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THE COMING COPYRIGHT JUDGE CRISIS

SAURABH VISHNUBHAKAT[†] & DAVE FAGUNDES[‡]

Commentary about the Supreme Court’s 2021 decision in United States v. Arthrex, Inc. has focused on the nexus between patent and administrative law. But this overlooks the decision’s seismic and as-yet unappreciated implication for copyright law: Arthrex renders the Copyright Royalty Board (“CRB”) unconstitutional. The CRB has suffered constitutional challenge since its 2004 inception, but these were seemingly resolved in 2011 when the D.C. Circuit held that the CRB’s composition did not offend the Appointments Clause as long as Copyright Royalty Judges (“CRJs”) were removable at-will. But when the Court invalidated the selection process for administrative patent judges on a similar theory in Arthrex, it also rejected the D.C. Circuit’s remedy of requiring at-will removal, making the CRB unconstitutional—again. This problem is not insoluble, however, and the best available option would be to make CRJs subject to presidential appointment with Senate approval. This Essay highlights this novel insight regarding Arthrex, proposes legislative and judicial solutions to the problem of constitutionality, and reflects on the broader implications of these claims for copyright’s administrative law and Appointments Clause jurisprudence.

INTRODUCTION	1
I. A BRIEF HISTORY OF COPYRIGHT ADJUDICATION	5
II. FROM <i>INTERCOLLEGIATE BROADCASTING</i> TO <i>ARTHREX</i>	10
A. <i>Judge Kavanaugh and the Intercollegiate Broadcasting Saga</i>	11
B. <i>The CRB’s Arthrex Problem</i>	14
III. CONSTITUTIONALIZING COPYRIGHT ROYALTY JUDGES	17
A. <i>Distinguishing CRJs from APJs</i>	18
B. <i>Making the CRB Constitutional (Again)</i>	20
1. <i>Leveling Up CRJ Selection Processes</i>	20
2. <i>Leveling Down CRB Authority</i>	23
CONCLUSION	27

INTRODUCTION

In June 2021, the Supreme Court decided *United States v. Arthrex, Inc.*,

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holding that hundreds of administrative patent judges (“APJs”) were selected in violation of the Appointments Clause of the U.S. Constitution.¹ *Arthrex* occasioned much scholarly analysis. Some academics have explored the implications of the Court’s strict reading of the Appointments Clause and highlighted the inconsistency of that interpretation with prior precedent.² Others have considered how *Arthrex* changed our understanding of the distinction between principal and inferior officers.³ But most academic attention has been focused on the case’s implications for patent law. Some commentators considered the practical implications of implementing the Court’s holding that APJ decisions must be reviewable by the Director of the Patent and Trademark Office (“PTO”).⁴ Others expressed uncertainty about the case’s implications for other matters decided by unconstitutionally appointed APJs.⁵ Still others considered the retroactivity of the Court’s Appointments Clause jurisprudence, paying particular attention to how it may affect patent litigation.⁶

These treatments of *Arthrex* notably fail to consider the implications of the case for copyright. This absence is unfortunate but unsurprising. A robust body of scholarship examining the intersection of administrative law and

¹ 141 S. Ct. 1970 (2021).

² See, e.g., Jennifer Mascott & John F. Duffy, *Executive Decisions After Arthrex*, 2021 SUP. CT. REV. 225, 261–65 (discussing the *Arthrex* Court’s failure to include or consider prior precedent, specifically *Morrison v. Olson*).

³ See, e.g., Comment, *Separation of Powers—Appointment and Removal—Principal and Inferior Officers—United States v. Arthrex, Inc.*, 135 HARV. L. REV. 391, 397 (2021) (arguing that *Arthrex* indicates that having a superior is a necessary condition for an officer to be inferior).

⁴ See, e.g., Patrick H.J. Hughes, *PTO Changes to Follow Supreme Court’s Arthrex Ruling, Attorneys Predict*, WESTLAW INTELL. PROP. DAILY BRIEFING (June 23, 2021), [https://today.westlaw.com/Document/I0205faa1d44511ebbea4f0dc9fb69570/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://today.westlaw.com/Document/I0205faa1d44511ebbea4f0dc9fb69570/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0) [https://perma.cc/9YQH-LF8Q] (mentioning a practitioner’s belief that subjecting the APJ decisions to a political appointee may imbue the process with an element of politics previously absent).

