
THE COPYRIGHT CLAIMS BOARD AND THE APPOINTMENTS CLAUSE

Russell W. Jacobs*

The lengthy Consolidated Appropriations Act, 2021 included not just spending provisions but also a large number of changes to other areas of law, including the Copyright Alternative in Small-Claims Enforcement Act (the “CASE Act”).¹ The CASE Act stems from a Congressional inquiry in 2006 regarding the need for a small-claims court for copyright disputes.² The statute establishes an administrative court in the Copyright Office where Copyright Claims Officers appointed by the Librarian of Congress decide small copyright infringement claims (up to \$30,000 in statutory damages).³ Either party can opt out of the proceedings and decide to bring the dispute elsewhere.⁴ The Copyright Claims Officers issue final decisions and the parties have limited grounds for appeal.⁵

Many have written about the policy reasons for and against the new Copyright Claims Board and administrative courts in general.⁶ This essay does not

* Russell W. Jacobs, Faculty, University of Washington School of Law; General Counsel, Chief Public Policy Officer of the National Court Appointed Special Advocate / Guardian Ad Litem (CASA/GAL) Association for Children. The views expressed in this article do not represent the views of National CASA/GAL.

1. Consolidated Appropriations Act, 2021, 116 H.R. 133, § 212 (2020) (adding small-claims tribunal sections to the Copyright Act at sections 1501 *et seq.*).

2. U.S. COPYRIGHT OFF., COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS 4 (2013), <http://copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf> [<https://perma.cc/Z8MA-S3H2>] (letter from Representative Lamar Smith to Register of Copyright asking for follow-up to 2006 hearings regarding “the need for new remedies to address small copyright claims”).

3. 17 U.S.C.A. § 1502(b)(1) (West 2021) (establishing role of Copyright Claims Officer, appointed by the Librarian of Congress); *Id.* § 1504(c)(1)(D) (\$30,000 limit to damages recoverable before the board).

4. 17 U.S.C.A. § 1504(a) (West 2021) (making participation in Copyright Claims Board proceedings voluntary and preserving the right of parties to litigate elsewhere).

5. 17 U.S.C.A. §§ 1507–1508 (West 2021) (defining the effect of the judgment and the narrow avenues for appeal).

6. See Kent Barnett, *Regulating Impartiality in Administrative Courts*, 69 DUKE L.J. 1695 (2020) (discussing impartiality within agency tribunals); Kathleen K. Olson, *The Copyright Claims Board and the Individual Creator: Is Real Reform Possible?*, 25 COMM. L. & POL’Y 1, 23 (2020) (criticizing the Copyright Office small-claims court because of an anticipated advantage for more-resourced parties and an overall increase in litigation); Sandra M. Aistars, *Ensuring Only Good Claims Come in Small Packages: A Response to Scholarly Concerns about a Proposed Small Copyright Claims Tribunal*, 26 GEO. MASON L. REV. 65, 68 (2018) (advocating for creation of the copyright small-claims tribunal because it would make copyrights more valuable to less-resourced parties); Pamela Samuelson & Kathryn Hashimoto, *Scholarly Concerns about a Proposed Copyright Small Claims Tribunal*, 33 BERKELEY TECH. L.J. 689, 709 (2018) (summarizing concerns of the copyright infringement

address or add to those arguments, nor does it discuss all of the constitutional concerns with the CASE Act.⁷ Instead, this essay focuses on a constitutional issue not addressed in the scholarship regarding the CASE Act but which courts have cited in striking down other, similar administrative courts, namely, Article II, Section 2, Clause 2, known as the Appointments Clause.

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and 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.⁸

While federal courts have found fault with other administrative courts under the Appointments Clause, the Copyright Claims Board will likely survive an Appointments Clause challenge because the powers of the Librarian of Congress over the Copyright Claims Officers renders them inferior officers. Specifically, the CASE Act gives the Librarian the power to appoint and remove these inferior officers consistent with the Appointments Clause.⁹ A federal court could remedy an Appointments Clause issue by removing any restrictions on terminating the Copyright Claims Officers' employment without cause.

