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The Potential Impact of *Arthrex* on the TTAB and ITC

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Over a year ago, in late October 2019, the U.S. Court of Appeals for the Federal Circuit ruled in *Arthrex, Inc. v. Smith & Nephew, Inc.* that the Patent Trial and Appeal Board's (PTAB's) administrative patent judges (APJs) who oversee *inter partes* review proceedings hold office in violation of the Appointments Clause of the U.S. Constitution.² The clause requires that "Officers of the United States" be appointed by the President "with the advice and consent of the Senate."³ An exception is made for "inferior officers," which may be appointed without senate oversight and by either the President, courts of law, or heads of departments, as chosen by Congress.⁴ The PTAB APJs are appointed as if they were inferior officers;⁵ however, in *Arthrex*, the Federal Circuit held that the PTAB's APJs are in fact *principal* officers due to "[t]he lack of any presidentially-appointed officer who can review, vacate, or correct [their] decisions" and the Secretary's "limited removal power."⁶ On October 13, 2020, the U.S. Supreme Court granted *certiorari* in *Arthrex* and will now consider whether the PTAB's APJs were unconstitutionally appointed.⁷

The broader application of *Arthrex* could call into question the appointments of administrative law judges across many federal agencies. The purpose of this article is to review the appointment process, oversight, and responsibilities of other IP tribunals—including the Trademark Trial and Appeal Board (TTAB) and the U.S. International Trade Commission (ITC)—and consider the implications of *Arthrex*, if any, on their constitutionality.

I. The Trademark Trial and Appeal Board of the USPTO

The United States Patent and Trademark Office (PTO) is an executive agency within the Department of Commerce.⁸ Congress vested "[t]he powers and duties" of the PTO in its Director (also named the Under Secretary of Commerce for Intellectual Property), who is presidentially-appointed and Senate-confirmed.⁹ The Director is responsible for "providing policy direction and management supervision for the Office and for the issuance of patents and the registration of trademarks," and establishing regulations governing the conduct of proceedings in the Office.¹⁰

The Deputy Director and two commissioners are appointed by the Secretary of Commerce.¹¹ The Deputy Director is vested with the authority to act in the capacity of the Director in the event of her absence or incapacity.¹² The Commissioner for Patents and the Commissioner for Trademarks serve as chief operating officers for the operations of the PTO relating to patents and trademarks, respectively.¹³

Two administrative tribunals exist within the PTO to adjudicate the different types of intellectual property matters encountered—the PTAB and the TTAB. *Arthrex* addresses the former, but some have questioned *Arthrex*'s impact on the TTAB.

The TTAB is an administrative tribunal within the PTO for adjudicating trademark matters¹⁴ and "include[s] the Director, Deputy Director of the United States Patent and Trademark Office, the Commissioner for Patents, the Commissioner for Trademarks, and administrative trademark judges [(ATJs)]."¹⁵ Each ATJ—there are currently 26—is appointed by the Secretary of Commerce in

consultation with the Director of the PTO.¹⁶ Similar to an APJ, an ATJ is hired through a competitive process, has a basic salary fixed by the Director, and can be terminated by the Secretary for cause.¹⁷

The TTAB determines, on appeal, a party's right to register a trademark with the federal government. It is responsible for reviewing appeals from decisions regarding trademark registration applications,¹⁸ as well as conducting four types of *inter partes* proceedings.¹⁹

The Director—pursuant to general authority to create “rules and regulations, not inconsistent with law” and oversee “the conduct of” TTAB proceedings—determines the composition of panels.²⁰ The proceedings are usually decided by three-judge panels who make decisions based on written administrative records, although parties can opt for an oral hearing.²¹ Typically, “one judge is assigned to read the testimony and examine the other evidence of record, discuss the case with the other judges, and then draft a decision and supporting opinion.”²²

A dissatisfied party can challenge the panel's decision by seeking reconsideration from the TTAB itself,²³ or by petitioning the Director to exercise his “supervisory authority.”²⁴ In *ex parte* appeals, the party may also petition the Director to reopen an application for further examination.²⁵ At the conclusion of any *inter partes* proceeding, the Director

may refuse to register the opposed mark, may cancel the registration, in whole or in part, may modify the application or registration by limiting the goods or services specified therein, may otherwise restrict or rectify with respect to the register the registration of a registered mark, may refuse to register any or all of several interfering marks, or may register the mark or marks for the person or persons entitled thereto, as the rights of the parties under this chapter may be established in the proceedings.²⁶

The TTAB reviews a few hundred cases each quarter.²⁷ Final decisions from the TTAB can be reviewed by either a U.S. district court or the Federal Circuit.²⁸

The PTO has taken the position that *Arthrex* does not impact the TTAB. For example, the PTO intervened in a Federal Circuit review of a TTAB determination where an *Arthrex*-based Appointments Clause challenge was made on appeal.²⁹ According to the Director: “This Court's decision in [*Arthrex*] is inapposite, because the Director has important tools for controlling administrative trademark judges that he does not have with respect to administrative patent judges.”³⁰ Specifically, “the Lanham Act provides the Director with a type of authority over administrative trademark judges that this Court

considered critically lacking in *Arthrex*: he may directly review and reverse their decisions.”³¹