⁵ See, e.g., Matthew Johnson, John Evans & Hannah Mehrle, *Review of Post-Arthrex Handling of Pending Federal Circuit Appeals with Appointment Clause Challenges*, 21 CHI.-KENT J. INTELL. PROP. 12, 21 (2022) (noting that whether director review or rehearing will be sought for cases remains unclear).

⁶ See, e.g., Andrew C. Michaels, *Retroactivity and Appointments*, 52 LOY. U. CHI. L.J. 627, 691–705 (2021) (discussing the retroactivity implications of *Arthrex*).

patent⁷ and trademark⁸ law has emerged over the past two decades. Yet, scholars have largely ignored examinations of the nexus between administrative law and copyright. As we have shown in previous work, this lacuna is unwarranted.⁹ Copyright law has a rich administrative history dating to the Founding, and following passage of the Copyright Act of 1976, the Copyright Office and, later, Copyright Royalty Judges (“CRJs”), were vested with authority to administer several complex statutory licensing regimes with significant implications for creators, content industries, and users.¹⁰

In this Essay, we illustrate the salience of copyright’s administrative law by revealing an unappreciated implication of *Arthrex*: It has likely rendered the Copyright Royalty Board (“CRB”) unconstitutional. In *Arthrex*, the Court concluded that the reason APJs had been functioning as principal officers of the United States was because their decisions were final and unreviewable as an intrabranched matter.¹¹ But APJs were (and still are) not appointed by the President, as required for principal officers, but by the Secretary of Commerce. The Court thus ordered that APJs be reduced to inferior officer status and that, accordingly, their decisions be rendered fully and unilaterally reviewable by the Director of the PTO, a principal officer and presidential appointee.¹²

Like APJs prior to *Arthrex*, three CRJs make up an administrative tribunal, the CRB, whose factual decisions are final and unreviewable—and whose legal decisions, though non-final, are not reviewable by a principal officer. Like APJs, CRJs are appointed not by the President with Senate

⁷ See, e.g., Jonathan S. Masur, *Regulating Patents*, 2010 SUP. CT. REV. 275 (2010) (arguing that the USPTO should be endowed with substantive rulemaking authority); Michael D. Frakes & Melissa F. Wasserman, *Does Agency Funding Affect Decisionmaking?: An Empirical Assessment of the PTO’s Granting Patterns*, 66 VAND. L. REV. 67 (2013) (using the USPTO to study the relationship between agency funding and outcomes of decisional processes); Sapna Kumar, *The Other Patent Agency: Congressional Regulation of the ITC*, 61 FLA. L. REV. 529 (2009) (warning of the dangers of multiple administrative bodies making patent law); Saurabh Vishnubhakat, Arti K. Rai & Jay P. Kesan, *Strategic Decision Making in Dual PTAB and District Court Proceedings*, 31 BERKELEY TECH. L.J. 45 (2016) (arguing that 2011 patent reform transformed the relationship between Article III patent litigation and the administrative state).

⁸ See, e.g., Melissa F. Wasserman, *What Administrative Law Can Teach the Trademark System*, 93 WASH. U. L. REV. 1511 (2016) (importing insights from administrative law into the trademark context); Saurabh Vishnubhakat, *Administrative Revocation in Trademark Law*, in RESEARCH HANDBOOK ON THE LAW AND ECONOMICS OF TRADEMARKS (Glynn S. Lunney, Jr., ed.) (2022) (applying the court-agency substitution thesis of patent revocation to the trademark context).

⁹ See Dave Fagundes & Saurabh Vishnubhakat, *Copyright’s Administrative Law*, 68 J. COPYRIGHT SOC’Y U.S.A. 417, 418 (2021).

¹⁰ See *id.* at 420–39.

¹¹ *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1985 (2021) (“We hold that the unreviewable authority wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to an inferior office.”).

¹² *Id.* at 1986.

approval, but by a presidential appointee, the Librarian of Congress. The close similarity between APJs and CRJs suggests that the selection of the latter also violates the Appointments Clause, just as the selection of the former did.¹³

This is not the first time that the CRB's legality has come under fire. Almost since the tribunal's creation in 2004, it has been embroiled in constitutional litigation. The controversy came to a head when the D.C. Circuit held the CRB unconstitutional on substantially the same Appointments Clause theory invoked a decade later in *Arthrex*.¹⁴ To remedy that constitutional infirmity, though, the court found it sufficient to leave the intrabranched reviewability structure of the CRB in place so long as CRJs themselves were made removable at-will.¹⁵ At-will removal is the same remedy that the Solicitor General would later advocate for in *Arthrex* should the Court conclude that APJs' selection violated the Appointments Clause.¹⁶ The Court rejected this proffer, requiring instead that APJ decisions be subject to review by the PTO Director.¹⁷ By opting for a more robust remedy instead of making APJs removable at-will, the Court indicated (without explicitly stating) that the D.C. Circuit's remedy was insufficient.¹⁸