I. THE APPOINTMENTS CLAUSE AND ADMINISTRATIVE COURTS

Three appellate decisions invalidating administrative law judge ("ALJ") appointments under the Appointments Clause set the framework for assessing the CASE Act. The first involves another administrative court within the Copyright Office—the Copyright Royalty Board, which determines and adjusts the terms and rates of royalty payments.¹⁰ In 2012, the U.S. Court of Appeals for the District of Columbia Circuit decided in *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board* that the appointment of the Copyright Royalty Judges violated the Appointments Clause because the Librarian of Congress did

tribunal, namely that participants would not understand the voluntary, opt-out nature, the need for "procedural and substantive protections for respondents," and the proportionality of available remedies); Morgan E. Pietz, *Copyright Court: A New Approach to Recapturing Revenue Lost to Infringement: How Existing Court Rules, Tactics from the "Trolls," and Innovative Lawyering Can Immediately Create a Copyright Small Claims Procedure that Solves Bittorrent and Photo Piracy*, 64 J. COPYRIGHT SOC'Y 1, 14–15 (2017) (arguing that a copyright small claims procedure would clear cases off federal district court dockets); John Zuercher, *Clarifying Uncertainty: Why we Need a Small Claims Copyright Court*, 21 MARQ. INTELL. PROP. L. REV. 105, 111 (2017) (arguing that creation of a small-claims copyright court would allow more cases to proceed to completion, which would yield a more thoughtful corpus of copyright jurisprudence).

7. Aistars, *supra* note 6, at 74–78 (arguing that the copyright small-claims courts would not establish an impermissible non-Article III court, nor would it violate due process or the right to a jury trial); Samuelson & Hashimoto, *supra* note 6, at 692–95 (expressing concerns that the Copyright Office small-claims tribunal would not pass muster as a tribunal outside an Article III court and would violate rights for due process and a jury trial).

8. U.S. CONST. art. 2, § 2, cl. 2.

9. 17 U.S.C.A. § 1502(b)(1) (West 2021) (establishing role of Copyright Claims Officer, appointed by the Librarian of Congress); *Id.* § 1502(b)(7) (sanction and removal of a Copyright Claims Officer).

10. *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1335 (D.C. Cir. 2012).

not exercise sufficient supervision over the judges.¹¹ The D.C. Circuit then remedied the violation by invalidating and severing the statutory language limiting the Librarian of Congress's discretion to remove those judges.¹²

Two more recent Appointments Clause decisions invalidated administrative law judge ("ALJ") set-ups in other agencies. In 2018, the United States Supreme Court considered the ALJ system for the U.S. Securities and Exchange Commission in *Lucia v. SEC*.¹³ SEC ALJs, hired by SEC staff members, not the Commission proper, presided over enforcement actions and issued decisions.¹⁴ In the dispute that reached the United States Supreme Court, the Commission imposed \$300,000 in sanctions against Raymond Lucia and his investment company and banned him from working in the securities industry for the rest of his life.¹⁵ Lucia appealed the SEC's decision, arguing that the ALJ did not receive a valid appointment under the Appointments Clause.¹⁶ The Supreme Court agreed with Lucia, determining that the ALJ qualified as an "Officer" under the Appointments Clause.¹⁷ Since the SEC had not validly appointed the ALJ, the Court ordered a new hearing with a validly appointed Officer.¹⁸

In 2019, the United States Court of Appeals for the Federal Circuit considered the ALJ system for *inter partes* patent proceedings at the United States Patent and Trademark Office in *Arthrex, Inc. v. Smith & Nephew, Inc.*¹⁹ In an *inter partes* proceeding, a three-judge panel of the Patent Trial and Appeal Board ("P.T.A.B.") conducts a court-like proceeding to consider the patentability of issued patent claims.²⁰ In the dispute that reached the Federal Circuit, the P.T.A.B. panel issued a decision invalidating certain patents claims owned by Arthrex, Inc.²¹ On appeal, Arthrex argued that the appointment of the ALJs known as Administrative Patent Judges by the Secretary of Commerce violated the Appointments Clause because of the limited supervisory powers held by the Secretary.²² The Federal Circuit agreed, severed the statutory language requiring cause for termination of the appointment, and ordered a new hearing for Arthrex.²³ In 2020, the U.S. Supreme Court granted certiorari to hear the appeal in *Arthrex*.²⁴

11. *Id.* at 1342.

12. *Id.*

13. *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018) (discussing framework for SEC agency enforcement actions).

14. *Id.* at 2049 (citing 17 C.F.R. § 201.360 (2020)) (discussing framework for SEC agency enforcement actions).

