

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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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 the
22 direct -- directly opposite to what the
23 Appointments Clause was designed to do, which is
24 transparency and make it clear who's
25 responsible.

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

5 Why isn't that true?

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

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

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

25 And as I said in my opening, the

1 director's power over rehearings is not plenary,
2 but it is substantial. And --

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas.

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

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

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

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

23 Things can slip through the cracks and
24 supervision can, nevertheless, be sufficient.
25 And that's essentially what we have here. Even

1 if you just look at after-the-fact review, the
2 director has substantial control.

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

11 JUSTICE THOMAS: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Breyer.

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

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

1 talking about PCAOB.

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

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

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

16 JUSTICE BREYER: Yeah.

17 MR. STEWART: -- the brief in this
18 case.

19 JUSTICE BREYER: Yeah, yeah.

20 MR. STEWART: There was a period --
21 there was a period when they were appointed by
22 the director and were thought to be employees.
23 Congress --

24 JUSTICE BREYER: Yeah.

25 MR. STEWART: -- changed the statute.

1 It -- it's not absolutely clear that that's so,
2 but the mechanism of appointment is sufficient
3 so long as they are inferior officers.

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

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

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

25 CHIEF JUSTICE ROBERTS: Justice Alito.

1 JUSTICE BREYER: Thank you.

2 JUSTICE ALITO: Mr. Stewart, suppose
3 Congress enacted a statute providing that a
4 deputy solicitor general shall have the final
5 and unreviewable authority to decide whether the
6 United States will take an appeal in any case
7 involving the interpretation or application of
8 one particular provision of one particular
9 regulatory statute.

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

19 Would that be constitutional?

20 MR. STEWART: I mean, I -- I think it
21 would be a close call. You would obviously be
22 looking at Morrison versus -- Morrison versus
23 Olson in order to determine -- to assess the
24 significance of the fact that the deputy's
25 authority was limited to a narrow category of

1 cases, and, certainly, the fact that the
2 solicitor general could promulgate substantive
3 standards that would bind the deputy in making
4 his decision might lead you to conclude that
5 that person is still an inferior officer rather
6 than a principal officer.

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

15 So that -- that authority, as I've
16 said, is not plenary but --

17 JUSTICE ALITO: Well, what if I change
18 my hypothetical so that the -- all of the
19 deputies collectively could review the decision
20 of the -- this one deputy? Would that -- would
21 that change it?

22 MR. STEWART: Well, if the solicitor
23 -- I -- I think that would change it somewhat.
24 I think it would change it more if you said the
25 solicitor general can sit on a panel that will

1 review the deputy's decision, and the solicitor
2 general may sit on a panel with two other
3 deputies and -- and theoretically could be
4 outvoted, but the solicitor general will not
5 only issue guidance before the fact but can sit
6 on the -- the board that determines whether the
7 deputy's decision will be overridden. That --
8 that would --

9 JUSTICE ALITO: All right. Thank you,
10 Mr. Stewart. Thanks.

11 CHIEF JUSTICE ROBERTS: Justice
12 Sotomayor.

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

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

1 the person who controls the outcome in the sense
2 of setting what the policies and procedures are.

3 Am I right that that's your baseline?

4 MR. STEWART: That -- that's certainly
5 part of it. And I would agree that we don't
6 have a bright-line test, but that's in part
7 because this Court has emphasized that there is
8 no exclusive criterion for determining inferior
9 versus principal officer status.

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

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

22 MR. STEWART: I -- I think the
23 advantage is that the government is so
24 multifarious, there's such an enormous number of
25 officers and employees within the Executive

1 Branch that any attempt to -- to formulate a
2 bright-line test would almost inevitably lead to
3 anomalous results in some category -- categories
4 of cases.

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

12 JUSTICE SOTOMAYOR: Thank you,
13 counsel.

14 CHIEF JUSTICE ROBERTS: Justice Kagan.

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

23 MR. STEWART: Well, I think,
24 typically, the rehearing petition filed by one
25 of the parties would be addressed to the panel,

1 and the panel could decide whether to rehear the
2 case if it had -- if it believed that it had
3 overlooked something.

