# Essay

# Supervising Guantanamo Tribunals: Appointments Clause Challenges After *Arthrex*

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## Abstract

*Recent Supreme Court jurisprudence suggests courts may begin to play a greater role in scrutinizing congressional statutes that shield agency adjudicators from presidential control. In the context of patent adjudication, the Supreme Court held in* Arthrex *that administrative patent judges' decisions must be subject to agency-head review because even though the judges issued final decisions on behalf of the executive branch, those judges were not properly appointed under the Appointments Clause as principal officers. There are few remaining administrative adjudicators who issue final decisions that lack final agency-head review. The Convening Authority—the person who convenes military tribunals known as "military commissions" to try unlawful enemy combatants for violations of the law of war—is an outlier. Although the Convening Authority reports to and is removable by the Secretary of Defense, only some of the officer's decisions are reviewable by an executive tribunal.*

*This Essay examines this exceptional system of executive oversight in the aftermath of* Arthrex*. It argues that until there is certainty regarding the Convening Authority's officer status, defendants will continue to raise Appointments Clause challenges, causing additional setbacks for the military commissions that have already largely failed to secure convictions. Ultimately,*

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*this Essay recommends incorporating senatorial consent into the appointment of the Convening Authority or providing for agency-head review in the Military Commissions Act in order to prevent future Appointments Clause challenges.*

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## Introduction

Shortly after the September 11 attacks, Majid Shoukat Khan traveled from Baltimore, Maryland—the city where he resided—to his native country of Pakistan.[1] In Pakistan, he agreed to be a suicide bomber in an al-Qaeda attempt to assassinate former Pakistani President Pervez Musharraf.[2] After that plan failed, Khan returned to the United States and continued to provide support to al-Qaeda.[3] Kahn

1 *See Majid Shoukat Khan*, Off. Mil. Comm'ns, https://www.mc.mil/Cases.aspx?caseType=omc&status=1&id=45 [https://perma.cc/E6JU-ASWV].

2 *See id.*

3 *See id.*

delivered $50,000 worth of al-Qaeda money to finance the 2003 bombing of the Indonesian Marriott Hotel that killed eleven people.[4] Khan was taken into Pakistani custody in March 2003, and he entered Central Intelligence Agency ("CIA") custody in May 2003.[5] He has been detained at Guantanamo Bay since 2006.[6] In February 2012, he pled guilty to conspiracy, providing material support for terrorism, murder in violation of the law of war, and attempted murder in violation of the law of war.[7]

In April 2021, Khan's lawyers reached a plea deal with the government.[8] Khan will face a reduced prison sentence, and in return, he will not invoke a landmark decision in his sentencing proceedings.[9] The landmark decision, issued by Military Commission Judge Colonel ("Col.") Douglas Watkins, would have allowed Khan to call witnesses to testify about his alleged torture in the CIA prison system, and the military judges trying the case could reduce his prison sentence as a remedy for that torture.[10] But under the plea deal, Khan agreed to give up the factfinding hearing where he could call CIA witnesses, and in return he could be released as early as 2022.[11] This plea deal was negotiated and approved by Col. Jeffrey Wood, the Convening Authority for military commissions.[12] By statute, Col. Wood's decision to grant Khan a reduced prison sentence cannot be reviewed by any other officer in the executive branch.[13]

Under Section 948h of the Military Commissions Act of 2006 ("MCA"), the Convening Authority is the official who selects the members of the military commissions to try unlawful enemy combat-

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4 *See id.*

5 *See* S. Rep. No. 113-288, at 89 n.497 (2014); *Majid Khan*, Rendition Project, https://www.therenditionproject.org.uk/prisoners/majid-khan.html [https://perma.cc/P9SS-47AP].

6 *See* Rendition Project, *supra* note 5.

7 Off. Mil. Comm'ns, *supra* note 1.

8 *See* Ruling on Defense Motion to Withdraw AE 033, Motion for Pretrial Punishment Credit, and to Vacate AE 033K, Ruling, United States v. Khan, No. AE 033R (Mil. Comm'ns Trial Judiciary Aug. 16, 2021), https://www.mc.mil/Portals/0/pdfs/Khan/Khan%20(AE033R(RULING)).pdf [https://perma.cc/8Q3F-5DYY].

9 *See id.* at 2; *see also* Carol Rosenberg & Julian E. Barnes, *Guantánamo Detainee Agrees to Drop Call for C.I.A. Testimony*, N.Y. Times (June 3, 2021), https://www.nytimes.com/2021/05/14/us/politics/guantanamo-detainee-cia-testimony.html [https://perma.cc/5FKA-FWRU].

10 *See* Ruling on Defense Motion for Pretrial Punishment Credit and Other Related Relief, United States v. Khan, No. AE 033K (Mil. Comm'ns Trial Judiciary June 4, 2020), https://www.mc.mil/Portals/0/pdfs/Khan/Khan%20(AE033K).pdf [https://perma.cc/HDK9-L27A].

11 Rosenberg & Barnes, *supra* note 9.

12 *Id.*

13 *See infra* Part III.

ants held at Guantanamo Bay.[14] Among other significant duties, the official's primary responsibility is convening the military commissions.[15] The Convening Authority also approves the charges that will be brought and can dismiss charges altogether.[16] Before the case is tried, the Convening Authority can negotiate and approve plea agreements.[17] After the proceedings, the Convening Authority can reduce the length of a prison sentence or overturn a guilty verdict altogether.[18]

Although the Secretary of Defense can act as the Convening Authority, under the MCA the Secretary can also appoint a civilian to act as the Convening Authority.[19] As a matter of practice, the Secretary has frequently opted to appoint a civilian to the role of Convening Authority.[20] It is possible this method of appointment is unconstitutional because it does not provide for senatorial consent. The Appointments Clause stipulates:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[21]

The Clause provides for two distinct methods of appointment based on whether the officer is principal or inferior.[22] Principal officers must be nominated by the President and confirmed by the Senate, but inferior officers can be appointed unilaterally by the President

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14 *See* 10 U.S.C. § 948h.

15 *See* 10 U.S.C. §§ 948h–948m.

16 10 U.S.C. § 950b.

17 10 U.S.C. § 949i.

18 10 U.S.C. § 950b.

19 10 U.S.C. § 948h.

20 *See* Petition for a Writ of Certiorari app. C at 87a–89a, Al Bahlul v. United States, 142 S. Ct. 621 (2021) (No. 21-339) (listing all persons appointed as the Convening Authority). The majority of the eleven individuals appointed to the post of Convening Authority were civilians prior to their appointment. *See, e.g.*, Al Bahlul v. United States, 967 F.3d 858, 864 (D.C. Cir. 2020); *Military Commission Personnel Announcement*, U.S. DEP'T OF DEF. (Mar. 18, 2015), https://www.defense.gov/News/Releases/Release/Article/605420/ [https://perma.cc/FS77-RF9F].

