluded that the appointment of APJs by the Secretary of Commerce violated the Appointments Clause.[2] The court acknowledged that the APJs exercised broad discretion in conducting *inter partes* review absent any significant supervisory control by a superior executive officer.[3] Since the APJs exercised such broad executive authority, and neither the Secretary of Commerce nor the Director of the USPTO exercised "sufficient direction and supervision" over them, the APJs were principal officers.[4]

Arthrex provides a lens through which to explore the implications exerted by the administrative state upon the separation of powers. Specifically, this case is one of many that pose questions regarding the proper scope of presidential control over administrative agencies. Part I of this Casenote details the facts in *Arthrex* and relevant portions of the Federal

1. Arthrex v. Smith & Nephew, Inc., 941 F.3d 1320, 1335 (Fed. Cir. 2019).
2. *Id.* at 1325. *See also* U.S. CONST. art. II, § 2, cl. 2.
3. *Id.* at 1328.
4. *Id.* at 1329.

Circuit's opinion. Part II analyzes the rationale underlying the court's decision. The court incorrectly held that APJs who are insulated by "for cause" removal limitations, are principal officers under Article II. First, the court misunderstands the crux of the review power inquiry. The key issue is whether review *may* occur, not whether it *must* occur. Second, the court severely undervalues the significant supervisory authority wielded by the Director. Finally, the court fails to note the principal purpose of removal limitations: balancing presidential control against the APJs' need for political independence. The Conclusion summarizes the conclusions of the analysis. Upholding the Federal Circuit's conclusion that APJs must be appointed by the President subject to advice and consent would signal a further restriction on the administrative state.

I. BACKGROUND

A. The Facts in Arthrex

35 U.S.C. § (6)(a) established the Patent Trial and Appeal Board, and provided for APJs to be appointed by the Secretary of Commerce.[5] Arthrex, Inc. owned a '907 patent that applied to a kind of knotless suture securing assembly.[6] Smith & Nephew, Inc. and Arthrocare Corp. petitioned the Board for *inter partes* review of various aspects of the '907 patent.[7] *Inter partes* review is a proceeding that consists of "'adjudicatory characteristics' similar to court proceedings" to determine the patentability of a given claim.[8] A three-judge panel of APJs heard the review at issue and ultimately issued a final written decision that found the claims unpatentable.[9]

Arthrex thereafter appealed to the Federal Circuit, contending, *inter alia*, that the appointment of the APJs by the Secretary of Commerce violated the Appointments Clause.[10] The statutory framework insulated the APJs from at-will removal by the Secretary, instead providing for removal only "for

5. 35 U.S.C. § 6(a).
6. *Arthrex*, 941 F.3d at 1325.
7. *Id.* at 1325.
8. *Id.* at 1325–26 (citing Saint Regis Mohawk Tribe v. Mylan Pharms., 896 F.3d 1322, 1326 (Fed. Cir. 2018)).
9. *Id.* at 1326.
10. *Id.* The Appointments Clause reads:

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

U.S. CONST. art. II, § 2, cl. 2.

such cause as will promote the efficiency of the service."[11] Arthrex argued that the APJs exercised significant authority in conducting review of patent claims, so as to render them "principal" officers of the United States appointable only by the President, subject to Senatorial advice and consent.[12] The Federal Circuit agreed, and concluded that the statute was violative of the Appointments Clause, and therefore unconstitutional.[13]

B. The Federal Circuit's Opinion

As a threshold issue, the court first determined that the APJs are "Officers of the United States" under Article II.[14] An "Officer of the United States" is an official who "exercises significant authority pursuant to the laws of the United States."[15] The court recognized that APJs exercise "significant discretion" in overseeing discovery, applying the Federal Rules of Evidence, and hearing oral arguments.[16] The court also deemed it significant that the APJs issued final patentability decisions, subject only to review by the Board or by appeal to the Federal Circuit.[17] Following consideration of that threshold issue, the court then sought to answer whether the APJs were "principal" or "inferior" officers under Article II.[18]

The court held that the APJs were principal officers.[19] In so holding, the court consulted a three-factor test laid out by the Supreme Court in *Edmond v. United States*: (1) whether another principal officer has review power over the APJs' decisions; (2) the level of supervision exercised by a principal officer over the APJs; and (3) the principal officers' power to remove the APJs.[20] The court determined that, while the Board Director exercised sufficient supervision over APJs, neither the Director nor the Secretary of Commerce exercised sufficient review power to render the APJs inferior officers.[21] Further, the for cause removal limitation on the Secretary's or Director's ability to remove the APJs was strong evidence that they were principal officers.[22]

11. 5 U.S.C. § 7513(a).
12. *Arthrex*, 941 F.3d at 1327.
13. *Id.* at 1335.
14. *Id.* at 1328.
15. *Id.* at 1327–28 (citing Buckley v. Valeo, 424 U.S. 1 (1976)).
16. *Id.* at 1328.
17. *Id.*
18. U.S. CONST. art. II, § 2, cl. 2.
19. *Arthrex*, 941 F.3d at 1329.
20. *Id.* at 1329 (citing Edmond v. United States, 520 U.S. 651 (1997)).
21. *Id.* at 1329.
22. *Id.* at 1334.