15. *Id.* at 2050.

16. *Id.*

17. *Id.* at 2051.

18. *Id.* at 2047–48 (holding that SEC administrative law judges must take their positions through a constitutional appointment and determining that the SEC ALJs had not done so).

19. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1325 (Fed. Cir. 2019) (discussing Patent Trial and Appeal Board).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 141 S. Ct. 551 (2020) (granting writ of certiorari).

II. THE APPOINTMENTS CLAUSE AND THE CASE ACT

In applying the Appointments Clause to non-Article III tribunals in *Lucia*, *Arthrex*, and *Intercollegiate*, the Supreme Court and Courts of Appeals considered two questions.²⁵ First, do the administrative law judges qualify as “Officers” under the Appointments Clause?²⁶ Second, if they qualify as “Officers”, then do they qualify as “principal” or “inferior” officers?²⁷ If they qualify as “principal” officers then only the President, with the advice and consent of the Senate, may appoint them.²⁸ If they qualify as “inferior” officers then Congress may authorize the President alone, a court, or a department head to appoint them.²⁹ The CASE Act likely establishes Copyright Claims Officers as inferior officers, meaning that the Librarian of Congress has the constitutional authority to appoint them and the CASE Act validly gives the Librarian such authority.³⁰

A. Officer Versus Employee

The first question—whether the position qualifies as an “Officer”—considers whether the administrative law judge “exercises significant authority pursuant to the laws of the United States.”³¹ The rationale behind the Appointments Clause helps frame the question. The Supreme Court made the following observations about the reasons for vesting the appointment power with the President.

The Appointments Clause of Article II is more than a matter of “etiquette or protocol”; it is among the significant structural safeguards of the constitutional scheme. By vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevents congressional encroachment upon the Executive and Judicial Branches.³²

The Court also observed that “The Framers understood, however, that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people.”³³

In giving the Librarian of Congress the power to appoint the Copyright Claims Officers has Congress encroached upon an institution in the Executive or Judicial Branch, the concern identified by the Supreme Court? One could argue that the voluntary nature of the proceedings means it has not. The Copyright

25. *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018); *Arthrex*, 941 F.3d at 1327–28; *Intercollegiate*, 684 F.3d at 1337.

26. *Lucia*, 138 S. Ct. at 2051; *Arthrex*, 941 F.3d at 1328; *Intercollegiate*, 684 F.3d at 1337.

27. *Lucia*, 138 S. Ct. at 2051 n.3; *Arthrex*, 941 F.3d at 1328–29; *Intercollegiate*, 684 F.3d at 1337.

28. *Lucia*, 138 S. Ct. at 2051 n.3.

29. *Id.*

30. The D.C. Circuit ruled that the Librarian of Congress falls within the definition of a “head of department” for Appointments Clause purposes and therefore has the constitutional authority to appoint inferior officers. *Intercollegiate*, 684 F.3d at 1341 (2012).

31. *Arthrex*, 941 F.3d at 1327–28 (setting forth “significant authority” test); *Intercollegiate*, 684 F.3d at 1342 (same).

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

33. *Freytag v. Comm’r*, 501 U.S. 868, 884 (1991).

Claims Board does not so much function as a federal court or an Executive Branch policy-making body, but rather an opt-in arbitration service, where the parties have agreed to the rules governing the proceeding.³⁴ In contrast, in *Lucia* and *Arthrex*, at least one of the parties to the disputes did not have a choice about appearing before the ALJ and had to submit to the authority of the representatives of the United States government presiding over the hearing.³⁵ The voluntary nature of the proceedings also touches on the other rationale for the Appointments clause raised by the Supreme Court—accountability. If the Board issues poor quality decisions, then the American people can hold the Copyright Claims Officers accountable by taking copyright disputes elsewhere—to the federal courts or to private arbitration services.

One could also argue that the limited authority of the Copyright Claims Officers in what they can order of the parties also suggests that they do not encroach upon the Executive or Judicial Branch. The Copyright Claims Board may order payment of damages or that one party cease certain activity, but it does not have authority to issue or cancel a copyright registration.³⁶ In contrast, the ALJs at the Securities and Exchange Commission and the P.T.A.B. did not just decide private disputes, but they had the power to grant or revoke a public right, *i.e.*, the license to trade securities and a patent.³⁷ Moreover, unlike some ALJs, the Copyright Claims Officers do not issue agency policy that would have a broader impact on the general public or a regulated industry.³⁸ Since the Copyright Claims Officers do not have authority to issue or revoke public rights or issue public policy, perhaps they do not fall within the scope of the Appointments Clause.