21 U.S. CONST. art. II, § 2, cl. 2.

22 According to the text of the Clause, there are two types of officers: "inferior Officers" and "Officers of the United States." *Id.* Because the appointment method stipulated for the "Officers of the United States" is more arduous, the Supreme Court refers to them as "principal officers." *See, e.g.*, Edmond v. United States, 520 U.S. 651, 659 (1997).

or agency heads. The text of the Clause, however, does not elaborate on how to delineate between the two types of officers.[23] It has been left to the Supreme Court to develop the doctrine on how to draw that line.[24] The distinction is not trivial in the context of agency adjudication, as a decision issued by an improperly appointed adjudicator could later be invalidated by an Article III court.[25]

Accordingly, whether the Convening Authority is a principal or inferior officer is an important question. Congress implicitly characterized the Convening Authority as an inferior officer by authorizing the Secretary of Defense to unilaterally appoint someone to the office in the MCA.[26] But the Convening Authority has the authority to issue a limited number of significant final decisions that bind the executive branch, which suggests a possible incompatibility with the inferior officer status.[27]

Previously, the U.S. Court of Appeals for the D.C. Circuit held that the Convening Authority is an inferior officer,[28] but the court's decision predated the Supreme Court's recent decision in *United States v. Arthrex*.[29] In *Arthrex*, the Court held that administrative patent judges ("APJs") appointed as inferior officers were acting as principal officers by issuing final decisions on behalf of the executive branch.[30] Although the Court considered three factors from the balancing test set forth in *Edmond v. United States*,[31] the Court clarified that the most important factor in *Edmond* was the officer's final decision-making authority.[32] The Court remedied the issue by making the APJs' decisions subject to agency-head review.[33] Some scholars view *Arthrex* as a "blockbuster" administrative law decision that shows the Court is increasingly willing to scrutinize congressional statutes that shield agency adjudicators from sufficient presidential control.[34] After

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23 *See* U.S. CONST. art. II, § 2, cl. 2.

24 *See, e.g.*, United States v. Arthrex, Inc., 141 S. Ct. 1970, 1978–86 (2021); *Edmond*, 520 U.S. at 658–66; Morrison v. Olson, 487 U.S. 654, 670–77 (1988).

25 *See, e.g.*, Arthrex, Inc. v. Smith & Nephew, Inc., 941 F.3d 1320, 1338–39 (Fed. Cir. 2019).

26 10 U.S.C. § 948h.

27 *See infra* Section III.A.

28 *See* Al Bahlul v. United States, 967 F.3d 858, 870 (D.C. Cir. 2020).

29 *Arthrex*, 141 S. Ct. at 1970.

30 *Id.* at 1978–86.

31 520 U.S. 651 (1997). In *Edmond*, the Court applied three factors to delineate between principal and inferior officers: (1) the reviewability of the officer's decisions, (2) the oversight of the officer by a superior, and (3) the ability for a superior to remove the officer. *See id.* at 664–65; *see also infra* Section II.A.

32 *Arthrex*, 141 S. Ct. at 1988.

33 *Id.* at 1987.

34 *See* Christopher J. Walker, *What* Arthrex *Means for the Future of Administrative Adju-*

*Arthrex*, whether the Convening Authority is a principal or inferior officer remains an open question.

This Essay examines the exceptional system of executive oversight of the Convening Authority created by the MCA. Part I provides a brief overview of the Appointments Clause. Part II discusses the relevant Supreme Court doctrine that delineates between principal and inferior officers. Part III then examines the Convening Authority's officer status. It provides a brief history of the Convening Authority, and it considers whether oversight by the Secretary of Defense and the Court of Military Commission Review ("CMCR") is sufficient to render the Convening Authority an inferior officer. It also considers whether the accused have standing to raise Appointments Clause challenges. Part IV argues that regardless of the officer status of the Convening Authority, the accused will continue to raise Appointments Clause challenges, creating setbacks for the military commissions. It recommends actions that the President or Congress can take to prevent future Appointments Clause challenges.

## I. Brief Overview of the Appointments Clause

The Appointments Clause was born out of concern that executive branch officials would be unaccountable to elected officials.[35] The Founders were skeptical of "oppressive officers" who needed to be "ashamed or intimidated[] into more honourable and just modes of conducting affairs" by the free press.[36] To ensure officers remained "accountable to political force and the will of the people," the Founders adopted an Appointments Clause, which provided for appointment by the President with the advice and consent of the Senate.[37] The Clause was intended to "provide[] a direct line of accountability for any poorly performing officers back to the actor who selected them."[38]

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*dication: Reaffirming the Centrality of Agency-Head Review*, Yale J. on Reg.: Notice & Comment (June 21, 2021), https://www.yalejreg.com/nc/what-arthrex-means-for-the-future-of-administrative-adjudication-reaffirming-the-centrality-of-agency-head-review/ [https://perma.cc/4V7N-YRSQ].

35 *See* Freytag v. Comm'r, 501 U.S. 868, 884 (1991).

36 Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

37 *Freytag*, 501 U.S. at 884; Note, *Congressional Restrictions on the President's Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 Harv. L. Rev. 1914, 1917 (2007).

38 Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443, 447 (2018).

The debates at the Constitutional Convention mostly centered around whether the Appointments Clause would vest the full appointment power in the President or if there would be senatorial appointment to provide a check on concentrated power.[39] The final language of the Appointments Clause reflects the Founders' ultimate rejection of giving the Senate pure appointment power because the Senate was "too numerous, and too little personally responsible, to ensure a good choice."[40]

The inferior officer provision, sometimes referred to as the "Excepting Clause," represents the Founders' countervailing concern about efficiency in the appointment process.[41] There was minimal discussion at the Constitutional Convention about the Excepting Clause, which was added to the Constitution on the final day of the Convention.[42] James Madison argued that it did not provide enough methods to appoint officers without Senate consent.[43] The Supreme Court's early impression was that "[the Excepting Clause's] obvious purpose is administrative convenience" because requiring a nomination by the President and confirmation by the Senate for numerous offices would be too cumbersome.[44]

Like the early debates at the Constitutional Convention, modern administrative law debates on the Appointments Clause focus on the advantages and disadvantages of political control over executive officers, such as adjudicators.[45] On the one hand, agency adjudicators need to be appointed and easily removable by the President to ensure they are accountable to an elected official.[46] On the other hand, political influence in the adjudicatory process raises concerns that lobbyists and interest groups will influence or "capture" the adjudicators.[47] Ad-

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39 *Congressional Restrictions on the President's Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, *supra* note 37.

40 JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 274–75 (Gaillard Hunt & James Brown Scott eds., 1920).

41 *See* Edmond v. United States, 520 U.S. 651, 660 (1997).

42 *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 627–28 (Max Farrand ed., 1911).

43 *See id.*

44 *Edmond*, 520 U.S. at 660 (citing United States v. Germaine, 99 U.S. 508, 510 (1879)).

45 *See, e.g.*, Christopher J. Walker, *Constitutional Tensions in Agency Adjudication*, 104 IOWA L. REV. 2679 (2019) [hereinafter Walker, *Constitutional Tensions*].

46 *Id.* at 2680.