1. Review Power

Under the statutory framework, no principal officer had the independent authority to review or overrule a final written decision issued by the APJs.[23] The Director was the only member of the Board nominated by the President and confirmed by the Senate, yet they lacked the ability to unilaterally reverse the decisions of the APJs.[24] Because neither the Director, nor the Secretary of Commerce enjoyed sufficient review power over the APJs' decisions, that counseled in favor of the APJs being deemed principal officers.

Once the APJs issued a final decision on the patentability of a given claim, the losing party "may [only] request rehearing by the Board or [appeal to the Federal Circuit]."[25] The court acknowledged that the Director could himself petition the court for review.[26] But for the court, the ability to *petition* for review was not the same as *unilaterally* reversing an APJ decision, which the Director lacked the power to accomplish.[27] The court also concluded that, though the Director had the power to place himself on a review panel, he would only constitute one-third of the vote.[28] In other words, even if the Director sat on a reviewing panel, two-thirds of the panel would still be composed of officers not appointed by the President.[29]

2. Supervision Power

The court determined that the Director's supervisory powers over the APJs "weigh in favor of a conclusion that APJs are inferior officers."[30] It was significant that the Director was vested with the power to promulgate regulations that bound the rest of the Board.[31] Additionally, the Director had the authority to designate the panel of judges, as well as decide whether to institute *inter partes* review in the first instance.[32] The court thus concluded that the Director possessed significant supervisory authority to determine the procedural aspects of review, and to bind the APJs to his own policy interpretations.[33]

23. *Id.* at 1329.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 1330.
29. *Id.*
30. *Id.* at 1332.
31. *Id.* at 1331.
32. *Id.*
33. *Id.* at 1332.

3. Removal Power

Finally, the court determined that the for cause removal protection enjoyed by APJs rendered them principal officers.[34] The court noted that removal power over an officer is a "powerful tool for control" when it is unencumbered by a for cause limitation.[35] Specifically, APJs could only be removed by the Director or Secretary "for such cause as will promote the efficiency of the service."[36] Such a limitation posed separation of powers concerns because, due to the lack of unfettered removal power, the APJs exercised significant executive power absent any imposing form of presidential control.[37]

Both the Secretary and Director were principal officers, but the court concluded that the for cause limitation on their removal power also rendered the APJs principal officers.[38] Because principal officers must be nominated by the President, subject to Senatorial advice and consent, the provision of the statute that vested appointment authority in the Secretary of Commerce was unconstitutional.[39] Having concluded that the removal restriction was unconstitutional, the court severed that provision from, and upheld the rest of, the statute.[40] Severing the removal restriction rendered the APJs "inferior" officers because they would then be subject to the direct control of a presidentially-appointed principal officers, namely the Director and Secretary of Commerce.[41]

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34. *Id.* at 1335. The constitutionality of for cause removal limitations are a subject of constant debate. For prominent scholarly debate on the issue, see generally MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING (2020) (arguing that removal limitations are unconstitutional, but that the President's removal power is vested through the Take Care Clause, rather than the Vesting Clause); Julian Davis Mortenson, *Article II Vests Executive Power*, *Not the Royal Prerogative* 119 COLUM. L. REV. 1169 (2019) (arguing that the Vesting Clause is merely the power to execute the laws and rejecting a residual powers theory); Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93 (2020) (arguing that the correct reading of the Vesting Clause is a "thick" one, wherein the President is vested with fundamental law-execution powers, such as removal power); SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE (2015) (arguing that removal limitations interfere with the President's power under the Vesting Clause).

35. *Arthrex*, 941 F.3d at 1332 (quoting Edmond v. United States, 520 U.S. 651, 664 (1997)). The logic underlying this justification is that the President cannot possibly control every aspect of the Executive Branch. As such, he must have the power to remove executive branch officers at will since it is "the President's only real tool for enforcing compliance" with presidential orders. MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING 167 (2020). Similarly, Professor Prakash argues for a formalistic executive branch structure; Congress is a "necessary partner" in creating and defining officers, but once an office is established, those officers "serve as the president's instruments." SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 202 (2015).