After the certiorari grant in *Arthrex*, the Federal Circuit ordered *sua sponte* the postponement of oral argument and stayed the case pending the Supreme Court's decision.³²

II. The U.S. International Trade Commission

The ITC is an independent, quasi-judicial federal agency headed by six Commissioners and charged by Congress with administering certain trade laws.³³ The Commissioners are nominated by the President and confirmed by the Senate for terms of nine years, unless appointed to fill an unexpired term.³⁴ The ITC investigates and adjudicates certain unfair practices in import trade,³⁵ and makes determinations related to certain unfair trade practices, such as dumping and countervailing duties.³⁶

According to statute, the Chairman of the Commission has authority to “appoint and fix the compensation of such employees of the Commission as he deems necessary,” including Administrative Law Judges (ALJs) to adjudicate unfair trade investigations.³⁷ Any such decision by the Chairman, however, is “subject to disapproval by a majority vote of all the commissioners in office.”³⁸ The Chairman of the Commission is also empowered to remove ALJs, subject to approval by a majority vote of the Commissioners.³⁹

The primary role of the ITC's ALJs is to conduct the trial phase of ITC investigations under 19 U.S.C. § 1337 of the Tariff Act of 1930 (section 337 investigations).⁴⁰ After the Commission institutes a section 337 investigation, the matter is referred to the ITC's Office of the Administrative Law Judges and is assigned to one of Office's six ALJs. In recent years, the ITC reports between 45 and 65 new section 337 investigations each year.⁴¹

Section 337 investigations include (1) investigations into the importation of articles that infringe a federally registered U.S. patent, trademark, copyright, or semiconductor mask work,⁴² and (2) investigations into unfair methods of competition and other acts when importing that may destroy or substantially injure a U.S. industry, prevent the establishment of a U.S. industry, or restrain or monopolize trade and commerce in the U.S.⁴³ The ALJ presides over the section 337 litigation, including discovery, motion practice, a trial-type evidentiary hearing, and post-hearing briefing. The ALJ then prepares a written decision called an Initial Determination (ID).

The Commission has the authority to review the ALJ's ID should it want.⁴⁴ If the Commission elects to review,

all issues are reviewed de novo.⁴⁵ Such review may be requested by a party filing a petition seeking Commission review.⁴⁶ Through a formal vote of the Commissioners, the Commission may (1) decline to review the ID in its entirety (in which case, the ID becomes the Final Determination (FD)), or (2) decide to review one or more substantive or procedural issues decided in the ID. If the Commission elects to review, it may either adopt, in whole or in part, or reverse all or part of the ID.⁴⁷ The Commission also may review an ID on its own initiative.⁴⁸

The ITC's FDs in section 337 investigations are appealable to the Federal Circuit.⁴⁹ Remedies ordered by the Commission under a section 337 investigation are also subject to review by the President on policy grounds for 60 days from their issuance.⁵⁰ The Office of the U.S. Trade Representative conducts this review on the President's behalf.⁵¹

In 2018, the Supreme Court held in *Lucia v. Sec. & Exch. Comm'n* that SEC ALJs were inferior officers (as opposed to merely employees) whose appointments must be made by

the Commission proper rather than by the SEC's staff.⁵² In response to *Lucia*, the Commissioners of the ITC, "out of an abundance of caution" voted affirmatively to ratify all previous appointments of then-functioning ITC APJs and voted affirmatively for APJ Cheney's original appointment.⁵³ Given this recent internal remedial action—and the established Article I-level review of ALJ determinations by the Commissioners—there appears to be less risk of Appointments Clause violations, including under *Arthrex* as presently understood.

III. Conclusion

It remains to be seen whether the TTAB and ITC ALJs will be impacted by the Supreme Court's determination in *Arthrex*. The factors that the Court chooses to consider in *Arthrex* could offer clues as to how the Justices would rule in a future case directed toward these key IP forums.