4 But, because the director is a member
5 of the board and chooses the composition of the
6 panel, the board -- the director can always
7 decide in an individual case, no, here, the
8 rehearing panel will be different.

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

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

23 JUSTICE KAGAN: Right. I think I was
24 talking about that, that -- that presumptive
25 panel with those particular three members. I

1 mean, the director doesn't merely have full
2 authority over the other two, doesn't -- does
3 he? He doesn't -- the other two might disagree
4 with him.

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

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

19 The only thing that really can slip
20 through the cracks in the PTO setting is factual
21 determinations with which the director might
22 disagree but other board members might invoke,
23 might -- might --

24 JUSTICE KAGAN: Thank you,
25 Mr. Stewart.

1 CHIEF JUSTICE ROBERTS: Justice
2 Gorsuch.

3 JUSTICE GORSUCH: Good morning,
4 Mr. Stewart. Last term, the Court in Seila Law
5 said that executive officials must always remain
6 subject to the ongoing supervision and control
7 of the elected President through the President's
8 oversight chain of dependence is preserved so
9 that low -- the lowest officers, the middle
10 grade, and the highest all depend, as they
11 ought, on the President and the President on the
12 community.

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

20 MR. STEWART: Well, the -- the
21 President obviously appoints the director
22 subject to Senate confirmation, and the director
23 can be removed by the President. The director
24 can --

25 JUSTICE GORSUCH: I understand the

1 removal, but I -- my question was focused on
2 supervision and control language in Seila Law.

3 MR. STEWART: Well, the -- the -- the
4 President can issue kind of instructions to the
5 director and can terminate the director if the
6 -- the director doesn't comply. The director
7 has various supervisory mechanisms.

8 JUSTICE GORSUCH: Again, that's
9 removal, and my question was focused on
10 supervision. If the President disagrees with
11 the decision or one of his designees down the
12 chain of dependents disagrees with the decision,
13 there's no remedy that the President has,
14 correct?

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

17 JUSTICE GORSUCH: I'm talking about
18 the decision. I'm not talking about removal.

19 MR. STEWART: No, there is a -- there
20 is a right of appeals to the -- the Federal
21 Circuit. But I think --

22 JUSTICE GORSUCH: That's --

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

24 JUSTICE GORSUCH: -- that's a separate
25 branch of government. I'm -- again, I'm talking

1 within the Executive Branch, Mr. Stewart.
2 There's -- there's no chain of dependence
3 running to the President with respect to the
4 supervision of a particular decision, is there?

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

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

18 CHIEF JUSTICE ROBERTS: Justice
19 Kavanaugh.

20 JUSTICE KAVANAUGH: Thank you, Chief
21 Justice.

22 And good morning, Mr. Stewart. I'm
23 not sure this wolf comes as a wolf, Mr. Stewart,
24 but I still think it may be a wolf, as Justice
25 Scalia famously said, and he said, in those

1 cases, it can be discerned by careful and
2 perceptive analysis.

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

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

23 So, you know, if Congress is going to
24 do that, they can eliminate agency review and
25 prevent removal at will, then it's easy to make

1 these AL -- APJs presidentially appointed and
2 Senate-confirmed. They haven't done that.

3 Where -- where in that analysis have
4 things -- has that analysis gone wrong?

5 MR. STEWART: I'd just -- the two or
6 three things I would say are, first, it isn't
7 unusual for administrative adjudicators to be
8 appointed in the manner that's appropriate for
9 inferior officers. Indeed, I think that --

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

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

24 And, in addition, the director has
25 substantial authority to instruct the judges as

1 to matters of law, as to the director's own
2 interpretation of the patent laws, and can
3 insist that the judges comply with that, those
4 instructions.