36. *Arthrex*, 941 F.3d at 1333 (quoting 5 U.S.C. § 7513(a)).

37. *Id.* at 1332.

38. *Id.* at 1335.

39. *Id.*

40. *Id.* at 1338.

41. *Id.*

II. ANALYSIS

The Federal Circuit was incorrect in determining that APJs are principal officers when they are removable for cause. First, the court misunderstands the weight of review authority vested in the Director, and is therefore unduly dismissive of that power. Second, the Director exercises significant authority to bind the APJs to his own policy determinations, as well as mandate the procedural structure of *inter partes* review. Such authority is substantial evidence that APJs are anything but loose administrative state cannons as the court seems to believe. Finally, the court misunderstands important Supreme Court precedent governing the underlying purpose of for cause removal limitations. The Court has consistently upheld for cause removal limitations in the interest of granting political independence to administrative agencies. Since review may be instituted, the Director wields significant supervisory authority, and the removal limitation is modest, the Federal Circuit should have deemed the APJs inferior officers.

A. The Court Misunderstands the Review Power Inquiry

The Federal Circuit misunderstands and ignores Supreme Court precedent, and thereby undervalues the authority vested in the Director to conduct review of APJ decisions. The Director may unilaterally intervene and "become a party in an appeal following a final written decision with which he disagrees."[42] He may also institute review of a decision via the Precedential Opinion Panel, which may "rehear and reverse" any decision by the APJs, as well as issue precedent that is binding on all future Board panels.[43] In *Edmond*, the Supreme Court noted that the Judge Advocate General "ha[d] no power to reverse decisions of the [Court of Criminal Appeals]," but acknowledged that such a review was *possible* by "another Executive Branch entity."[44] So too here, the Director may institute review and perhaps even reversal of a decision through a number of tools.[45] The court in *Arthrex* bemoans the fact that the Director cannot unilaterally review an APJ decision.[46] But that complaint misses the forest for the trees.

In *Freytag*, the Supreme Court determined that special trial judges of the Tax Court were inferior officers.[47] The Court expressly acknowledged that Tax Court decisions were only *appealable* to the courts of appeals.[48] In

42. *Id.* at 1329.
43. *Id.* at 1330.
44. Edmond v. United States, 520 U.S. 651, 664 (1997).
45. *Arthrex*, 941 F.3d at 1330.
46. *Id.* at 1329.
47. Freytag v. Commissioner, 501 U.S. 868, 882 (1991).
48. *Id.* at 891.

other words, the Court recognized that absolute authority to unilaterally review an agency decision is not determinative in whether an officer is "inferior" or "principal." The most significant consideration, therefore, is *whether* review may be instituted, not whether it is *automatically* instituted. Here, there is ample opportunity for review: the parties may file an appeal; the Director may unilaterally intervene; or the Director may institute review by the Precedential Opinion Panel.[49]

This key principle is also evident in *Morrison*. There the independent counsel was overseen by the Attorney General, but he could not *sua sponte* review or reverse the findings of the independent counsel.[50] On the contrary, the independent counsel "possesse[d] a degree of independent discretion" to faithfully carry out her duties.[51] Indeed, the purpose of an *independent* counsel is to accord them the necessary latitude to execute their duties. The Federal Circuit blatantly disregards this consideration, and instead focuses its firepower on the lack of *unilateral* review. That has never been the purpose of the review inquiry. That inquiry, like administrative law more generally, has instead focused on the need for officer independence in rendering sound policy judgments in order to govern effectively.[52] That independence would be hopelessly undermined if, as the Federal Circuit would have it, the lodestar of that inquiry were whether an officer wielded unfettered, unilateral review power. The Federal Circuit's paean to the Director's lack of unilateral review power is therefore misplaced, and ignorant of significant Supreme Court precedent.

B. The Director Wields Broad Authority to Supervise the APJs

The court correctly acknowledges the significant supervisory authority vested in the Director, but fails to accord appropriate weight to that fact. In determining whether an officer is inferior, courts have accorded significant attention to whether an officer's "work is directed and supervised at some level" by another principal officer.[53] The court notes that "the Director is 'responsible for providing policy direction and management supervision' for the USPTO."[54] Specifically, it is the Director's prerogative to issue

49. *Arthrex*, 941 F.3d at 1329–30.

50. *See* PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 41 (2009).