With that said, while the structure of the Copyright Claims Board as akin to a private arbitration body might introduce some novel questions into the Appointments Clause analysis, the tests set forth in *Lucia* and *Arthrex* place Copyright Claims Officers squarely within the definition of an “officer” under the Appointments Clause. Three considerations inform whether to categorize a position as an “officer” or an “employee”: (1) the permanency of the role, (2) the duties of the role, and (3) the finality of the orders issued by the ALJ.³⁹ On the first consideration—the permanency of the role—ongoing terms, as opposed to “periodic” or “episodic” engagements, characterize the position as an officer.⁴⁰ Likewise, where statutes defined the duties and appointment mechanism, the

34. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) (“Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties.”).

35. *Lucia v. SEC*, 138 S. Ct. 2044, 2046 (2018); *Arthrex*, 941 F.3d at 1325; *Intercollegiate*, 684 F.3d at 1337.

36. 17 U.S.C.A. § 1504(e) (West 2021) (setting forth remedies that Board may issue).

37. *Lucia*, 138 S. Ct. at 2051 n.3; *Arthrex*, 941 F.3d at 1328–29; *Intercollegiate*, 684 F.3d at 1337.

38. Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693, 696 (2005) (discussing authority of administrative law judges, such as those in the SEC, to set policy).

39. *Arthrex*, 941 F.3d at 1327–28 (setting forth “significant authority” test); *Intercollegiate*, 684 F.3d at 1342 (same).

40. *Lucia*, 138 S. Ct. at 2052–53 (citing *Freytag v. Comm’r*, 501 U.S. 868 (1991)); *Arthrex*, 941 F.3d at 1328.

Supreme Court and Federal Circuit classified the roles as continuing.⁴¹ The CASE Act establishes the Copyright Claims Officers as full-time positions (each serving renewable six-year terms), defines the qualifications and duties, and vests authority with the Librarian of Congress to appoint the Officers, all signals of a continuing office.⁴²

The officer/employee question continues with a second consideration—the duties of the role—which focuses on whether the individual exercises “significant discretion” when carrying out “important functions.”⁴³ Courts have identified the following duties as ones conducted by an officer: taking testimony, conducting trials, hearing oral arguments, ruling on the admissibility of evidence, and enforcing compliance with discovery orders.⁴⁴ Under the CASE Act, the Copyright Claims Officers have comparable duties—they manage proceedings, make evidentiary determinations, oversee discovery, and conduct hearings.⁴⁵ In *Intercollegiate*, the D.C. Circuit considered it indicative of an officer that the Copyright Royalty Board set royalty rates, which could make or break a business.⁴⁶ Likewise, the CASE Act gives the Copyright Claims Officers the authority to decide whether businesses have infringed copyrights and then impose damages, which could result in significant financial benefits for a prevailing copyright holder or liabilities for a losing infringer.⁴⁷ Accordingly, the duties of Copyright Claims Officers align with those of an “officer” under the Appointments Clause.

The third and final consideration of the officer/employee question looks at whether the individual issues final orders.⁴⁸ Under the CASE Act, the Copyright Claims Officers make determinations on copyright infringement claims and award monetary damages and must do so independently without consulting the Register of Copyrights on the facts of any case.⁴⁹ Further, parties may only appeal a determination by the tribunal on grounds that the Copyright Claims Board committed “fraud, corruption, misrepresentation, or other misconduct,” the Board “exceeded its authority or failed to render a final determination concerning the subject matter at issue,” or the Board issued a determination based on default or failure to prosecute and the party establishes “that the default or failure was

41. *Lucia*, 138 S. Ct. at 2052–53 (citing *Freytag*, 501 U.S. 868); *Arthrex*, 941 F.3d at 1328.

42. 17 U.S.C.A. § 1502(b) (West 2021) (defining appointment mechanism, qualifications, and term); *Id.* § 1503 (defining duties of Copyright Claims Officers).

43. *Lucia*, 138 S. Ct. at 2052–53 (citing *Freytag*, 501 U.S. 868).