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

13 JUSTICE KAVANAUGH: Thank you,
14 Mr. Stewart.

15 CHIEF JUSTICE ROBERTS: Justice
16 Barrett.

17 JUSTICE BARRETT: Good morning,
18 Mr. Stewart. On page 38 of your brief, you talk
19 about the strength of the removal power, and you
20 say that because there's an efficiency of
21 service standard applicable here and because the
22 director can promulgate regulations, the
23 violation of which might be cause for firing,
24 that those are ways in which the director can
25 exercise some back-end control of the APJs with

1 whom he's not happy with their performance.

2 But isn't it the case, you know, as
3 Arthrex points out, that APJs get the protection
4 of the MSPB, which means that, at the end of the
5 day, the director is actually not the official
6 in the Executive Branch that has the last word
7 on the continuation in service?

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

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

24 MR. STEWART: There are --

25 JUSTICE BARRETT: Or benched with pay?

1 MR. STEWART: -- two things that could
2 be done. First, they could be assigned tasks
3 such as rulemaking, training other employees,
4 and APJs do sometimes perform those tasks.

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

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

22 MR. STEWART: Yes, I mean, especially
23 if the director thought the problem with these
24 officials is that in inter partes reviews, that
25 you're not being sufficiently compliant with the

1 director's instructions.

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

10 CHIEF JUSTICE ROBERTS: A minute to --

11 JUSTICE BARRETT: Thank you,
12 Mr. Stewart.

13 CHIEF JUSTICE ROBERTS: -- a minute to
14 wrap up, Mr. Stewart.

15 MR. STEWART: Thank you, Mr. Chief
16 Justice.

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

23 The director has a power that the
24 Judge Advocate -- neither the Judge Advocate
25 General nor the Court of Appeals for the Armed

1 Forces had in Edmond, namely, the -- the ability
2 to issue binding instructions that will provide
3 rules of decision for administrative patent
4 judges as they decide cases.

5 Thank you, Mr. Chief Justice.

6 CHIEF JUSTICE ROBERTS: Mr. Perry.

7 ORAL ARGUMENT OF MARK A. PERRY

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

9 MR. PERRY: Mr. Chief Justice, and may
10 it please the Court:

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

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

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

1 board decision.

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

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

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

1 everything is -- is all right.

2 I mean, it -- it -- it really doesn't
3 sound like any kind of adjudication that we
4 would accept, you know, in a system
5 characterized by due process.

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

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

19 CHIEF JUSTICE ROBERTS: Justice
20 Thomas.

21 JUSTICE THOMAS: Thank you, Mr. Chief
22 Justice.

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

1 circumstances.

2 MR. PERRY: Justice Thomas, the --
3 the -- the principal officers sit at the right
4 hand of the President. They -- the only ones
5 this Court has recognized are the ambassadors
6 and the cabinet officers, and the heads of
7 agencies --

8 JUSTICE THOMAS: Yes.

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

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

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

1 MR. PERRY: Your Honor, the -- the
2 ultimate test is whether the President and his
3 direct reports remain accountable for the
4 operations of the agency. So, if the Congress
5 were to give total free reign to a -- to a
6 sleeper agent embedded within the agency, that
7 might be a problem.

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

15 JUSTICE THOMAS: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Breyer.

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

1 really seems pretty unreviewable?

2 MR. PERRY: Well, Your Honor, many
3 executive officials, of course, have essentially
4 unreviewable authority over narrow things.
5 AUSAs, for example, get to make on-the-call
6 decisions every day in court.

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

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

23 JUSTICE BREYER: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice Alito.

25 JUSTICE ALITO: Mr. Perry, your brief

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

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

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

24 He does not control how many and which
25 APJs rehear a case. He does not decide whether

1 to dismiss an entire APR proceeding rather than
2 allow a panel's decision to become final.

3 Where -- where along that line did --
4 did we cross the Rubicon?

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

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

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

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

1 JUSTICE ALITO: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Sotomayor.

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

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

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

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

1 make those mistakes, preserves both the
2 political accountability and avoids those due
3 process-type problems that may arise in
4 individual circumstances.