47 *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1375, 1381 (2018) (Gorsuch, J., dissenting) (arguing that "[p]owerful interests are capable of amassing armies of lobbyists and lawyers to influence (and even capture) politically accountable bureaucracies"); Walker, *Constitutional Tensions*, *supra* note 45, at 2680.

ministrative adjudicators often make decisions that implicate due process concerns, such as those concerning property interests. Insulating individuals from decisions made by biased adjudicators is a core principle of the modern due process doctrine.[48] Thus, insulating adjudicators from political influence becomes a potential response to these due process concerns, but that is directly in tension with the objective of ensuring officers are politically accountable under the Appointments Clause.[49]

A practical weakness of the Appointments Clause is the cumbersome process it creates for the appointment of principal officers.[50] The process is prolonged when the Senate does not acquiesce to nominations. The Senate has slowed in confirming nominations over time, with the average length of the confirmation process jumping from fifty-six days in the Reagan administration to 117 days in the Trump administration.[51] The number of Senate-confirmed positions exploded—increasing from roughly 800 to 1,200 between 1960 and 2020—with the growth in administrative agencies, which further exacerbated the issue.[52] Another issue in implementing the Appointments Clause is delineating between principal and inferior officers to determine which appointment process is required for each respective officer. That is the key issue that this Essay addresses.

## II. Delineating Between Officers in Administrative Adjudication

The text of the Appointments Clause is minimal, so it has been left to the Supreme Court to determine how to delineate between

48 *See, e.g.*, Schweiker v. McClure, 456 U.S. 188 (1982); Withrow v. Larkin, 421 U.S. 35 (1975); Gibson v. Berryhill, 411 U.S. 564 (1973).

49 *See* Walker, *Constitutional Tensions*, *supra* note 45, at 2680.

50 After a nomination is referred to the appropriate Senate committee, the Senate committee may or may not act on the nomination. Lorraine H. Tong, Cong. Rsch. Serv., RS20986, Senate Confirmation Process: A Brief Overview 1–2 (2009). The Senate committee often holds a hearing if they do choose to act on the nomination, and if it is approved, the full Senate may or may not take up the nomination on the full floor. *Id.* The full Senate must provide an affirmative majority vote for the officer to be confirmed. *Id.*

51 P'ship for Pub. Serv., Unconfirmed: Why Reducing the Number of Senate-Confirmed Positions Can Make Government More Effective 4 (2021), https://presidentialtransition.org/wp-content/uploads/sites/6/2021/08/Unconfirmed-report.pdf [https://perma.cc/46N5-V7WG].

52 *Id.* For the latest precise count, see the quadrennial report on positions referred to as the "Plum Book." *See* H. Comm. on Oversight & Reform, 116th Cong., Policy and Supporting Positions 209–12 (Comm. Print 2020).

principal and inferior officers.[53] In the context of administrative adjudication, *Edmond* and *Arthrex* together provide the precedent for delineating between principal and inferior officers.[54]

### *A.* Edmond v. United States

The issue in *Edmond* was whether Congress could "authorize[] the Secretary of Transportation to appoint civilian [judges to] the Coast Guard Court of Criminal Appeals [("CGCCA")]" under the Uniform Code of Military Justice ("UCMJ").[55] The CGCCA is an intermediate appellate court within the military justice system, and it had two civilian members at the time of the petitioners' court-martial.[56] The petitioners, whose court-martial convictions were affirmed by the CGCCA and the Court of Appeals for the Armed Forces, argued that the CGCCA judges were principal officers that must be appointed by the President and confirmed by the Senate.[57] Accordingly, the petitioners requested a new hearing before a properly appointed panel.[58]

Writing on behalf of seven members of the Court, Justice Scalia concluded that the civilian officers were inferior officers under the Appointments Clause.[59] Justice Scalia distinguished inferior officers as those "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[60] Applying this test to the CGCAA, Justice Scalia found that the dual system of oversight by the Judge Advocate General and the Court of Appeals for the Armed Forces provided enough supervision to render the judges inferior officers.[61]

The opinion also emphasized three other considerations to support their inferior officer status. First, the Judge Advocate General could remove a CGCCA judge without cause, which the Court recognized "is a powerful tool for control."[62] Second, the Judge Advocate General exercised other means of control over the CGCCA judges by

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53 *See, e.g.*, United States v. Arthrex, Inc., 141 S. Ct. 1970, 1978–86 (2021); Edmond v. United States, 520 U.S. 651, 656 (1997); Morrison v. Olson, 487 U.S. 654, 670–77 (1988).

54 *See Arthrex*, 141 S. Ct. at 1978–86; *Edmond*, 520 U.S. at 659.

55 *Edmond*, 520 U.S. at 653.

56 *See id.*

57 *See id.* at 655.

58 *See id.*

59 *See id.* at 666.

60 *Id.* at 663.

61 *See id.* at 664–65.

62 *Id.* at 664.

prescribing uniform procedures the court had to follow.[63] Third, the "significant" factor is that the CGCCA judges could not issue a final decision on behalf of the executive branch;[64] the judges' decisions were reviewable by the Court of Appeals for the Armed Forces.[65]

Justice Scalia discussed other considerations that did not ultimately persuade the Court. For example, the CGCCA and other intermediate courts in the military justice system are not required to defer to the trial court's fact finding and may "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact."[66] Additionally, the Judge Advocate General does not have the ability to review or reverse the CGCCA decisions, and "[h]e may not attempt to influence (by threat of removal or otherwise) the outcome of the individual proceedings."[67] But neither limitation made the judges principal officers.[68]

To understand the similarities and differences between the military justice system and the military commission system, there is additional relevant context that was not discussed in *Edmond*. By its inherent nature, an intermediate appellate court in the military justice system, like the CGCCA, only renders a decision when there is an appeal of a decision made by *other* executive branch officials.[69] As Justice Scalia mentioned, the intermediate appellate court decisions are then reviewable by an executive tribunal.[70] What was not at issue in *Edmond*, however, was the convening authority for the military justice system. Under Article 22 of the UCMJ, a military justice convening authority exercises very similar authority to that of the Convening Authority for military commissions.[71] For example, the military justice convening authority selects members of courts-martial and can overturn or reduce sentences.[72] Importantly, though, under the UCMJ, the convening authority is generally a commissioned officer or one of six civilian officers, all of which are considered principal officers for the purposes of the Appointments Clause.[73]

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63 *Id.*

64 *Id.* at 665.

65 *Id.*

66 *Id.* at 662.

67 *Id.* at 664.

68 *Id.* at 665.

69 *See Appellate Review of Courts-Martial*, U.S. Ct. Appeals for Armed Forces https://www.armfor.uscourts.gov/newcaaf/appell_review.htm [https://perma.cc/ZH3A-CCHW].

70 *See Edmond*, 520 U.S. at 664–65.

71 *See* 10 U.S.C. § 822.