44. *Lucia*, 138 S. Ct. at 2053 (duties included taking testimony, conducting trials, ruling on the admissibility of evidence, and enforcing compliance with discovery orders); *Arthrex*, 941 F.3d at 1328 (duties included oversight of discovery, application of the Federal Rules of Evidence, and hearing oral arguments).

45. 17 U.S.C.A. § 1502(a) (West 2021) (setting forth responsibilities of Copyright Claims Officers, including, *inter alia*, managing proceedings, rendering rulings on discovery, evidence and other matters, requesting information from participants, and conducting hearings).

46. *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1338 (2012).

47. 17 U.S.C.A. § 1503(a) (West 2021) (setting forth authority of Copyright Claims Board).

48. *Lucia*, 138 S. Ct. at 2053–55 (the SEC ALJs issued orders that became final unless the Commission proactively revised them); *Arthrex*, 941 F.3d at 1328 (“[T]he APJs issue final written decisions containing fact findings and legal conclusions, and ultimately deciding the patentability of the claims at issue.”).

49. 17 U.S.C.A. § 1502(a) (West 2021) (setting forth duties of Copyright Claims Officers to render judgments); *Id.* § 1502(b) (setting forth requirements for independence in rendering judgments).

due to excusable neglect.”⁵⁰ Based on this statutory language, the Copyright Claims Officers render final judgments and all three considerations in the *Lucia* and *Arthrex* tests point to the Copyright Claims Officers meeting the definition of an “officer” under the Appointments Clause.

B. Principal Versus Inferior Officers

The second question looks at the distinction between principal and inferior officers.⁵¹ The Supreme Court in *Lucia* did not address this question because the SEC did not appoint the ALJs in the manner appropriate for either principal or inferior officers.⁵² But the *Arthrex* court explored that question, and identified three non-exclusive factors that distinguish between principal and inferior officers: “(1) whether an appointed official has the power to review and reverse the officers’ decision; (2) the level of supervision and oversight an appointed official has over the officers; and (3) the appointed official’s power to remove the officers.”⁵³ The third factor will likely make the difference for the CASE Act. Despite ambiguity in a number of legal questions relevant to the analysis, the Librarian of Congress likely has sufficient removal authority to render the Copyright Claims Officers inferior officers.

Starting with the first factor, the Supreme Court noted in *Edmond v. United States*, “[w]hat is significant [to distinguish judges as inferior rather than principal officers] is that the judges . . . have no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers.”⁵⁴ In *Arthrex*, the court observed that the Director did not have any independent authority to review decisions and the majority vote of the panelists would control, traits which characterize principal officers.⁵⁵ In *Intercollegiate*, the D.C. Circuit likewise determined that the Librarian of Congress had little authority to review the Copyright Rate Court decisions.⁵⁶ The Register of Copyrights appointed by the Librarian of Congress could correct any legal errors in the determinations, but the judges still had vast discretion over rates and terms,

50. 17 U.S.C.A. § 1508(c)(1) (West 2021) (setting forth bases for challenging a determination).

51. *Lucia*, 138 S. Ct. at 2051 n.3; *Arthrex*, 941 F.3d at 1328–29.

52. *Lucia*, 138 S. Ct. at 2051 n.3.

53. *Arthrex*, 941 F.3d at 1328–29, citing *Edmond v. United States*, 520 U.S. 651, 664–65 (1997). In an earlier decision regarding Copyright Rate Judges, Justice Kavanaugh, then a judge on the D.C. Circuit, wrote in a concurring opinion that those judges “appear to be principal officers — not inferior officers — because they are not removable at will and their decisions regarding royalty rates apparently are not reversible by the Librarian of Congress or any other Executive Branch official.” *Soundexchange, Inc. v. Librarian of Cong.*, 571 F.3d 1220, 1226 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (not reaching the constitutional issue since the parties had not raised it on appeal). This opinion signals how Justice Kavanaugh, who had not joined the Supreme Court when it issued its decision in *Lucia*, might approach an Appointments Clause challenge to the CASE Act.

54. *Edmond*, 520 U.S. at 665 (categorizing Coast Guard Court of Criminal Appeals judges as inferior officers).

55. *Arthrex*, 941 F.3d at 1330.