51. Morrison v. Olson, 487 U.S. 654, 671 (1988).

52. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010) (Breyer, J., dissenting) (arguing that interference with Congress's use of for cause removal limitations "threatens to disrupt severely the fair and efficient administration of the laws."); *see generally* Gillian Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

53. *See* Intercollegiate Broad. Sys. v. Copyright Royalty Bd., 684 F.3d 1332, 1338 (D.C. Cir. 2012) (citing Edmond v. United States, 520 U.S. 651 (1997)).

54. *Arthrex*, 941 F.3d at 1331 (quoting 35 U.S.C. § 3(a)(2)(A)).

regulations that govern the conduct of *inter partes* review and to issue binding policy directives.[55] The vast supervisory authority vested in the Director directly addresses the separation of powers concerns that the Appointments Clause was intended to remedy.

Supervision is important because it ensures that an officer may not come to wield freeform control over executive branch policy.[56] In other words, the supervision power grants a principal officer significant control over an inferior officer. The power held by the Director in *Arthrex* is indicative of that control, and combined with the ability to institute review of APJ decisions, counsels in favor of the inferior status of APJs.

Similar to *Edmond* and *Intercollegiate*, the Director controls the contours of *inter partes* review and holds the power to bind APJs to his own policy interpretations.[57] The Federal Circuit fails to recognize the weight of supervisory power held by the Director. It is nonsensical to lament a lack of review power, but thereafter dismiss the sheer breadth of policy discretion and supervision accorded to the Director, as the court does.[58] As such, the court correctly decided that the Director's powers "weigh in favor of a conclusion that APJs are inferior officers," but it should have accorded more dispositive weight with regard to that determination.[59]

C. Removal Limitations Provide a Necessary Level of Independence

The Federal Circuit exhibits a misunderstanding of key Supreme Court precedent regarding removal power. The general principle underlying congressional curtailment of removal power is that "Congress may, consistent with the Constitution, limit" removal authority depending on the nature of the office.[60] Similarly, in *Morrison* the Court determined that the for cause limitation on the Attorney General's power to remove the independent counsel was permissible.[61] In other words, modest limitations on removability have traditionally been maintained as they pertain to executive branch officers.

The court pontificates about the fact that the Director's "only actual removal authority" is subject to a for cause limitation.[62] In waxing-poetic, the court fails to comprehend the purpose of removal limitations. The

55. *Id.*
56. *Id.* at 1332.
57. *Id.* at 1331.
58. *See supra* Part II.A.
59. *Arthrex*, 941 F.3d at 1332.
60. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 516 (2010) (Breyer, J., dissenting). *See also* Seila Law v. CFPB, 140 S. Ct. 2183, 2227 (2020) (Kagan, J., concurring in part and dissenting in part).
61. Morrison v. Olson, 487 U.S. 654, 663 (1988).
62. *Arthrex*, 941 F.3d at 1333.

Supreme Court has long upheld similar limitations on removal in the interest of political independence for administrative agencies.[63] Moreover, the Federal Circuit misses the entire point of such independence: if the Director were able to remove the APJs at will, the APJs' independent authority to perform their statutory duties would be eviscerated. Subjecting the APJs to unfettered removal has the effect of transforming them into "dependent decisionmakers," subject to the whims of the Director.[64]

Modest limitations on removal have never been held as dispositive in a principal-versus-inferior officer inquiry. In *Morrison*, the Supreme Court surmised that the fact that the independent counsel *could* be removed by the Attorney General "indicate[d] that she is to some degree 'inferior' in rank and authority."[65] The key determinative factor in *Morrison* was that the statute at issue granted the Attorney General—a principal officer directly answerable to the President—the power to remove the independent counsel for cause.[66]

Here, the Federal Circuit determined that the for cause limitation on the Director's removal authority amounted to an insufficient level of Presidential control over the APJs.[67] In arriving at that determination, the court blatantly ignores the Supreme Court's decision in *Morrison*. Just as the Attorney General could only remove the independent counsel for cause, so too here the Director may only remove the APJs "for such cause as will promote the efficiency of the service."[68] Similar to the Attorney General, the Director is directly accountable to the President.[69] Therefore, under *Morrison* the removal limitation imposed by the statute on the Director does

63. *See Free Enterprise Fund*, 561 U.S. at 522 (Breyer, J., dissenting). *But see*, *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting). For an interesting argument that executive "Departments" provide a constitutional basis for agency independence, wholly removed from the vesting of "executive Power" in the President, see Blake Emerson, *The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller* 38 YALE J. REG. 90, 93 (2021).

64. *See* Lucia v. SEC, 138 S. Ct. 2044, 2060 (2018) (Breyer, J., dissenting). A new book makes special note of modern governance's reliance on knowledge. "Authority today is not just legal and political; it is also knowledge-based." STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE 6 (2021).

