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NCLA Asks US Supreme Ct. to Let Congress Fix Appointments Clause Defect in Admin. Patent Judges

United States v. Arthrex, Inc., et al.; United States v. Polaris Innovations, Ltd. et al.
Smith & Nephew, Inc. and ArthroCare Corp. v. Arthrex, Inc. and United States

Washington, DC (December 31, 2020) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed an *amicus curiae* brief in the U.S. Supreme Court in the case of *United States v. Arthrex, Inc., et al.* At issue in the consolidated set of cases is whether administrative patent judges (APJs) can be appointed by the U.S. Secretary of Commerce or whether the Constitution requires the President to appoint these judges and the Senate to confirm them.

NCLA argues (with Arthrex) that APJs are "principal officers" of the United States. Hence, according to the Constitution's Appointments Clause, they must be appointed by the President with the advice and consent of the Senate. The Secretary of Commerce, as the head of a department, could appoint APJs if they were deemed "inferior officers." But under the America Invents Act of 2011, APJ decisions cannot be reviewed by a superior in the Executive Branch—only by other APJs. This fact means that APJs are "principal" officers. Therefore, the Appointments Clause requires appointment by the President himself, thereby ensuring presidential accountability for their performance in office.

The earlier decision in this case by the U.S. Court of Appeals for the Federal Circuit was poorly reasoned. Instead of recognizing that APJs must be presidentially appointed, the court sought to turn APJs into "inferior" officers by eliminating their tenure protections. But even after the Federal Circuit's re-write of the statute, APJs will continue to be "principal officers" because their rulings are still not subject to review by any Executive Branch superiors.

There are several possibilities to resolve this conundrum, such as permitting a principal officer like the Director of the Patent Office to review all decisions by APJs. But NCLA contends that it is not for the courts to pick a favored solution from among the constitutionally permissible options. Congress is responsible for drafting statutes, and it must make this choice instead. The Supreme Court has no more idea than the Federal Circuit did of how Congress would want to respond to a (correct) ruling that the current appointment scheme is unconstitutional.

NCLA takes no policy position in this case over the desirability of administrative review of patents by APJs. Its *amicus* brief focuses entirely on defending the Appointments Clause, which must be considered as an inviolable element in protecting separation-of-powers principles.

NCLA released the following statements:

"The Constitution's Appointments Clause serves important separation-of-powers principles by requiring that federal officers go through Senate confirmation if their adjudicative decisions are not supervised by a superior executive officer. That's true of the work of administrative patent judges, yet none has been appointed by the President or confirmed by the Senate."

— Richard Samp, Senior Litigation Counsel, NCLA

"The Federal Circuit, like King Solomon, attempted to split the baby here and left no one happy with its compromise decision. Within constitutional parameters, it's the legislative role of Congress—not the courts—to negotiate policy compromises about how an administrative scheme should function."

— Jared McClain, Litigation Counsel, NCLA

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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