1. The authors are attorneys at the intellectual property firm of Finnegan, Henderson, Farabow, Garrett & Dunner LLP. This article is for informational purposes, is not intended to constitute legal advice, and may be considered advertising under applicable state laws. This article is only the opinion of the authors and is not attributable to Finnegan, Henderson, Farabow, Garrett & Dunner LLP, or the firm's clients.
2. *Arthrex, Inc. v. Smith & Nephew, Inc. (Arthrex I)*, 941 F.3d 1320, 1340 (Fed. Cir. 2019), cert. granted sub nom. United States v. Arthrex, Inc. (*Arthrex II*), No. 19-1434, 2020 WL 6037206 (U.S. Oct. 13, 2020).
3. U.S. CONST. art. II, § 2, cl. 2.
4. *Id.*
5. The APJs, of which there are now over 200, are "appointed by the Secretary, in consultation with the Director." 35 U.S.C. § 6(a). In practice, the PTO interviews APJ candidates, recommends desired candidates to the Director, and the Secretary of Commerce ultimately approves the candidates as judges.
6. *Arthrex I*, 941 F.3d at 1335.
7. *Arthrex II*, No. 19-1434, 2020 WL 6037206 (U.S. Oct. 13, 2020).
8. 35 U.S.C. § 1(a).
9. § 3(a)(1).
10. § 3(a)(2).
11. § 3(b).
12. § 3(b)(1).
13. § 3(b)(2).
14. 15 U.S.C. § 1067.
15. § 1067(b).
16. *Id.*
17. 35 U.S.C. § 3(b)(6); 5 U.S.C. § 7513(a).
18. 15 U.S.C. § 1070.
19. See § 1067; see also § 1052(d) (concurrent use); §§ 1062, 1063 (opposition); §§ 1066, 1067 (interference); §§ 1064, 1092 (cancellation).
20. § 1123; 35 U.S.C. § 2(b)(2)(A).
21. 37 C.F.R. §§ 2.129(a), 2.142(e)(1); Chief ATJ Gerard Rogers & ATJ Susan Hightower, *Trademark Trial and Appeal Board Celebrates 60 Years*, USPTO: DIRECTOR'S FORUM (Jan. 5, 2018), https://www.uspto.gov/blog/director/entry/trademark_trial_and_appeal_board.
22. TTAB Manual of Proc. 2020-06, § 803.
23. 37 CFR §§ 2.129(c), 2.144.
24. § 2.146.
25. § 2.142(g); see also § 2.84.
26. 15 U.S.C. § 1068.
27. TTAB Incoming Filings and Performance Measures for Decisions, USPTO, <https://www.uspto.gov/trademarks-application-process/appealing-trademark-decisions/ttab-incoming-filings-and-performance> (last visited Dec. 17, 2020).
28. 28 U.S.C. § 1295; 15 U.S.C. § 1071.
29. See Corrected Brief Filed for Intervenor Andrei Iancu at 13, *Piano Factory Group, Inc. v. Schiedmayer Celesta GmbH*, No. 20-1196 (Fed. Cir. July 8, 2020), ECF No. 40.
30. *Id.*
31. *Id.* at 46; see also *id.* at 47–50 (comparing 35 U.S.C. § 6(c) and § 318(b) with 15 U.S.C. §§ 1067–68 and § 1123 to conclude that, "[i]n contrast to the statutory scheme governing administrative patent judges, . . . the Lanham Act does not place any limitations on the Director's ability to singlehandedly review or reverse decisions made by administrative trademark judges").
32. See Sua Sponte Order at 2, *Piano Factory Group, Inc.*, No. 20-1196 (Fed. Cir. Oct. 26, 2020) (per curiam) ECF No. 68.
33. See United States International Trade Commission Year in Review: Fiscal Year 2020 7 (2020).
34. 19 U.S.C. § 1330(a), (b).
35. § 1337.
36. §§ 167–77.
37. § 1331(a)(1)(A)(1).
38. § 1331(a)(1)(C).
39. § 1331(a)(2)(A).
40. 19 C.F.R. § 210.3; 5 U.S.C. §§ 556–557; 19 C.F.R. § 210.3; 2020 Annual Report, 27.
41. Section 337 Statistics, USITC (Nov. 15, 2020), https://www.usitc.gov/intellectual_property/337_statistics_number_new_completed_and_active.htm.
42. 19 U.S.C. § 1337(a)(1)(B)–(E).
43. § 1337(a)(1)(A)(i)–(iii).
44. 19 C.F.R. § 210.42(h).
45. Certain Connecting Devices (Quick Clamps) at 12, Inv. No. 337-TA-587 (June 3, 2011) (Final) ("When the Commission determines to review an initial determination, its review is conducted de novo with respect to any issue under review . . ."); 19 C.F.R. § 210.45(c).
46. 19 C.F.R. § 210.43(a).
47. § 210.43(d); see, e.g., Certain Electrical Connectors at 2, Inv. No. 337-TA-1043 (Aug. 22, 2019) (Final) ("[T]he Commission has determined to affirm in part, modify in part, reverse in part, and take no position with respect to certain portions of the final ID's findings.").
48. § 210.44.
49. 19 U.S.C. § 1337(c).
50. § 1337(j).
51. Assignment of Certain Functions under Section 337 of the Tariff Act of 1930, 70 Fed. Reg. 43251 (July 26, 2005).
52. *Lucia v. Sec. & Exch. Comm'n*, 138 S. Ct. 2044, 2053–54 (2018) (holding that ALJs of the SEC were inferior officers whose appointments were to be made by SEC and not by the SEC's staff).
53. See Appointment of the Commission's Administrative Law Judges for Section 337 Investigations, 83 Fed. Reg. 45678, 45679 (Sept. 10, 2018).

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