72 *See id.*

73 *Id.* Summary and special court-martial convening authorities may be junior officers who

### *B.* United States v. Arthrex, Inc.

In *Arthrex*, the issue presented was whether, under the Appointments Clause, Congress could authorize the Secretary of Commerce to appoint APJs to the Patent Trial and Appeals Board ("PTAB") at the U.S. Patent and Trademark Office ("PTO").[74] The APJs reviewed decisions that were made by patent examiners and decided whether an invention satisfied the standards for patentability.[75] The APJs could also review patents previously issued by the PTO.[76] For example, they could reconsider whether a patent satisfies novelty and nonobviousness requirements.[77]

Arthrex, Inc., a medical device developer, claimed that another company infringed on its patent, but three APJs concluded that Arthrex's patent was invalid.[78] In an appeal to the Federal Circuit, Arthrex argued that the APJs were principal officers under the Appointments Clause and their appointment by the Secretary of Commerce alone was unconstitutional.[79]

The Federal Circuit held that the APJs were improperly appointed principal officers for two main reasons.[80] First, the Secretary of Commerce and the Director of the PTO did not have the power to review the judges' decisions.[81] The PTAB issued final decisions on behalf of the executive branch that were not reviewable by a principal officer.[82] Second, the Secretary of Commerce and the Director of the PTO did not have the power to remove the judges at will.[83] Although the agency head provided supervision and oversight by issuing procedural rules, the Secretary could remove the APJs "only for such cause as will promote the efficiency of the service."[84] The Federal Circuit remedied the Appointments Clause violation by invalidating tenure protections for the APJs and making them removable at will.[85] This did not satisfy any party, and some scholars argued that the remedy

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are not Senate confirmed, but they can have cases removed from them by the senior convening authorities. 10 U.S.C. §§ 823(b), 824(b).

74 United States v. Arthrex, Inc., 141 S. Ct. 1970, 1976 (2021).

75 *Id.* at 1977.

76 *Id.*

77 *Id.*

78 *Id.* at 1978.

79 *Id.*

80 *See* Arthrex, Inc. v. Smith & Nephew, Inc., 941 F.3d 1320 (Fed. Cir. 2019).

81 *See id.* at 1329.

82 *See id.*

83 *Id.* at 1332.

84 *Id.* at 1331, 1333.

85 *Id.* at 1338.

did not even fix the constitutional flaw because an officer who can be removed at will is not automatically an inferior officer.[86] All parties filed a petition for a writ for certiorari.[87]

In a 5–4 decision, Chief Justice Roberts wrote that the final decision-making authority of the APJs made their roles "incompatible with their appointment by the Secretary to an inferior office."[88] However, the Court did not affirm the Federal Circuit's remedy and instead came up with a creative remedy to fix the Appointments Clause violation. Rather than vacate the PTAB's decision and issue a remand for a new hearing before properly appointed officers, the Court altered the review structure and gave the Director of the PTO the ability to review final PTAB decisions.[89] The Court held that "[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in the proceeding before us."[90]

Chief Justice Roberts was careful to point out that the criteria considered in *Arthrex* are not the only criteria that courts can use to distinguish between principal and inferior officers. But he implied that the criteria considered in *Arthrex* may need to be applied to distinguish between types of administrative adjudicators (as opposed to other administrative decision-makers, like those issuing or enforcing legislative rules):

> In reaching this conclusion, we do not attempt to "set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes." Many decisions by inferior officers do not bind the Executive Branch to exercise executive power in a particular manner, and *we do not address supervision outside the context of adjudication*. Here, however, Congress has assigned APJs "significant authority" in adjudicating the public rights of private parties, while also insulating their decisions from review and their offices from removal.[91]

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86 *See* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1979 (2021); *see also* Alan Morrison, *The Principal Officer Puzzle*, YALE J. ON REG.: NOTICE & COMMENT (Nov. 15, 2019), https://www.yalejreg.com/nc/the-principal-officer-puzzle-by-alan-b-morrison [https://perma.cc/TVC7-HVLS].

87 *Arthrex*, 141 S. Ct. at 1978.

88 *Id.* at 1985.

89 *Id.* at 1986.

90 *Id.* at 1985.

91 *Id.* at 1985–86 (emphasis added) (citations omitted) (quoting Edmond v. United States, 520 U.S. 651, 661 (1997)).

This language could be interpreted to mean that the criterion considered in *Arthrex* must be applied when evaluating supervision *inside* the context of administrative adjudication.

This decision leaves questions unanswered. For example, did *Arthrex* modify the *Edmond* three-part balancing test by strengthening the role of principal-officer review or simply end patent exceptionalism? Justice Thomas's dissent points to the significance of the holding, noting that this was the first time the Supreme Court invalidated a portion of a statute for vesting appointment power with an agency head under the Appointments Clause.[92]

It is too soon to observe how lower courts will react to *Arthrex*, and early scholarly reactions have been mixed.[93] Professor Christopher Walker argued that "[m]any viewed *Arthrex* as a potential blockbuster for administrative law . . . [that] had the potential to further advance political control of the administrative state."[94] However, he noted that there are few remaining adjudicative systems where the agency head lacks final decision-making authority, meaning that *Arthrex* may have minimal implications for administrative adjudication.[95]

The U.S. Court of Appeals for the D.C. Circuit recently held that the Convening Authority is an inferior officer, but the panel's decision predated the Supreme Court's *Arthrex* decision.[96] In a recent petition for certiorari, Ali Hamza Ahmad Suliman Al Bahlul asked the Supreme Court to vacate the D.C. Circuit decision affirming his conviction and remand it for reconsideration after *Arthrex*, which the Supreme Court denied.[97] The petition argued that in *Arthrex*, the Court "eschewed [the *Edmond*] balancing test" and held that officers must be Senate-confirmed whenever they are permitted to issue final, unreviewable decisions on behalf of the executive branch.[98] The government argued that the Court in *Arthrex* did not abandon the *Ed-*

92 *Id.* at 1997–98 (Thomas, J., dissenting).

93 A review of the Westlaw citing reference cases as of June 17, 2022, shows only thirty-seven citing cases, many of which are patent disputes.

94 Walker, *supra* note 34; *see also* Oliver Dunford & Damien Schiff, *Distinguishing Between Inferior and Non-Inferior Officers Under the Appointments Clause: A Question of "Significance"* (Pac. Legal Found., Research Paper No. 2021-2, 2021), https://ssrn.com/abstract=3917655 [https://perma.cc/X7ZE-RQ2V] (arguing that the Court effectively eschewed the *Edmond* multifactor test in *Arthrex* and pointing out that the Court seems more interested in whether an officer wields significant authority).

95 *See* Walker, *supra* note 34.

96 *See* Al Bahlul v. United States, 967 F.3d 858 (D.C. Cir. 2020).

97 *See* Petition for a Writ of Certiorari, *supra* note 20, at 19; *see also Al Bahlul*, 967 F.3d at 877.

98 Petition for a Writ of Certiorari, *supra* note 20, at 19.

*mond* three-part test, and the D.C. Circuit appropriately applied *Edmond*'s three factors when it found the Convening Authority to be an inferior officer.[99]

## III. Supervising the Convening Authority

### A. *History of the Military Commissions Act and the Convening Authority*

This Section describes the history of the MCA and the Convening Authority in order to analyze whether the Convening Authority is a principal or inferior officer. The MCA, signed into law by President George W. Bush in 2006, authorized the trial of "alien unlawful enemy combatants" by military commissions housed in the Department of Defense ("DoD").[100] It was drafted after the Supreme Court invalidated the previous military commission system that tried persons detained as "enemy combatants" in *Hamdan v. Rumsfeld*.[101] Shortly after the terrorist attacks on September 11, 2001, President Bush issued a Military Order that authorized noncitizens suspected of terrorist acts to be tried by military commissions.[102] Historically, military commissions were set up in the field to try "enemy belligerents" accused of violations of the law of war.[103] They were distinguished from the military courts-martial that were set up to try members of the armed forces—and sometimes civilians accompanying them—for violations of the UCMJ.[104] In *Hamdan*, the Court held that the military commission system had to follow procedural rules as similar as possible to the rules under the UCMJ.[105] In response, Congress enacted the MCA to establish procedures and rules that are modeled after, but distinct from, the UCMJ.[106]

The military commissions authorized by the MCA "may be convened by the Secretary of Defense or by any officer or official of the

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99 *See* Brief for the United States in Opposition at 16, Al Bahlul v. United States, 142 S. Ct. 621 (2021) (No. 21-339).

