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In NCLA *Amicus* Win, Supreme Court Rules Admin. Patent Judges Are Unconstitutionally Appointed

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

Washington, DC (June 21, 2021) – The New Civil Liberties Alliance is celebrating an *amicus* win against the Administrative State in the U.S. Supreme Court case *United States v. Arthrex, Inc.* A divided Supreme Court on Monday vacated an earlier decision in this case by the U.S. Court of Appeals for the Federal Circuit and held that administrative patent judges (APJs) were not appointed to their positions in the manner Article II of the Constitution requires. Justice Gorsuch [quoted](#) NCLA’s [amicus brief](#) in his concurring opinion to demonstrate that Congress likely disapproved of the remedy devised by the majority. NCLA argued (with Arthrex) that APJs are “principal officers” of the United States. Hence, according to the Constitution’s Appointments Clause, they must be appointed by the President with the advice and consent of the Senate.

The United States argued that APJs are mere “inferior” officers of the United States because they are closely supervised by the Director of the Patent and Trademark Office (PTO) and thus need not be appointed by the President. The Court rejected that argument, agreeing with NCLA that a federal official is a principal officer when, as here, their decisions are not subject to review by anyone else within the Executive Branch. The Court explained that requiring principal officers to be appointed by the President with the advice and consent of the Senate ensures direct accountability of elected officials for the actions of Executive Branch employees.

In 2011, the America Invents Act (AIA) shifted adjudication of important property rights from the judiciary to bureaucrats not directly answerable to elected officials. Today’s decision restores accountability and oversight to the Patent Trial and Appeal Board (PTAB) and re-affirms that Article II of the Constitution grants the President sole authority to direct Executive Branch operations.

The Court fixed the constitutional problem by striking a provision of the law that barred the Director of PTO from reviewing decisions issued by APJs. By striking that portion of the AIA, the Court “solved” the problem, as APJs are no longer principal officers because they no longer possess unreviewable authority to invalidate patents.

NCLA released the following statements:

“Today’s decision affirms important separation-of-powers principles imbedded in the Constitution. Article II’s Appointments Clause requires that principal officers of the United States must be appointed by the President with the advice and consent of the Senate. The Court properly held that because patent law grants Administrative Patent Judges unreviewable authority to invalidate patents, they are “principal officers”—and thus the law violated the Appointments Clause by circumventing the advice-and-consent requirement.”

— **Rich Samp, Senior Litigation Counsel, NCLA**

“In today’s decision, the Court underlines once again that Congress cannot empower inferior federal officers to make significant decisions that bind the Executive Branch while also shielding those decisions—and those

officers—from review. NCLA is pleased that the Court has taken another step toward making executive officials more accountable to the President and the people.”

— **Jared McClain, Litigation Counsel, NCLA**

For more information visit the case page [here](#).

ABOUT NCLA

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

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