5 That is the essence of supervision,
6 which is carried out every day at the PTAB and
7 in the Patent Office.

8 JUSTICE SOTOMAYOR: Thank you,
9 counsel.

10 CHIEF JUSTICE ROBERTS: Justice Kagan.

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

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

20 MR. PERRY: It is the long and proud
21 history of the Patent Office, Justice Kagan.
22 The interference examiners, about whom Arthrex
23 never wants to talk, going back to 1836,
24 administrative agents have decided
25 interferences, conflicts between two private

1 parties over patentability, including priority
2 date, the issue in this case, and they have
3 always been appointed by the Secretary, in 1870,
4 in 1952, in 1975, in 2008. There's no question
5 that those issues have always been decided by
6 inferior officers, much of that time, since
7 1939, in the interference context, without
8 director review. And -- and that's what has
9 been carried forward into the modern tradition.

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

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

22 JUSTICE KAGAN: And has Congress ever
23 taken a look at this? Do we know that Congress
24 has considered this and -- and knows what's
25 going on? And has it ever reached a

1 determination on the Appointments Clause
2 question?

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

13 JUSTICE KAGAN: Thank you, Mr. Perry.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch.

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

1 MR. PERRY: Well, there is
2 reviewability in the agency head, but, Justice
3 Gorsuch, to directly answer your question, since
4 the APA was enacted in 1946, most agency
5 adjudications follow either the APA 556, 557
6 categories or a close proxy. And the Patent
7 Office doesn't.

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

14 JUSTICE GORSUCH: Is that a long way
15 of saying yes, that this area is, if not sui
16 generis, very, very unusual?

17 MR. PERRY: It is unusual, but it is
18 also well and historically founded and -- and,
19 until now, unchallenged.

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

1 process problems there?

2 MR. PERRY: We certainly think that
3 the PTAB structure and -- and the decisions are
4 subject to due process constraints, and that
5 would be a legitimate source of concern if those
6 kinds of issues arose. There is no such
7 question or allegation or concern in this case.

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

12 JUSTICE GORSUCH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Kavanaugh.

15 JUSTICE KAVANAUGH: Thank you, Chief
16 Justice.

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

22 Just to pick up on Justice Gorsuch,
23 this does seem, and I think you acknowledged, a
24 -- a significant departure from general
25 historical practice since the APA, which is a

1 yellow flag, if not a red flag.

2 And then your test to try to deal with
3 that seems to resurrect Morrison v. Olson's
4 test. I thought we'd gotten away from that in --
5 in Edmond. Justice Alito's questions pointed
6 that out.

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

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

1 and Senate advice and consent if you want a more
2 judicial model.

3 But, here, the -- this hybrid gives
4 enormous power to inferior officers, and it's
5 really just out of the norm. Your response?

6 MR. PERRY: Two responses, Justice
7 Kavanaugh.

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

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

25 The Congress has made a different

1 determination here, but it is absolutely
2 consistent with the dictates of the Appointments
3 Clause.

4 JUSTICE KAVANAUGH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett.

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

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

18 You know, so we could, if we decided
19 that it was unconstitutional, perhaps make all
20 of the APJs subject to -- say they're principal
21 officers, and so they have to be subject to
22 presidential appointment, senatorial
23 confirmation. We could say, listen, we're going
24 to strike the provision in the statute that says
25 only the PTAB may grant rehearings so that the

1 director has that authority. We could make them
2 maybe at-will employees, so they're removable at
3 the discretion of the director without having to
4 go through the full process that we discussed
5 before.

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

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

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

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

25 And it's certainly not where Arthrex

1 has identified it, which is to take down this
2 whole system. You know, they don't actually
3 want presidential confirmation. They don't
4 actually want director review. What they want
5 is for the Court to -- to blow up the whole
6 thing because of a structural problem that,
7 again, not to fight the hypothetical, we think
8 doesn't exist.

9 JUSTICE BARRETT: Thank you.

10 CHIEF JUSTICE ROBERTS: A minute to
11 wrap up, Mr. Perry.

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

18 The APJs here are three steps away
19 from the President. The chain of command runs
20 through the Secretary of Commerce and the PTO
21 Director.