100 Jennifer K. Elsea, Cong. Rsch. Serv., RL33688, The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice 6 (2007).

101 *See* 548 U.S. 557 (2006).

102 Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 16, 2001).

103 Jennifer K. Elsea, Cong. Rsch. Serv., RL31191, Terrorism and the Law of War: Trying Terrorists as War Criminals Before Military Commissions 3 (2001).

104 *Id.* at 16. Members of the armed forces could be tried by a court-martial or an Article III court for war crimes. *Id.*

105 *Hamdan*, 548 U.S. at 220–22.

106 Elsea, *supra* note 100, at 1.

United States designated by the Secretary for that purpose."[107] In other words, the Secretary can unilaterally delegate authority to the Convening Authority to convene the military commissions by statute.

The Convening Authority has many roles. The Convening Authority appoints the Chief Judge of the Military Commissions Trial Judiciary, who selects the military judges for trials, as well as the "members" of the military commissions who serve as jurors.[108] The Convening Authority negotiates and approves plea agreements[109] and can grant immunity from prosecution.[110] Prior to trial, the Convening Authority selects which charges, if any, to refer to a military commission.[111] During trial, the Convening Authority can dismiss charges before the findings are announced.[112] After trial, the Convening Authority has "sole discretion and prerogative" to set aside a guilty finding and reduce or commute a sentence.[113] In sum, the Convening Authority directs and oversees the entire military commissions process with its strong decision-making authority.[114] This long and nonexhaustive list of significant authorities indicates that the Convening Authority is an "officer" within the meaning of the Appointments Clause and not a mere "employee."[115] It is more challenging to discern if the Convening Authority is a principal or inferior officer.

Commissioned officers generally do not need a second appointment under the Appointments Clause because commissioned officers will have already received Senate appointments.[116] The current Convening Authority, Col. Jeffrey Wood, was appointed to the office as a civilian, which makes any convictions and sentences approved by him vulnerable to Appointments Clause challenges.[117] If he was appointed

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107 10 U.S.C. § 948h.

108 10 U.S.C. § 948i.

109 *See* U.S. DEP'T OF DEF., MANUAL FOR MILITARY COMMISSIONS pt. II, r. 705, at 59 (2019) [hereinafter MMC].

110 *Id.* pt. II, r. 704, at 57.

111 *Id.* pt. II, r. 407, at 20–21.

112 *Id.* pt. II, r. 604, at 39.

113 10 U.S.C. § 950b(c).

114 10 U.S.C. § 949b(a)(2)(B).

115 The Supreme Court explained that the difference between "inferior officers" and mere "employees" has to do with the "important functions" of the role and whether the person exercised an "important function." *See* Freytag v. Comm'r, 501 U.S. 868, 880–82 (1991) (holding that special trial judges of the Tax Court were inferior officers and not mere employees because they served important functions like taking testimony and ruling on the admissibility of evidence).

116 *E.g.*, Weiss v. United States, 510 U.S. 163 (1994).

117 The press release announcing Jeffrey Wood's appointment included the title of "Colonel." *See SECDEF Appoints New Convening Authority for Military Commissions*, U.S. DEP'T OF DEF. (Apr. 21, 2020), https://www.defense.gov/News/Releases/Release/Article/2158184/secdef-

as a commissioned officer, this may have insulated him from Appointments Clause challenges.

The following Sections focus on the system of supervision over the Convening Authority for the purpose of evaluating its status under the Appointments Clause. They describe the dual system of oversight provided by the Secretary of Defense and the CMCR and conclude that after *Arthrex*, the Convening Authority's officer status is uncertain.

### *B. Oversight by the Secretary*

Congress gave the Secretary of Defense two mechanisms to oversee the Convening Authority: removal and regulation. First, the Secretary can remove the Convening Authority from office.[118] If an officer is subject to easy removal by a higher officer, this favors the officer's status as an inferior officer rather than a principal officer. However, the extent of the Secretary's removal ability is contested.

Strictly speaking, the MCA allows the Secretary of Defense to remove the Convening Authority at will. The MCA has no explicit tenure or removal provisions, and "[t]he long-standing rule relating to the removal power is that, in the face of congressional silence, the power of removal is incident to the power of appointment."[119] However, the MCA limits the Secretary from influencing the outcome of individual proceedings. It provides that "[n]o person may attempt to coerce or, by any unauthorized means, influence . . . the action of any convening, approving, or reviewing authority with respect to their judicial acts."[120] The impact of this provision on the Secretary's removal power is unresolved.

The accused argue that this forbids the Secretary of Defense from threatening to remove the Convening Authority for the handling of a case.[121] For example, in early 2018, Secretary Jim Mattis fired Conven-

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appoints-new-convening-authority-for-military-commissions [https://perma.cc/4LWU-JKFE]. However, correspondence produced in discovery in *Al Bahlul* clarifies that Wood was appointed to the position in "his capacity as a GS-13 federal technician for the Arkansas National Guard, which is a federal civilian employee position." *See* Letter from Michel Paradis, Couns. for Petitioner, Mil. Comm'n Def. Org., to Hon. Scott S. Harris, Clerk, Sup. Ct. of the U.S., (Nov. 19, 2021), https://www.supremecourt.gov/DocketPDF/21/21-339/200786/20211119192819398_2021-11-19%20Letter.pdf [https://perma.cc/8X5E-33VX].

118 Al Bahlul v. United States, 967 F.3d 858, 872 (D.C. Cir. 2020).

119 *Id.* (alteration in original) (quoting Kalaris v. Donovan, 697 F.2d 376, 401 (D.C. Cir. 1983)).

120 10 U.S.C. § 949b(2)(B).

121 Petition for a Writ of Certiorari, *supra* note 20, at 10.

ing Authority Harvey Rishikof.[122] Rishikof was purportedly exploring potential plea bargains with five suspects in the September 11 terrorist attacks.[123] One of the detainees, Ammar al Baluchi, argued that the firing was improper retaliation.[124] A military commission judge accepted DoD's alternative explanations for the firing of Rishikof.[125] Defendant Al Bahlul raised similar concerns, arguing that DoD's alternative explanations were "widely seen as pretextual."[126]

A DoD memorandum released in litigation reveals that the agency views potential allegations of "unlawful influence" as a risk in Convening Authority firings.[127] The memorandum assessed the legal risk of firing Rishikof and concluded that the main risk was the possibility for allegations of "unlawful influence" because of "indications [that the Convening Authority] may entertain a [plea agreement] if offered by an accused."[128] If DoD's own interpretation is that subsequent allegations of undue influence create a legal risk, it is reasonable to assume the agency views this as a potential limit on the Secretary's ability to remove the Convening Authority at will.