56. *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1338 (2012) (determining that the Librarian has no “room to play an influential role in the CRJs’ substantive decisions”).

and the Register could not reverse or change the rates.⁵⁷ The ability to issue final decisions marked the Copyright Rate Judges as principal officers.⁵⁸ The CASE Act gives the Librarian of Congress the same or even less review power over Copyright Claims Board decisions than the review authority held by the superiors in *Arthrex* and *Intercollegiate*. The CASE Act requires that the Board render its decisions independently, without consulting the Register of Copyrights on the facts of any case.⁵⁹ The CASE Act does not provide for any review of the Board's decisions by the Librarian of Congress.⁶⁰ This lack of review of the Board's decisions means that the first consideration favors viewing Copyright Claims Officers as principal officers.

The second type of power involves the supervision over the officer. A principal officer generally receives little supervision, while an inferior officer works under the supervision of a senior officer.⁶¹ The *Edmond* court reasoned that “in the context of a clause designed to preserve political accountability relative to important government assignments, we think it evident that ‘inferior officers’ are officers 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.”⁶² In *Arthrex*, the Federal Circuit concluded that the Director of the U.S.P.T.O. exercised significant authority over the P.T.A.B. ALJs.⁶³ Namely, the Director could issue regulations governing the conduct of the P.T.A.B. proceedings, supervise the operations of the office, provide exemplary language for decisions, approve decisions as precedential, decide whether to initiate a case, assign ALJs to panels, and authorize pay.⁶⁴ This type of supervision aligned the P.T.A.B. ALJs more into the category of inferior officers.⁶⁵ While the *Intercollegiate* court acknowledged the importance of supervision in the inferior versus principal officer analysis, the D.C. Circuit only assessed the supervision exercised over decisions and did not consider the other aspects of supervision raised by the Federal Circuit in *Arthrex*.⁶⁶

As in *Arthrex*, the CASE Act gives the Register of Copyright the authority to establish the regulations to implement the Copyright Claims Board.⁶⁷ Further, the CASE Act states that the Register of Copyrights supervises the Copyright

57. *Id.* at 1339–40 (discussing review authority over Copyright Rate Court decisions by Librarian of Congress).

58. *Id.*

59. 17 U.S.C.A. § 1502(a) (West 2021) (setting forth duties of Copyright Claims Officers to render judgments); *Id.* § 1502(b) (setting forth requirements for independence in rendering judgments).

60. 17 U.S.C.A. § 1501 *et seq.* (West 2021) (no requirement for review of Board determinations by anyone outside the Board).

61. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1331 (Fed. Cir. 2019).

62. *Edmond v. United States*, 520 U.S. 651, 663 (1997) (categorizing Coast Guard Court of Criminal Appeals judges as inferior officers).

63. *Arthrex*, 941 F.3d at 1331–32.

64. *Id.*

65. *Id.*

66. *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1338 (2012) (“[T]he Librarian [has no] room to play an influential role in the CRJs’ substantive decisions.”).

67. 17 U.S.C.A. § 1510(a)(1) (West 2021) (establishing duty of Register of Copyright to “establish regulations to carry out this chapter”).

Claims Officers.⁶⁸ This type of supervision aligns more with the profile of an inferior officer as set forth in *Arthrex*. On the other hand, the CASE Act does not give authority to the Librarian of Congress and Register of Copyrights to decide which cases to initiate, to produce any template agreements, or to provide any meaningful day-to-day supervision of the work of Copyright Claims Officers, which aligns them more with the profile of a principal officer.⁶⁹ Regulations issued by the Register of Copyrights and the practices established by the Copyright Claims Board, once implemented, would show the level of involvement actually exercised by the Register of Copyrights and the Librarian of Congress. Accordingly, this consideration remains ambiguous at present.

The third type of power focuses on the ability to remove an officer. A principal officer's superiors have limited authority to remove the principal officer, while an inferior officer's superiors have a high degree of discretion to remove that officer.⁷⁰ The Supreme Court emphasized in *Edmond* that "[t]he power to remove officers, we have recognized, is a powerful tool for control."⁷¹ In *Intercollegiate*, the D.C. Circuit noted that the limitation on grounds for removal of Copyright Rate Judges by the Librarian of Congress only for "misconduct or neglect of duty" marked them as principal officers.⁷² In *Arthrex*, the Federal Circuit determined that the Director of the U.S.P.T.O. did not have significant authority to remove the ALJ from office since he could only remove an ALJ "for such cause as will promote the efficiency of the service."⁷³ Both courts concluded that the limited authority to remove the ALJs from office marked them as principal officers.⁷⁴