22 This Court has consistently recognized
23 subordinate officials in general and
24 administrative adjudicators in particular to be
25 inferior officers. APJs carry out policy. They

1 do not make it. Findings like these have been
2 made by inferior officers since the Patent
3 Office was created, and APJs carry on that
4 tradition. They are inferior officers.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. Lamken.

9 ORAL ARGUMENT OF JEFFREY A. LAMKEN
10 ON BEHALF OF ARTHREX, INC.

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

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

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

1 choice.

2 But the principal is not accountable
3 if the answer is I have no authority. Congress
4 made my supposed underlings the final word.
5 Punishing APJs for decisions or guidance to
6 prevent future error doesn't undo decisions
7 already made. For parties, the decision remains
8 the executive's final word.

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

22 How to fix the statute is for
23 Congress. Solutions point in the opposite
24 direction. Congress might want APJs to be
25 presidentially appointed and Senate-confirmed as

1 examiners-in-chief were for 114 years. Congress
2 might want to grant the director express
3 authority to read board panel decisions. That's
4 how the Congress fixed the problem for the
5 Trademark Trial and Appeals Board, the TTAB,
6 last year.

7 But this Court can't pencil in those
8 solutions. It's more respectful of Congress to
9 allow Congress to choose how to structure the
10 agency.

11 I, of course, welcome the Court's
12 questions.

13 CHIEF JUSTICE ROBERTS: Thank you, Mr.
14 Lamken.

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

1 are at stake, but, at the same time, in terms of
2 basic patent rules and approaches and guidance,
3 you do want them to have that responsibility.

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

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

13 Allowing unaccountable officers to
14 decide those cases finally, stripping any
15 accountable principal of authority to overturn
16 them, defeats that structural protection.

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

24 This, by contrast, comes up with a
25 situation where you really -- it doesn't make

1 sense because you really can't be an inferior
2 officer. You cannot be an inferior adjudicator
3 when there's no superior who can review any of
4 your decisions ever.

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

12 MR. LAMKEN: A regulation or -- or
13 punishment of the APJ after the fact simply
14 doesn't change the fact that the APJ's decision
15 is the final word in the case, the final word of
16 the executive.

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

23 The principal office -- officer's
24 response is, I have no authority to overturn
25 those bad decisions, Congress stripped me of

1 that power. That's the opposite of
2 accountability. It's the nature of adjudication
3 that you decide individual cases. If we're
4 going to have accountability in adjudication, it
5 has to be accountability for individual cases.

6 Structural protections like these
7 protect individual liberty, so they have to
8 apply in individual cases.

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

14 Hundreds and hundreds of
15 administrative hearing examiners, as at least
16 they used to be called, making these sorts of
17 decisions, the notion of meaningful review of
18 each one seems to me to be fanciful.

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

1 accountable for that decision.

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

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas.

8 JUSTICE THOMAS: Mr. Lamken, why does
9 that accountability matter in this case? Are
10 you saying that you would actually get a better
11 decision from the director?

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

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

1 JUSTICE THOMAS: So how much review
2 are you talking about? Is it -- can it be just
3 pro forma review? Rubber stamp review? How
4 much review are you talking about to address
5 your concerns?

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

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

22 But what you can't have is what we
23 have here, which is not only can you not remove
24 the lower -- the supposedly lower officers, but
25 the director simply does not have authority to

1 overturn their decisions no matter how
2 vehemently he may disagree with -- he may
3 disagree with them.

4 In fact, he, at most, in any rehearing
5 sits on a panel of two -- three, where he is
6 outnumbered two to one by other inferior
7 officers.

8 JUSTICE THOMAS: So, if I understand
9 you, if Congress amended the relevant provision
10 and gave discretion to the director, you -- that
11 would solve your problem?

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

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

25 The only person that would --

1 JUSTICE THOMAS: Well, let me ask you
2 one more question then. The -- assuming that
3 Congress addresses the problem by providing the
4 director with discretion, could the director
5 then delegate that authority to the APJs and the
6 various structures within the organization to
7 basically the way it exists now by statute, but
8 the -- the director accomplishes that by
9 delegation? Would that be okay?