The stricter remedial approach adopted in *Arthrex* likely leaves the CRB in violation of the Appointments Clause. This problem could be fixed in two ways. CRJ selection could be ratcheted up, requiring presidential appointment with Senate approval, rather than just appointment by the Librarian of Congress. Alternatively, the CRB's institutional freedom could be ratcheted down, making its decisions fully reviewable by the Librarian of Congress.¹⁹ We explain in detail why the former approach entails fewer legal and practical problems, making it the superior alternative. We relatedly argue that once the appointment of CRJs is reformed to reflect their principal-officer status, the decisions of CRJs should be made final and unreviewable except by the Article III courts.

¹³ APJs and CRJs are not identical because the former's decisions were fully unreviewable, while only the factual portions of the latter's decisions are unreviewable. We take up this point in Part III.A, *infra*, and show why it does not make a difference.

¹⁴ See *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1332 (D.C. Cir. 2012).

¹⁵ See *id.* at 1341 (explaining that CRJs become validly appointed inferior officers once they are subject to at-will removal by the Librarian of Congress, a Head of Department).

¹⁶ Reply and Response Brief for Petitioner at 34, *United States v. Arthrex*, 141 S. Ct. 1970 (2021) (Nos. 19-1434, 19-1452, 19-1458).

¹⁷ *Arthrex*, 141 S. Ct. at 1987.

¹⁸ See *id.* (“[R]egardless whether the Government is correct that at-will removal by the Secretary would cure the constitutional problem, review by the Director better reflects the structure of supervision within the PTO and the nature of the APJs’ duties . . .”).

¹⁹ Making their decisions fully reviewable by the Register of Copyrights, as opposed to the Librarian of Congress, would almost certainly fall short under *Arthrex*, which required APJ decisions to be reviewed by a presidential appointee (the Director of the PTO), whereas the Register is appointed by the Librarian. We explore this point in Part III.B.2., *infra*.

This Essay proceeds as follows. Part I sketches a quick history of adjudication in copyright law that culminates with the Copyright Royalty Board—focusing on the creation, structure, and baked-in constitutional flaws of this administrative tribunal. Part II reviews the variety of constitutional challenges that have embroiled the CRB since its 2004 creation and outlines in detail both the curative approach used by the D.C. Circuit in *Intercollegiate Broadcasting* and why this approach would likely be insufficient under *Arthrex*. Part III details why APJs and CRJs, though not identical, are similar in relevant ways for Appointments Clause purposes. It then considers two remedies to the CRB’s newfound unconstitutionality, explains the superiority of one, and addresses potential wrinkles and likely costs to its implementation. The Conclusion points out that this Essay illustrates the importance of attending to the nexus of administrative law and copyright and reflects on this Essay’s implications for Appointments Clause jurisprudence.

I

A BRIEF HISTORY OF COPYRIGHT ADJUDICATION

While the history of copyright administration dates to the passage of the first Copyright Act in 1790, copyright administration remained uncontroversial for nearly two centuries, when it mainly entailed the registration and recordation of copyrights.²⁰ This kind of administration was primarily ministerial, and lacked the kind of policymaking discretion enjoyed by the agencies that arose during the New Deal.²¹ The Copyright Act of 1976 (“1976 Act”), though, established a complex compulsory license regime that governed mechanical recordings of musical works,²² public performances via coin-operated devices (e.g., jukeboxes),²³ and cable retransmissions of audiovisual works.²⁴ In the ensuing decades, the 1976 Act was revised to add compulsory licenses for satellite television retransmissions²⁵ and public performances of sound recordings via digital media.²⁶ Administering these provisions required collecting and distributing royalties owed under these schemes—work that was important, but entailed no exercise of judgment or policymaking expertise.²⁷ Beyond these nondiscretionary duties, the 1976 Act also required adjudication of disputes

²⁰ See Fagundes & Vishnubhakat, *supra* note 9, at 420–39 (discussing the history of copyright administration). The ensuing discussion relies heavily on the discussion of copyright administration in that article.

²¹ *Id.* at 432.

²² 17 U.S.C. § 115.

²³ *Id.* § 116.

