

# Unconstitutionality of PTAB Judges Corrected by Federal Circuit Decision

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In a Halloween decision, the Federal Circuit issued its opinion in [Arthrex, Inc. v. Smith & Nephew, Inc. et al.](#), an appeal from IPR2017-00275. Without wading into the technical merits of the decision, the three judge panel of Judges Moore, Reyna, and Chen, issued a decision that, at first glance, sent tremors through those who practice before the PTAB in AIA-based post-grant review proceedings: finding the appointment of PTAB judges unconstitutional.

After the Supreme Court's decision in *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, held that *inter partes* reviews do not violate Article III or the Seventh Amendment of the constitution, many practitioners expected the constitutionality challenges to wane from favor. 138 S. Ct. 1365, 1379 (2018).

However, in the *Arthrex* appeal, the panel zeroed in on Arthrex's argument that "the appointment of the Board's Administrative Patent Judges ("APJs") by the Secretary of Commerce, as currently set forth in Title 35, violates the Appointments Clause, U.S. Const., art. II, § 2, cl. 2." *Arthrex, Inc. v. Smith & Nephew, Inc. et al.*, Appeal No. 2018-2140, slip op. at 2 (Fed. Cir. Oct. 31, 2019). The panel agreed, concluding that the as-written statute made the APJs of the PTAB "principle officers" subject to appointment by the president and confirmation by the Senate. *Id.*

In response, the panel concluded that "severing the portion of the Patent Act restricting removal of the APJs is sufficient to render the APJs inferior officers and remedy the constitutional appointment problem." *Id.* The technical merits of the hearing were remanded for rehearing by a new panel of APJs. *Id.*

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