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

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

20 MR. LAMKEN: Well, it wouldn't be the
21 exact same posture, Your Honor, because, if it's
22 by delegation, he could always withdraw that
23 delegation. If it's by delegation, he is
24 accountable for having done the delegation. He
25 cannot point his finger at Congress and say:

1 Congress deprived me of the power to overturn
2 that decision. It would be his choice to not
3 review the decision, his choice to delegate, his
4 choice for which he is accountable to the
5 President and the people of the United States.

6 JUSTICE THOMAS: Thank you.

7 MR. LAMKEN: What's missing --

8 CHIEF JUSTICE ROBERTS: Justice
9 Breyer.

10 JUSTICE BREYER: But following up on
11 what Justice Thomas says, I mean, I don't -- why
12 is this an unusual matter of delegation? I
13 mean, after all, the government is filled with
14 all kinds of different people.

15 Doctors in practice may have final
16 authority to decide if the Veterans
17 Administration, whether you're on your right day
18 for an appointment. Sergeants will decide what
19 hill to take in the Army.

20 Inspectors general may decide who is a
21 whistleblower and have absolutely unreviewable
22 authority to send something over to Congress to
23 say what that whistleblower said. There are
24 many shapes and sizes.

25 And some -- and Congress, I mean,

1 you're saying Congress can't restrict their
2 authority at all, no matter what the shape and
3 what the size? Or can they do it sometimes and
4 not do it other times? And if so, when? I
5 mean, they're just pretty complicated.

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

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

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

15 JUSTICE BREYER: Oh.

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

21 JUSTICE BREYER: True, but --

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

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

1 letter with a whistleblower?

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

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

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

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

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

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

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

20 JUSTICE BREYER: -- now we've got --
21 you'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 denial of summary judgment. What nature of
8 the authority delegated, what's the nature of
9 the job, what's the distance from the president,
10 and it all comes under the rubric policy.

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

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

1 decisions.

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

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

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

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

22 CHIEF JUSTICE ROBERTS: Justice Alito.

23 JUSTICE ALITO: Mr. Lamken, let's
24 assume that we agree with you that this current
25 scheme violates the Appointments Clause. You

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

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

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

18 Accordingly, the IPR really should be
19 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 -- 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 reviewed by the director, is a sort of
7 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 the form of relief;
16 is it not?

17 MR. LAMKEN: Yes, yes. And it is the
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 other
9 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: Thank you --

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

17 JUSTICE ALITO: Thank you, Mr. Lamken.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor.

20 JUSTICE SOTOMAYOR: Counsel, I find it
21 odd -- not odd to protect Congress's
22 prerogative, but it's nothing that we do will
23 tie Congress's hand. And one thing we do know
24 is they can change anything we do as a temporary
25 remedy, assuming we were to rule in your favor.

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

12 Yet, that's the way we proceeded. The
13 history also shows that early statutes gave
14 non-principal officers the power to make final
15 adjudicatory decisions on behalf of the
16 executive.

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

23 I personally read this history as
24 suggesting is that principal officers were
25 intended to be policymakers, and individuals who

1 merely adjudicated claims based on set policies
2 were not principal officers.

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

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

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

18 MR. LAMKEN: Well, Your Honor, I think
19 the short answer is, if the director has no
20 authority to over -- overturn it, then the
21 director isn't responsible for it.

22 It's not his fault. And I think that
23 in terms of --

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

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

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

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

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

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

23 JUSTICE SOTOMAYOR: Counsel --

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

1 JUSTICE SOTOMAYOR: -- just one last
2 point. I just ignore the history under your
3 view, and --

4 MR. LAMKEN: No.

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

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

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

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

22 CHIEF JUSTICE ROBERTS: Justice Kagan.

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

25 JUSTICE KAGAN: Mr. Lamken, suppose

1 that there was review by the director in this
2 case, but the review was under a clear error
3 standard. Would that be enough?