65. *Morrison*, 487 U.S. at 671.

66. *Free Enterprise Fund*, 561 U.S. at 495 (citing *Morrison*, 487 U.S. at 695–696).

67. *Arthrex*, 941 F.3d at 1334.

68. *Id.* at 1333 (quoting 5 U.S.C. § 7513(a)).

69. *Id.* at 1338. There is debate as to whether the President has to be able to remove the officer directly, or whether he has sufficient control by being able to remove the Attorney General at will. This was one of the Reagan Administration's chief arguments against the Ethics in Government Act of 1978 in *Morrison*. President Reagan declared that an officer exercising law enforcement authority "must be subject to executive branch appointment, review and removal." STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 377 (2008).

not prohibit the President from "ensur[ing] the laws are faithfully executed."[70]

The removal limitation does not resemble those at issue in *Free Enterprise Fund*. In that case, the Supreme Court struck down a statutory scheme that imposed dual for cause removal limitations.[71] There, the President could only remove the Commissioners of the SEC for cause, and the Commissioners could only remove Public Company Accounting Oversight Board members for cause.[72] Under that scheme, the President could not hold the SEC accountable because of the removal limitations.[73]

The removal restriction here is not nearly as odious as those at issue in *Free Enterprise Fund*. The key consideration in that case was that the President was unable to hold the SEC accountable for the decisions of the Board members due to the dual for cause limitations.[74] Here, the President may remove the Director or the Secretary of Commerce and thereby hold them accountable for the decisions of the APJs.[75] The separation of powers concerns posed by limitations in *Free Enterprise Fund* are therefore not present in *Arthrex*. Though the Federal Circuit cites *Free Enterprise Fund* for the proposition that the President cannot oversee the APJs, it fails to note the critical distinction in the removal limitations. The President may still oversee the APJs by removing the Director or Secretary of Commerce, something he could not do in *Free Enterprise Fund*.

CONCLUSION

The Federal Circuit incorrectly concluded that APJs are principal officers when they are protected by a for cause removal limitation. The court misunderstands the review power inquiry. An aggrieved party may appeal a decision of the APJs, and precedent has never held that automatic or unilateral review power is determinative in a principal officer analysis. The

70. *Arthrex*, 941 F.3d at 1335; U.S. CONST. art II, § 3. Professor McConnell argues that the Take Care Clause—not the Article II Vesting Clause—vests the President with the power to remove officers who exercise discretionary power, i.e., principal officers. He further reasons that locating the removal power in the Take Care Clause posits a narrower scope, since Congress may place for cause limitations on inferior officers, but not principal officers. While Professor McConnell would likely argue that labeling the independent counsel (and APJs) as inferior officers is incorrect, as a matter of precedent, the removal limitation at issue in *Arthrex* should be upheld, even under Professor McConnell's view. MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING 166 (2020). For the more common argument that the President is vested with the removal power through the Vesting Clause, see Steven G. Calabresi & Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 598 (1994).

71. *Free Enterprise Fund*, 561 U.S. at 492.

72. *Id.* at 477.

73. *Id.* at 496.

74. *Id.*

75. *Arthrex*, 941 F.3d at 1329.

court also fails to appreciate the significant supervisory authority wielded by the Director. The Director may issue binding policy interpretations to the APJs, as well as control the contours and procedure of *inter partes* review. The court should have accorded more weight to this power to control the APJs. Finally, the court blatantly misreads Supreme Court precedent with regard to removal power. For cause removal limitations are modest, and have consistently been upheld by the Supreme Court as a way to ensure agency independence while still allowing the President to maintain control over those agencies. The Federal Circuit's decision in *Arthrex* thus ignores precedent, and misunderstands the principle underlying removal limitations.

The Federal Circuit's misreading and misunderstanding of precedent should not be taken lightly.[76] Failure to properly apply precedent becomes especially egregious in separation of powers disputes, since the structure of the government provides crucial safeguards to individual liberty.[77] As such, the Supreme Court is faced with an opportunity to fix the Federal Circuit's mistake in *Arthrex*. From the dawn of the Republic, the Constitution has recognized a place for informed decision-making, free from political pressure.[78] Thus, holding officers such as APJs subject to at will removal seriously inhibits their ability to faithfully discharge their duties as independent decisionmakers. In a case about power such as this one, it is vital that courts acknowledge that the government is one of "separated institutions sharing powers."[79]

76. For an excellent discussion of the importance of precedent, see RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT (2017).

77. *See* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 5 (1967).

78. *See, e.g.*, JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012) (detailing the ignored history of administrative law in the early republic)

79. JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 2 (2017) (quoting RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN 29 (1990)).