

**19-1458 ARTHREX, INC. V. SMITH & NEPHEW, INC.**

DECISION BELOW: 941 F.3d 1320

LOWER COURT CASE NUMBER: 2018-2140

QUESTION PRESENTED:

The Appointments Clause requires principal officers to be appointed by the President with the advice and consent of the Senate, but permits inferior officers to be appointed by department heads. U.S. Const. art. II, §2. This case concerns the appointment of the Patent Office's administrative patent judges ("APJs"). APJs issue decisions that are not reviewable by any superior executive officer, and they are removable from office only for cause. Nonetheless, APJs are appointed by the Secretary of Commerce.

The Federal Circuit held that, given their tenure protection and the absence of Executive Branch review, APJs are principal officers who cannot be appointed by the Secretary. The court purported to remedy the constitutional defect by severing APJs' tenure protections. The court deemed that change sufficient to render APJs inferior officers even though APJs still issue decisions that are not reviewable by any principal executive officer.

The questions presented are:

1. Whether the court of appeals' severance remedy is consistent with congressional intent, where Congress has long considered tenure protections essential to secure the independence and impartiality of administrative judges.
2. Whether the court of appeals correctly held that the elimination of APJ tenure protections was sufficient to render APJs inferior officers, even though their decisions still are not reviewable by any principal executive officer.

CONSOLIDATED WITH 19-1934 AND 19-1952 FOR ONE HOUR ORAL ARGUMENT.  
LIMITED TO QUESTIONS 1 AND 2 AS SET FORTH IN THE JULY 22, 2020  
MEMORANDUM FOR THE UNITED STATES.

1. Whether, for purposes of the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, administrative patent judges of the U.S. Patent and Trademark Office are principal officers who must be appointed by the President with the Senate's advice and consent, or "inferior Officers" whose appointment Congress has permissibly vested in a department head.
2. Whether, if administrative patent judges are principal officers, the court of appeals properly cured any Appointments Clause defect in the current statutory scheme prospectively by severing the application of 5 U.S.C. 7513(a) to those judges.

CERT. GRANTED 10/13/2020