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

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

11 MR. LAMKEN: I think, Your Honor, at
12 some point, where the authority of the director
13 is so cut off that he is not able to say with
14 any accountability that the final decision of
15 the APJ represents the views of the United
16 States, that this is a decision that he is
17 willing to stand behind as the word of the PTO
18 --

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

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

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

24 In Edmond, as you said -- and this is
25 why you said a clear error standard would have

1 to suffice -- the standard was is there
2 competent evidence in the record.

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

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

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

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

25 JUSTICE KAGAN: Well, but with --

1 MR. LAMKEN: But the one --

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

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

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

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

1 into the mix and needs to be considered along
2 with all the other evidence of -- of -- of
3 control that the agency head has.

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

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

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

19 JUSTICE KAGAN: If we're being --

20 MR. LAMKEN: That wouldn't --

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

1 MR. LAMKEN: No, Your Honor, I don't
2 think so, because, you know, for example, he
3 cannot conceivably anticipate every conceivable
4 factual scenario, every conceivable distinction,
5 every single thing that an -- an adjudicator
6 might come up with along the way.

7 JUSTICE KAGAN: Thank you, Mr. Lamken.

8 MR. LAMKEN: Just --

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

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

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

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

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

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

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

21 Why -- why isn't that sufficient?

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

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

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

13 MR. LAMKEN: So any --

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

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

21 MR. LAMKEN: So, Your Honor --

22 JUSTICE GORSUCH: Would that solve the
23 problem.

24 MR. LAMKEN: Right. I think, you
25 know, Congress could rewrite the statute that

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

8 JUSTICE GORSUCH: Are there other --

9 MR. LAMKEN: Congress --

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

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

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

25 But, ultimately, the problem is

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

9 JUSTICE GORSUCH: Well, one --

10 MR. LAMKEN: But that's --

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

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

1 750 of these IPRs currently pending,
2 approximately, which is a little more than three
3 per IPJ. Congress could readily make it
4 possible for these to be refiled if it chose in
5 a new and constitutional system.

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

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

17 JUSTICE GORSUCH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Kavanaugh.

20 JUSTICE KAVANAUGH: Thank you, Chief
21 Justice.

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

25 First, following up on the Chief's

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

9 You want to preserve that, correct?

10 MR. LAMKEN: That's exactly right.

11 And it was also that type of solution that
12 persisted for hundreds of years in -- with
13 respect to initial examinations and with -- with
14 respect to interferences as well --

15 JUSTICE KAVANAUGH: Okay. Here --

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

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

1 MR. LAMKEN: That's right. If -- if
2 history means anything, this is an outlier.
3 It's an aberration and an unconstitutional one
4 at that.

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

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

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

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

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

6 Do you have any different
7 understanding of that?

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

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

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

24 JUSTICE KAVANAUGH: And in Edmond --

25 MR. LAMKEN: And that's in the

1 Executive Branch.

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

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

12 JUSTICE KAVANAUGH: Let me --

13 MR. LAMKEN: The absence of review.

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

1 Isn't the nature of the constitutional
2 problem here the lack of director review, which
3 would mean us saying 6(c) is the constitutional
4 problem?

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

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

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Barrett.

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

24 So, on pages 56 and 57 of your brief,
25 you cite Sorrell and Bowsher and Free

1 Enterprise, and you cite them all for the -- the
2 proposition that if there are multiple ways to
3 cure a constitutional problem in a statutory
4 scheme, then the judiciary ought not be
5 blue-penciling it.

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

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

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

23 JUSTICE BARRETT: Well, no, no, no,
24 counsel, I -- I understand that we did that in
25 Sorrell, but my question is, have we ever done

1 what we didn't do in Sorrell?

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

3 JUSTICE BARRETT: Yes --

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

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

17 MR. LAMKEN: Well, the Court could
18 just as easily say the locus of the
19 constitutional problem is the fact that these
20 officers are not appointed by the President and
21 Senate-confirmed.