Second, Congress gave the Secretary the power to prescribe the procedures and rules governing the military commissions and the Convening Authority.[129] The Secretary exercised that authority by issuing the corollary Rules for Military Commissions ("Rules") in a 238-page guidance document.[130] The Rules elaborate on the MCA requirements. For example, the Rules parrot the text of the MCA prohibition on undue influence, and then they clarify that there are

122 Charlie Savage, *Fired Pentagon Official Was Exploring Plea Deals for 9/11 Suspects at Guantánamo*, N.Y. TIMES (Feb. 10, 2018), https://www.nytimes.com/2018/02/10/us/politics/guantanamo-sept-11-rishikof.html [https://perma.cc/XF4F-EZRB].

123 *Id.*

124 Mr. al Baluchi's Motion to Dismiss for Unlawful Influence over Convening Authority and Legal Advisor, United States v. Mohammad, No. AE 555 (AAA) (Mil. Comm'ns Trial Judiciary Feb. 9, 2018), https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE555(AAA)).pdf [https://perma.cc/UQ8G-GDGA].

125 *See* Ruling on Mr. al Baluchi's Motion to Dismiss for Unlawful Influence over Convening Authority and Legal Advisor at 30–32, United States v. Mohammad, No. AE 555EEE (Mil. Comm'ns Trial Judiciary Jan. 10, 2019), https://www.justsecurity.org/wp-content/uploads/2019/01/AE-555EEE-RULING-dtd-10-Jan-19.pdf [https://perma.cc/4BMC-7QVY].

126 Petition for a Writ of Certiorari, *supra* note 20, at 23.

127 Ruling on Mr. al Baluchi's Motion to Dismiss for Unlawful Influence over Convening Authority and Legal Advisor, *supra* note 125, at 18.

128 *Id.*

129 10 U.S.C. § 949a(a).

130 *See* MMC, *supra* note 109, pt. II. DoD also issued "regulations" for the military commission trials in a separate guidance document, but this Essay draws from the Rules. *See* DEP'T OF DEF., REGULATION FOR TRIAL BY MILITARY COMMISSION (2011).

exceptions to this rule that are not written in the statute.[131] The D.C. Circuit explained that "[w]hile the Secretary's power to define rules of evidence and other procedures does not by itself make the Convening Authority an inferior officer, it provides further evidence that the Convening Authority's work is directed by the Secretary and subject to his supervision."[132]

### *C. The Convening Authority's Power to Render Final Decisions*

Although the Convening Authority is empowered to take significant actions, many do not constitute final decisions that bind the executive branch. For example, the Convening Authority convenes the military commissions, but this does not constitute a final decision.[133] There are only three specific actions the Convening Authority can take that constitute a final, binding decision that is not reviewable by another executive branch official. The Convening Authority can (1) approve a plea agreement, (2) overturn a verdict, and (3) commute a sentence. Notably, the Convening Authority can only make final decisions that are adverse to the government and beneficial to the accused.

First, the Convening Authority has the authority to enter into pretrial agreements. The MCA provides that a "plea of guilty made by the accused . . . may form the basis for an agreement reducing the maximum sentence approved by the convening authority, including the reduction of a sentence of death to a lesser punishment . . . ."[134]

Although the Rules include a list of what the plea agreements may include, the Rules explain that the list is non-exhaustive and grant the Convening Authority significant latitude to design the agreements.[135] For example, the Convening Authority can add in additional conditions that the accused requests.[136]

Not every approval of a plea agreement constitutes a final decision. For instance, a plea agreement could simply include a promise that trial counsel will not present certain evidence at trial. But some approvals of a plea bargain inherently constitute a final decision, such

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131 *See* MMC, *supra* note 109, pt. II, r. 104, at 9–11. The exceptions are straightforward. For example, the prohibition on undue influence does not extend to court instructions provided in opening proceedings. *Id.*

132 Al Bahlul v. United States, 967 F.3d 858, 872 (D.C. Cir. 2020).

133 *See* MMC, *supra* note 109, pt. II, r. 504(a)–(b), at 31.

134 10 U.S.C. § 949i(c).

135 MMC, *supra* note 109, pt. II, r. 705(b), at 59–60.

136 *Id*.

as an agreement to reduce a sentence pronounced by a military commission.

Second, the Convening Authority can overturn a verdict of guilty issued by a military commission. The MCA provides that "[t]he authority . . . to modify the findings and sentence of a military commission under this chapter is a matter of the sole discretion and prerogative of the convening authority."[137] If the Convening Authority does overturn a verdict of guilty, he can then drop or modify the charges against the accused.[138]

Third, the Convening Authority can commute a sentence. "The convening authority acting on the case . . . may suspend the execution of any sentence or part thereof in the case, except a sentence of death."[139] However, the MCA prohibits the Convening Authority from increasing the sentence unless the sentence prescribed for the offense is mandatory.[140]

The Rules place a few limits on the Convening Authority's ability to overturn a finding or commute a sentence. For example, the Convening Authority must act on a verdict or sentence within a certain time period.[141] The Convening Authority must also consider certain factors, like the outcome of the trial, the legal advisor's recommendations, and any matters the accused brings up.[142]

As with plea agreements, overturning a verdict will not always constitute a final decision on behalf of the executive branch. When there is an error or omission in the legal record, or there is improper military commission action that can be rectified without prejudice to the accused, then charges may be brought again.[143] However, it does constitute a final decision if the charges are subsequently dropped. A decision to commute a sentence more plainly constitutes a final decision.

The Convening Authority certainly makes other significant decisions. For example, the Convening Authority can approve a finding of guilty.[144] But, importantly for the purposes of assessing the Convening Authority's status under the Appointments Clause, these decisions are not final. Outside of the three types of final decisions identified in this

137 10 U.S.C. § 950b(c)(1).
138 10 U.S.C. § 950b(c)(3)(A).
139 10 U.S.C. § 950i(d).
140 10 U.S.C. § 950b(d)(2)(B).
141 *See* MMC, *supra* note 109, pt. II, r. 1107(b)(2), at 156.
142 *Id.* pt. II, r. 1107(b)(3), at 156–57.
143 10 U.S.C. § 950b(d)(2).
144 10 U.S.C. § 950b(c)(3).

Section, the Convening Authority's decisions are all reviewable by the CMCR.

The CMCR is an executive tribunal comprised of appellate military judges who are appointed by the Secretary of the Defense or the President and confirmed by the Senate.[145] Under the MCA, the accused may appeal a finding of guilty approved by the Convening Authority to the CMCR.[146] The CMCR's review is limited to issues of law, and not factual findings, but this was also true in *Edmond*.[147] In *Edmond*, the Court of Appeals for the Armed Forces' review of factual findings was limited, but the Supreme Court still held that the CGCCA did not have the "power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers."[148] Thus, the Convening Authority decisions reviewed by the CMCR are not final.