The CASE sets forth that "... the Librarian of Congress may sanction or remove a Copyright Claims Officer."⁷⁵ This language tracks the rewrite of the removal language in 17 U.S.C. section 802(i) ordered by the D.C. Circuit in *intercollegiate* to remedy the Appointments Clause problem: "The Librarian of Congress may sanction or remove a Copyright Royalty Judge."⁷⁶ As the CASE Act removal language aligns with the language approved by the D.C. Circuit, the statute therefore seems to create an inferior, rather than a principal officer.

Before moving on from this power, though, we should consider whether other statutes impact the removability of Copyright Claims Officers. In the wake of the *Lucia* decision, President Trump issued an Executive Order moving the

68. 17 U.S.C.A. § 1503(c) (West 2021) (establishing supervision of Copyright Claims Officers by Register of Copyrights). The *Intercollegiate* court observed that the Librarian of Congress, not the President, appoints the Register of Copyrights. *Intercollegiate*, 684 F.3d at 1338 (citing 17 U.S.C. § 701(a)).

69. 17 U.S.C.A. § 1502(a) (West 2021) (setting forth duties of Copyright Claims Officers to render judgments); *Id.* § 1502(b) (setting forth requirements for independence in rendering judgments).

70. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1332 (Fed. Cir. 2019) (discussing removal authority).

71. *Edmond v. United States*, 520 U.S. 651, 665 (1997) (categorizing Coast Guard Court of Criminal Appeals judges as inferior officers).

72. *Intercollegiate*, 684 F.3d at 1340.

73. *Arthrex*, 941 F.3d at 1333 (citing 5 U.S.C. § 7513(a)).

74. *Id.* at 1334.

75. 17 U.S.C.A. § 1502(b)(7) (West 2021) (sanction and removal of a Copyright Claims Officer).

76. *Intercollegiate*, 684 F.3d at 1341.

hiring of all administrative law judges out of the competitive service and into the excepted service.⁷⁷ In September 2020, the Office of Personnel Management published proposed regulations to implement the Executive Order.⁷⁸ The proposed rule clarifies that 5 U.S.C. § 7521 applies to all ALJs.⁷⁹ That statute provides that an agency may take actions to remove, suspend, reduce in grade, reduce in pay, and furlough of 30 days or less against ALJs “only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.”⁸⁰ In considering similar language, the *Arthrex* court concluded that officers removable only for cause belong to the category of principal officers.⁸¹

But does 5 U.S.C. § 7521 apply to Copyright Claims Officers? The proposed rule does not define “administrative law judges,” and it does not reference any specific positions or agencies.⁸² According to the Administrative Procedures Act, the removal provisions in 5 U.S.C. § 7521 apply to any judge who presides over an agency hearing on the record.⁸³ Under the CASE Act, the Copyright Claims Officers conduct hearings on the record, which suggests that the APA removal provisions apply.⁸⁴ Yet in *Intercollegiate*, the D.C. Circuit looked only at the express removal language in the Copyright Act, and did not address the removal provisions of the Administrative Procedures Act, apparently thinking that they did not apply.⁸⁵ With no meaningful difference between the Copyright Royalty Judges and the Copyright Claims Officers, the same approach would hold for the CASE Act. Although the removal standards for ALJs in general remains unclear, the plain language of the CASE Act and the D.C. Circuit’s approach in *Intercollegiate* suggest that the courts might determine that the Librarian of Congress can remove the Copyright Claims Officers at will, making them inferior officers.

C. Severing Termination Provisions

If a court determines that the Librarian of Congress lacks the authority to remove the Copyright Claims Officers at will, the court could remedy the

77. Exec. Order No. 13,843, 83 Fed. Reg. 32755 (July 10, 2018).

78. Administrative Law Judges, 85 Fed. Reg. 59207 (Sept. 21, 2020).

79. *Id.* (“Adverse actions against ALJs are governed by 5 U.S.C. 7521, subject to regulations issued by the Merit Systems Protection Board (MSPB) under 5 U.S.C. 1305. These provisions likewise make no distinction between competitive service and excepted service ALJs.”).

80. 5 U.S.C. § 7521 (setting forth standard for adverse actions against administrative law judges).

81. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1334 (Fed. Cir. 2019).

82. Administrative Law Judges, 85 Fed. Reg. 59207 (2020).

83. 5 U.S.C. § 7521 (setting forth removal standards for administrative law judges appointed pursuant to §5 U.S.C. § 3105); 5 U.S.C. § 3105 (setting forth that the section applies to judges presiding over hearings conducted in accordance with 5 U.S.C. § 556); 5 U.S.C. § 556(a) (setting forth that the section applies to any hearing pursuant to 5 U.S.C. § 554(a)); 5 U.S.C. § 554(a) (“This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . .”).

84. 17 U.S.C.A. § 1503(a)(1)(I) (West 2021) (Copyright Claims Officers have the responsibility to maintain records of proceedings before the Board).

85. *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1340 (2012).

Appointments Clause deficiency by changing the removal authority over the ALJs, as the *Intercollegiate* and *Arthrex* courts both did.⁸⁶ In *Arthrex*, the Federal Circuit severed the portion of the Patent Act that restricted the removal of the P.T.A.B. ALJs and concluded that doing so would remedy the problem.⁸⁷ In *Intercollegiate*, the D.C. Circuit likewise invalidated and severed any restrictions on the Librarian’s authority to remove the Copyright Rate Judges, concluding that doing so would overcome the Appointments Clause problem.⁸⁸ Specifically, the D.C. Circuit rewrote 17 U.S.C. § 802(i) to read “The Librarian of Congress may sanction or remove a Copyright Royalty Judge.”⁸⁹ In the event 5 U.S.C. § 7521 or another statute or rule sets a for-cause standard for termination of employment of Copyright Claims Officers, a court could overcome the Appointments Clause deficiency by ordering that the statute or rule does not apply to Copyright Claims Officers—that way the Librarian of Congress may remove those officers without cause and the appointments would satisfy the Appointments Clause.

III. POTENTIAL DEVELOPMENTS WITH THE APPOINTMENTS CLAUSE AND THE COPYRIGHT CLAIMS OFFICERS

Three expected developments this year will impact the Appointments Clause analysis for the CASE Act. First, the Supreme Court will consider the appeal in *Arthrex*, which could yield more guidance on the distinction between principal and inferior officers, particularly regarding the impact of for-cause restrictions on removability of officers.⁹⁰ Second, the Biden administration might address the standards for termination of ALJs and clarify whether those standards apply to Copyright Claims Officers. Third, the Copyright Office will issue policies regarding operations of the Copyright Claims Board and oversight of the Copyright Claims Officers by the Librarian of Congress.⁹¹ These policies might establish a level of supervision by the Librarian that would make the Copyright Claims Officers inferior officers, thereby satisfying the Appointments Clause.

IV. CONCLUSION

The new Copyright Claims Board will likely face challenges that the appointment of its judges violates the Appointments Clause—either from a party dissatisfied with the outcome of the case or someone opposed in principle to administrative law courts. The success of that challenge will likely depend on the removability of the Copyright Claims Officers. The language of the CASE Act seems to define the Copyright Claims Officers as inferior officers since it gives

86. *See id.* at 1340; *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1333 (Fed. Cir. 2019).

87. *Arthrex*, 941 F.3d at 1325.

88. *Intercollegiate*, 684 F.3d at 1340–41.

89. *Id.* at 1341.

90. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 141 S. Ct. 551 (2020) (granting writ of certiorari).

91. 17 U.S.C.A. § 1510(a)(1) (West 2021) (establishing duty of Register of Copyright to “establish regulations to carry out this chapter”).

the Librarian of Congress the authority to remove them from their roles. The true scope of the Librarian's removal power will become clearer this year as the Copyright Office sets the rules for the court, the Biden administration determines its policies regarding administrative law judges, and the Supreme Court issues its decision in *Lucia v. SEC*. Other features of the Copyright Claims Board might make the Copyright Claims Officers employees rather than officers, namely, the limited authority of the Copyright Claims Officers to bind parties with decisions or policies of the United States since the parties can opt out of the proceedings and the Board can only impose monetary damages or orders to stop doing certain activities. If a court concludes that the appointments violate Article II, it could remedy the constitutional issue by enhancing the removal powers of the Librarian of Congress, which would make the Copyright Claims Officers inferior officers accountable to the Librarian.