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

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

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

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

25 JUSTICE BARRETT: Okay, Mr. Lamken.

1 MR. LAMKEN: It is --

2 JUSTICE BARRETT: Let me -- let me
3 pivot to the Appointments Clause issue. So
4 Justice Kagan was pointing out there are many
5 way in which we would say that APJs are
6 subordinate to the director, and it seems to me
7 that one way to look at this case is to say that
8 at a 10,000-foot level, if you look at front-end
9 controls, you know, if you look at hiring and --
10 and firing and the ability of the director to
11 set policy that the APJs must follow, in many
12 respects, they're inferior officers, and we
13 might say that Congress has given them this one
14 authority, this case-specific review authority,
15 that is one that is inconsistent with the
16 inferior officer role, but it does -- it does
17 seem odd, doesn't it, to say that they are
18 principal officers because they exercise this
19 one piece of authority that seems to go beyond
20 what an inferior officer can do?

21 MR. LAMKEN: Well, that, Your Honor,
22 is Freytag. Freytag held that it may well be
23 that a single officer has many responsibilities
24 to those of inferior officers, but if that
25 officer has authority that goes beyond that for

1 an inferior officer, if the officer is the final
2 decision maker for the Executive Branch where
3 no -- he has no superior in that context, that
4 officer is then a principal officer for all
5 purposes and cannot continue in that office
6 absent a proper appointment. That is --

7 JUSTICE BARRETT: Thank you, Mr.
8 Lamken.

9 CHIEF JUSTICE ROBERTS: A minute to
10 wrap up, Mr. Lamken.

11 MR. LAMKEN: Certainly. Through
12 adjudicators to be officers and inferior
13 officers, they have to have a superior who can
14 overrule their decisions before they become the
15 final word of the Executive Branch.

16 Because APJs don't have that superior,
17 they cannot be appointed as inferior officers.
18 The current IPR regime is, as a result,
19 unconstitutional. I know that Mr. Perry pointed
20 to Section 318(b) and the fact that the director
21 does the final action, but Section 318(b) points
22 out that, in fact, the director is made
23 subordinate to the APJs because it says that the
24 director shall issue and publish the certificate
25 canceling any claim if the Board finds the

1 patents unpatentable.

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

8 Congress might want them to be Senate
9 confirmed, as they were -- as examiners-in-chief
10 were -- have been for 114 years or they might
11 want to subordinate them to the director as
12 Congress ordered for -- as Congress provided for
13 trademark judges last year.

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

21 The Court should hold the IPR regime
22 unconstitutionally constituted. The IPR
23 proceedings against Arthrex, therefore, cannot
24 continue and the IPR should be dismissed. Thank
25 you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Rebuttal, Mr. Stewart?

4 REBUTTAL ARGUMENT OF MALCOLM L. STEWART
5 ON BEHALF OF THE UNITED STATES

6 MR. STEWART: Thank you, Mr. Chief
7 Justice.

8 Mr. Lamken referred to this Court's
9 ability to supervise lower courts by reviewing
10 their judgments, but the principal means by
11 which this Court supervises the lower courts is
12 not by affirming or reversing a few dozen lower
13 court judgment -- judgments every year.

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

21 And -- and similarly, in this case,
22 it's important not to ignore the front-end
23 mechanisms that are available to the director to
24 influence the outcome of Board decisions. That
25 -- that's so both because they are the most

1 practically efficacious means of using the
2 director's resources, and because these are the
3 means that are most often characteristic of the
4 exercise of supervisory power.

5 But, second, Mr. Lamken said that the
6 director can't be held accountable if the Board
7 issues a decision that people believe are wrong
8 -- is wrong, and that -- that's incorrect. The
9 losing party in an IPR can always ask the
10 director to convene a new panel to grant
11 rehearing and to put the director himself on
12 that panel.

13 And if the director declines to take
14 that step, he can be held accountable for
15 allowing the panel decision to remain in place.

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

23 The only practical fear is that those
24 two people will disagree with the director's
25 view of the facts. And to that extent

1 accountability is limited.

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

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

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

24 Mr. Lamken attempts to confine the
25 rule he is advocating to adjudicative officials,

1 but there's really no principal basis for
2 striking that limitation. Edmond makes clear
3 that administrative adjudicators are subject to
4 the same Appointments Clause principles as other
5 other federal officers. Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel. The case is submitted.

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

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