### *D. Is the Convening Authority Unconstitutionally Appointed?*

The constitutional doctrine and the dual system of oversight prescribed by the MCA begs the question: Does the Convening Authority's final decision-making authority make the officer a principal officer?

The conclusion that the Convening Authority is a principal officer is supported by a broad interpretation of the majority's reasoning in *Arthrex*.[149] Chief Justice Roberts wrote that only principal officers can issue final decisions, but he included a critical qualifier.[150] Only a principal officer can issue a final decision "in the proceeding before [the Court]."[151] If the deciding factor in distinguishing between officers in all modes of administrative adjudication after *Arthrex* is the ability to issue final decisions, then the Convening Authority's ability to issue final, unreviewable decisions creates a constitutional problem. But if inferior officers can issue final decisions in adjudications outside of patent adjudications, then the Convening Authority may be immune to Appointments Clause challenges.

Considering the differences between the Convening Authority and the CGCCA judges in *Edmond* also supports the conclusion that

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145 10 U.S.C. § 950f(b).

146 10 U.S.C. §§ 950f(d), 950g(a).

147 Al Bahlul v. United States, 967 F.3d 858, 871 (D.C. Cir. 2020); Edmond v. United States, 520 U.S. 651, 662 (1997).

148 *Edmond*, 520 U.S. at 652.

149 *See supra* Section II.B.

150 United States v. Arthrex, Inc., 141 S. Ct. 1970, 1985 (2021).

151 *Id.*

the Convening Authority is an improperly appointed principal officer.[152] In *Edmond*, the Court assessed an intermediate appellate court in the military justice system.[153] By its nature, an intermediate appellate court in the military justice system does not issue final decisions. The Court of Appeals for the Armed Forces may review all of its decisions.[154] What was not at issue in *Edmond* was the convening authority in the military justice system, which is analogous to the Convening Authority for military commissions.[155] A convening authority in the military justice system may be able to issue final decisions on behalf of the executive branch, but unlike the Convening Authority for military commissions, such military convening authorities are Senate confirmed.[156]

On the other hand, the conclusion that the Convening Authority is an inferior officer is supported by a narrow reading of *Arthrex*.[157] If *Arthrex* did not elevate final decision-making authority above the other two factors, then the Convening Authority may be compliant with the Appointments Clause because of the Secretary's removal power. In *Arthrex*, the agency head could not remove the APJs without cause, but under the MCA, the Secretary can remove the Convening Authority at will.[158]

The MCA does limit the Secretary from influencing the outcome of a proceeding, but so far military commissions have been unwilling to view threats of removal as undue influence.[159] Additionally, the MCA's prohibition on undue influence extends only to influence exercised by "unauthorized means."[160] Because the text of the statute is ambiguous, it is reasonable for DoD to argue that the Secretary's removal authority is an authorized means of influence.

The MCA created an anomaly from the typical modes of administrative adjudication. The system of supervision over the Convening Authority falls squarely in the middle of the systems of supervision at

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152 The D.C. Circuit argued that CMCR review of the Convening Authority's decisions was analogous to the Court of Appeals for the Armed Forces' review of CGCCA, but it did not highlight the differences between a Convening Authority and an intermediate appellate court. *See Al Bahlul*, 967 F.3d at 871.

153 *Edmond*, 520 U.S. at 653.

154 *Id.* at 664–65.

155 10 U.S.C. § 822.

156 *See id.*; *supra* note 73 and accompanying text.

157 *See supra* Section II.B.

158 *See supra* Section III.D.

159 *See supra* Section III.B.

160 10 U.S.C. § 949(b)(2).

issue in *Edmond* and *Arthrex*.[161] The Convening Authority is below the CMCR and the Secretary of Defense in the hierarchy of the executive branch, but some of its significant decisions evade their review.

### *E. Standing to Raise Appointments Clause Challenges*

Although it is possible that the method of appointing the Convening Authority is unconstitutional, courts may not need to proceed further than justiciability.[162] It is likely that detainees held at Guantanamo Bay cannot show an injury sufficient to confer standing to raise Appointments Clause challenges.

Article III of the Constitution limits the federal courts to resolving only "cases" and "controversies."[163] The doctrine of standing is the corollary of this limit on judicial power, and it requires plaintiffs to show they have an injury in fact and that the injury is redressable by the court.[164] The injury must also be "fairly traceable to the defendant's allegedly unlawful conduct."[165] It is unlikely that the accused can trace injuries to the Convening Authority's potentially unlawful exercise of power.

A similar issue was presented recently in *California v. Texas*.[166] There, the question was whether the plaintiffs had standing to challenge the constitutionality of the individual mandate under the Patient Protection and Affordable Care Act.[167] The case presented a standing question for the Court because, in 2017, Congress zeroed out the financial penalty used to enforce the individual mandate.[168] The Supreme Court held that the individual and state plaintiffs were unable to trace their injuries—i.e., paying to carry the coverage and paying

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161 Edmond v. United States 520 U.S. 651 (1997); United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021).

162 Supreme Court precedent also leaves unresolved whether noncitizen detainees at Guantanamo Bay can bring structural constitutional challenges to statutes. In fact, Supreme Court precedent has not resolved which individual rights apply to noncitizens. In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Supreme Court held that the noncitizens detained at Guantanamo Bay can challenge the lawfulness of their detention in federal court by filing writs of habeas corpus. *Id.* at 732. Although the Supreme Court has repeatedly refused to recognize constitutional protections for noncitizens who are not present on U.S. soil, this caselaw is largely limited to due process protections and other individual rights. *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 273–75 (2001); Kwong Hai Chew v. Colding, 344 U.S. 590, 597 (1953); Johnson v. Eisentrager, 339 U.S. 763, 784–85 (1950).

163 U.S. CONST. art. III, § 2.

164 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–71 (1992).

165 Allen v. Wright, 468 U.S. 737, 751 (1984).

166 141 S. Ct. 2104 (2021).

167 *Id.* at 2112.

168 *Id.*

the costs for additional citizens who opt into state-operated insurance programs—to any potentially unlawful government action.[169] Since the government no longer enforced the mandate, the decision to purchase coverage was not related to any government action.[170]

As discussed in Section III.C, the three actions that the Convening Authority can take to create the Appointments Clause liability are all beneficial to the accused and adverse to the government.[171] Because the Convening Authority's potentially unlawful exercise of power is always beneficial to the accused, it is unlikely that the accused can trace an injury to that conduct.

Consider again the case of Al Bahlul, who asked the Supreme Court to vacate the D.C. Circuit decision affirming his conviction and remand it for reconsideration after *Arthrex*.[172] After Al Bahlul's conviction by military commission, the Convening Authority "approved the findings and sentence without exception."[173] The accused then appealed the decision to the CMCR, which affirmed the findings and sentence.[174] His injury is traceable only to final decisions that have been issued by properly appointed principal officers.

The accused could potentially establish standing through two avenues. First, the accused could argue that an injury is traceable to the Convening Authority's unlawful exercise of power. If the Convening Authority had appropriate supervision, the defendant may have been offered a better plea bargain or a reduced sentence. However, this is speculative, and the Supreme Court regularly rejects requests for standing when alleged injuries are too speculative.[175]

Second, the accused could push for "standing-through-inseverability."[176] In his dissent in *California v. Texas*, Justice Alito argued that plaintiffs should be able to obtain standing by claiming an injury

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169 *Id.* at 2113.

