RealClear Policy

Supreme Court Ignores a Loophole Used to Avoid Senate Confirmations

Thomas Berry

July 12, 2021

Last month in *U.S. v. Arthrex*, the Supreme Court held that there was a serious constitutional flaw in the organization of the Patent and Trademark Office (PTO). Although the Court's decision was ostensibly a win for political accountability, that victory will be hollow until the Court closes a loophole of its own creation.

Arthrex concerned a group of adjudicators called administrative patent judges (APJs). By statute, APJs had unreviewable authority to make key decisions: whether to cancel challenged patents. Once the APJs made their decisions, no one else in the executive branch could review or reverse them. Losing parties' only recourse was to appeal to the federal court system. Arthrex, a medical device company, was such a losing party. After one of its patents was cancelled by a panel of three APJs, Arthrex argued in federal court that this statutory scheme was unconstitutional.

The Supreme Court agreed with Arthrex. As the Court explained, APJs are neither nominated by the president nor confirmed by the Senate. Instead, they are appointed by the Secretary of Commerce. But the Constitution only permits cabinet secretaries to appoint "inferior" officers. And the APJs' unreviewable authority within the executive branch, the Court held, was incompatible with "inferior" status.

To remedy this constitutional violation, the Court took away the power of APJs to make unreviewable decisions and thereby demoted them to true "inferior" status. The Court modified the statutory scheme to give the Director of the PTO the authority to review all APJ decisions on patent cancellations. As explained in the plurality opinion by Chief Justice John Roberts that set out this remedy, "the exercise of executive power by inferior officers must at some level be subject to the direction and supervision of an officer nominated by the President and confirmed by the Senate." The PTO Director is a position normally filled by presidential nomination and Senate confirmation, so granting reviewing power to the PTO Director seemingly fit the bill.

But there's a twist hiding behind just a single word in Roberts' opinion. Roberts wrote that "the appropriate remedy is a remand to the Acting Director for him to" review the decision to cancel Arthrex's patent. The "Acting Director" that Roberts referred to is Drew Hirshfeld, the current leader of the PTO. But as implied by that crucial word "Acting," Hirshfeld was neither nominated by the president nor confirmed by the Senate as PTO director. In fact, he was not

even appointed by President Biden as acting director of the PTO under the "Vacancies Act," a law that allows the president to bypass Senate consent to fill vacant offices for a limited time.

Instead, as described on the PTO's website, Hirshfeld is merely "performing the functions and duties" of the PTO Director. That mouthful of words is a formulation that agencies frequently invoke to bypass the time limits of the Vacancies Act. By delegating all the powers of an office without the formal title, agencies can fill positions *indefinitely* without Senate consent. Hirshfeld's permanent job is the Commissioner for Patents, a position to which he was appointed by the Secretary of Commerce. And Hirshfeld is performing the functions of PTO Director pursuant to a delegation that was *also* presumably signed by the Secretary.

This is a tremendous irony for Arthrex and for those who hoped the Supreme Court's decision would bring real political accountability to agency decision-making. In theory, the Court vindicated Arthrex's argument that final review by APJs is unconstitutional so long as APJs are appointed by the Commerce Secretary. But after years of litigation, Arthrex's only relief is final review by someone else — Hirshfeld — who was *also* appointed by the Commerce Secretary.

Why didn't the Court acknowledge the obvious inconsistency between its remedy in theory — final review by a Senate-confirmed PTO Director — and its remedy in practice? The problem can be traced all the way back to 1898, when the Supreme Court issued a thinly reasoned opinion in a case called *U.S. v. Eaton*. In that case, the Court seemingly endorsed the constitutionality of serving without Senate consent in positions that would normally require Senate consent, so long as the service is "for a limited time, and under special and temporary conditions."

The problem is that the Court has never drawn the line as to just how long "special and temporary" service can last. Hirshfeld has now served for nearly six months, during which time President Biden has not even nominated an appointee for permanent PTO Director. Under Presidents Obama and Trump, some positions went years without being filled by Senate-confirmed appointees.

Such lengthy tenures have made acting officers virtually indistinguishable from their Senate-confirmed counterparts. *Eaton* has turned into an open-ended license for agencies to indefinitely avoid the accountability of Senate confirmation that the Constitution requires. As the empty remedy of *Arthrex* starkly demonstrates, the Supreme Court will eventually have to reconsider *Eaton* to bring the lofty ideals espoused in its opinions in line with today's realities of agency leadership. To achieve real political accountability, agency decisions must be reviewed by offices that require Senate confirmation in *fact*, not just in theory.

Thomas Berry is a research fellow in the Cato Institute's Robert A. Levy Center for Constitutional Studies and managing editor of the Cato Supreme Court Review.