

Comment from Senior Fellow Jack M. Beermann on *Participation of Senate-Confirmed Officials in Administrative Adjudication*  
April 17, 2024

I have a general concern about the consistency of this recommendation with Arthrex and with the APA's provision that agency heads have all powers when deciding after an ALJ decision that they would have if they had made the initial decision. I would like to hear discussion of that. (I will try to read as much of the report as I can between now and when I have to leave my home for another obligation.)

Also, I have recently been doing research that indicates there may be hundreds or even thousands of annual adjudicatory decision by federal agencies that violate Arthrex by having final decisions made by non-PAS officials. The first example I encountered involved Treasury Department garnishment decisions. They are made by low level officials who violate Arthrex and PCAOB because they are protected by more than one level of for-cause requirements. Basically, these decisions, if enforced throughout the government, can cause chaos in routine adjudicatory decisionmaking regimes that have no policy implications.

Here are a few initial comments on some of the recommendations:

Comment 2, line 22: Once confirmed, why would they be more responsive to Congress? Do we have empirical evidence of this, statistical or anecdotal?

Line 31-32, only Agency Heads can appoint if you take Lucia to govern all adjudicators.

General question—doesn't Arthrex mean that there must be a PAS official involved in all adjudications?

Recommendation 2: Isn't it contrary to Arthrex to delegate final decisionmaking authority to a non-PAS official?

Line 165—motion or initiative? Motion predetermines the form of review.

Line 167—5. Even if review is a matter of right, summary affirmance should be an option. What about the APA's provision that the agency has all powers on review of ALJ decision? Can an agency use a clearly erroneous test?

Number 6—Arthrex again.

Line 206—it seems untimely that you allow a counter petition after a grant of review. Why not before?

Number 19, written as if it applies generally, beyond PAS adjudication.

Sorry these are so cryptic as written but I think they make sense in context.

I should also add that PAS is not a synonym for principal officer. Many inferior officers are appointed that way because PAS is the default appointment process for all officers of the United States. In my view, and the view of some others, there is only one principal officer in each department, except independent agencies, the heads of which may all be principal officers. I'm not sure how this relates to Arthrex, but again, PAS does not mean principal officer, in fact most PAS officials are not principal officers, the vast majority I would argue.

Jack