170 *Id.* at 2114.

171 *See supra* Section III.C.

172 *See* Petition for a Writ of Certiorari, *supra* note 20.

173 Brief for Petitioner at 6, Al Bahlul v. United States, 967 F.3d 858 (D.C. Cir. 2020) (No. 19-1076).

174 *Id.*

175 *See, e.g.*, Clapper v. Amnesty Int'l USA, 568 U.S. 398, 411 (2013) (holding that the plaintiffs did not have standing to challenge the FISA Amendments Act because the claim that they would be targets of surveillance was too speculative). In contrast, in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), the plaintiffs challenged a "for cause" removal restriction on the Director of the Federal Housing Finance Agency, and the Court held that the harm was directly traceable to an allegedly unlawful exercise of power. *Id.* at 1770. But in that case, the Director was unlawfully exercising power in each decision he made because of the removal restriction. *See id.*

176 *See* California v. Texas, 141 S. Ct. 2104, 2122 (2021) (Thomas, J., concurring).

is traceable to unlawful conduct, even if that conduct is causing them injury only because it is inseverable from another statutory provision that is causing them injury.[177] The accused could argue that the Convening Authority's potentially unlawful decision-making authority is inseverable from the rest of the MCA.[178] As an example, the accused could argue that other provisions of the MCA are intertwined with the Convening Authority's ability to approve plea agreements. Defendants may be unwilling to negotiate a plea agreement with a party who does not have the final say, and the military commissions process as a whole depends on an efficient plea agreement system that encourages swift adjudication. However, six other Justices in *California v. Texas* signaled a lack of support for such relaxed tracing requirements.[179]

## IV. Putting Appointments Clause Questions to Rest

Until there is finality regarding the Convening Authority's status under the Appointments Clause, the accused are likely to raise Appointments Clause challenges, causing additional setbacks for the military commissions that have already largely failed to secure convictions.[180] In addition to Al Bahlul, another detainee already raised an Appointments Clause challenge to the MCA, suggesting there is an appetite to raise such challenges.[181] The Supreme Court denied Al Bahlul's petition for a writ of certiorari,[182] leaving in place the D.C. Circuit's decision that the Convening Authority is an inferior officer. The D.C. Circuit has exclusive jurisdiction over appeals from

177 *Id.* at 2130 (Alito, J., dissenting).

178 Jonathan Adler predicts that a "standing-through-inseverability" doctrine would undercut standing limits because it would be exceedingly easy to make arguments like this one. In other words, plaintiffs could easily find a constitutionally vulnerable claim within a regulatory statute and argue that it is inseverable from the provision that causes injury. *See* Jonathan H. Adler, *What the Supreme Court Got Right (and Justice Alito Got Wrong) in the Texas ACA Decision*, The Volokh Conspiracy (June 17, 2021, 11:23 PM), https://reason.com/volokh/2021/06/17/what-the-supreme-court-got-right-and-justice-alito-got-wrong-in-the-texas-aca-decision/ [https://perma.cc/S2WV-PHZB].

179 *California v. Texas*, 141 S. Ct. at 2113–19. Justice Thomas agreed that inseverability "might well support standing in some circumstances," but he thought it should not be addressed in *California v. Texas*, in part because the Court has never analyzed it in any detail. *Id.* at 2122 (Thomas, J., concurring).

180 *See* Steve Vladeck, *It's Time to Admit that the Military Commissions Have Failed*, Lawfare (Apr. 16, 2019, 10:40 PM), https://www.lawfareblog.com/its-time-admit-military-commissions-have-failed [https://perma.cc/G3FQ-37UA].

181 *See In re* Al-Nashiri, 791 F.3d 71, 74–75 (D.C. Cir. 2015) (declining to decide if CMCR appointments violated the Appointments Clause in response to a petition for writ of mandamus because the constitutional challenges could be raised on appeal following a final judgment).

182 Al Bahlul v. United States, 967 F.3d 858 (D.C. Cir. 2020).

the CMCR, meaning no circuit split can develop.[183] However, later panels can overturn the decisions of an earlier panel when there are developments in the law.[184] The later decision in *Arthrex* creates the possibility that a later panel will overturn the earlier decision, incentivizing the accused to continue raising the issue on appeal.[185] This Part recommends actions that the President or Congress can take to prevent any future Appointments Clause challenges.

### *A. Appoint the Convening Authority with Senate Consent*

The President and Senate should avoid Appointments Clause challenges by nominating and confirming all Convening Authorities moving forward. In fact, when a detainee asked the D.C. Circuit, via mandamus, to resolve an Appointments Clause challenge to the CMCR, the D.C. Circuit denied the request and suggested the President and Senate could avoid the issue on appeal from final judgment by nominating and confirming CMCR judges.[186] They "chose to take that tack."[187] Col. Wood was appointed to the office as a civilian, but some of the previous officers designated to be Convening Authorities were nominated and confirmed prior to their designation, making them less vulnerable to Appointments Clause challenges.[188]

### *B. Amend the Military Commissions Act to Provide Agency-Head Review*

As an alternative, Congress should amend the MCA to explicitly give the Secretary of Defense final decision-making authority over Convening Authority decisions that are not reviewable by the CMCR. This is in line with traditional Administrative Procedure Act adjudication where the agency head maintains freedom to review the decision of an administrative law judge.[189] Professors Christopher Walker and Melissa Wasserman identified several reasons why vesting decision-making authority with the agency head is beneficial in patent adjudication, which may also apply to military commissions.[190] First, it en-

183 10 U.S.C. § 950g.

184 Joseph Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 797 (2012).

185 *See* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1978–86 (2021).

186 *See Al-Nashiri*, 791 F.3d at 82.

187 *In re* Al-Nashiri, 835 F.3d 110, 116 (D.C. Cir. 2016).

188 *See supra* note 20.

189 *See* FCC v. Allentown Broad. Corp., 349 U.S. 358, 364 (1955).

190 *See* Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 175 (2019).

sures the agency head is in control, and the agency head usually has "a comparative advantage in policy expertise relative to agency adjudicators."[191] Second, it helps promote consistency in outcomes.[192] Third, it makes the agency head aware of the details of the adjudicatory system, which helps the agency head advocate for any necessary changes to the system.[193] Although this would increase political influence in the adjudications, it would reduce the risk of Appointments Clause challenges.

## Conclusion

The Convening Authority—the person who convenes military commissions to try unlawful enemy combatants for violations of the law of war—is one of the few remaining administrative adjudicators who issue final decisions that lack agency-head review. By statute, the Secretary of Defense can unilaterally appoint the Convening Authority, and recent Supreme Court jurisprudence raises questions about the constitutionality of this method of appointment. To put to rest any future Appointments Clause issues after *Arthrex*, the President and Senate should nominate and confirm all Convening Authorities moving forward, or Congress should amend the statute to give the Secretary of Defense final decision-making authority over Convening Authority decisions that currently evade review.

191 *Id.*

192 *See id.* at 176.

193 *See id.* at 177.