²⁴ *Id.* § 111.

²⁵ *Id.* §§ 119, 122.

²⁶ *Id.* § 114.

²⁷ See *id.* § 801(b)(3)(A).

about whether the license rates complied with statutory standards.²⁸ In contrast with the ministerial work of managing royalties, resolving ratemaking matters involves discretion and entails policy judgment. It requires the adjudicative body to resolve objections raised by parties affected by compulsory license rates, a process which demands the body's interpretation and application of open-ended statutory standards.

To undertake these responsibilities, the 1976 Act established a new body in the Library of Congress, the Copyright Royalty Tribunal ("CRT").²⁹ The CRT was originally a five-member body, with each member appointed by the President with Senate advice and consent for seven-year terms. After only a few years, however, the Tribunal came under attack.³⁰ Two of its own members advocated the Tribunal's abolition before Congress,³¹ and a consensus soon emerged that the Tribunal lacked qualified commissioners and that its workload did not justify a five-member body.³² Although by 1990 the Tribunal had shrunk to three,³³ infighting and weak leadership persisted.³⁴ As a result, Congress abolished the Copyright Royalty Tribunal in 1993.³⁵

In its place, Congress authorized the Register to convene ad hoc panels of arbitrators to hear disputes arising under the Act's statutory license provisions.³⁶ These so-called Copyright Arbitration Royalty Panels ("CARPs") were not underworked, as the CRT had been, but their lack of expertise led to a barrage of criticism aimed at the cost associated with rendering decisions, the instability of CARP decisionmaking, and the panel's

²⁸ See *id.* §§ 801(b)(4)–(7).

²⁹ 17 U.S.C. § 801 (1976), amended by Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304.

³⁰ See Fagundes & Vishnubhakat, *supra* note 9, at 444–45.

³¹ See U.S. GOV'T ACCOUNTABILITY OFF., GAO-115478, STATEMENT OF WILBUR D. CAMPBELL, DEPUTY DIRECTOR, ACCOUNTING AND FINANCIAL MANAGEMENT DIVISION, BEFORE THE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE, HOUSE OF REPRESENTATIVES, ON THE OPERATION OF THE COPYRIGHT ROYALTY TRIBUNAL (1981), www.gao.gov/assets/115478.pdf [<https://perma.cc/GQ8W-GWBZ>].

³² See *Copyright Reform Act of 1993: Hearing on H.R. 897 Before the Subcomm. on Intell. Prop. and Jud. Admin. of the H. Comm. on the Judiciary*, 103d Cong. 97 (1993) (statement of Edward J. Damich, Commissioner, Copyright Royalty Tribunal) (citing the lack of workload and expertise as reasons to abolish the Tribunal).

³³ See 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1.91, Westlaw (database updated September 2022).

³⁴ See *Copyright Reform Act of 1993: Hearings on H.R. 897 Before the Subcomm. on Intell. Prop. and Jud. Admin. of the H. Comm. on the Judiciary*, 103d Cong. 101–05 (1993) (transcribing remarks that illustrate the infighting between the three Tribunal commissioners, particularly between two of the Commissioners and the Chairman, and the dysfunction that results).

³⁵ See Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304 (establishing copyright arbitration royalty panels to replace the Copyright Royalty Tribunal).

³⁶ Copyright Royalty and Distribution Reform Act of 2004, 17 U.S.C. § 801 (2018) (establishing copyright arbitration royalty panels).

difficulties handling small claims.³⁷ Two decisions in particular doomed the CARPs in the eyes of industry and Congress. First, a 1997 CARP decision set satellite retransmission fees at market rates,³⁸ but Congress disagreed and quickly legislated over it.³⁹ Second, a 2002 CARP decision undertook ratemaking related to small webcasters but was roundly rejected both by copyright owners and by webcasters themselves,⁴⁰ leading again to legislative reversal.⁴¹ Ultimately, CARPs came under bipartisan and industry attack as incompetent, unduly expensive, and—due to their ad hoc nature—inconsistent.⁴²

These attacks brought further reform. The 2004 Copyright Royalty and Distribution Reform Act largely abolished CARPs and established the current Copyright Royalty Board.⁴³ The failures of the CRT and CARPs largely structured the shape of the CRB. It has a three-member structure and undertakes significant statutory ratemaking duties to avoid falling into disuse, like the CRT.⁴⁴ It was also constituted as a standing body characterized by subject matter expertise to promote competence and avoid the high costs of the ad hoc CARPs. But while the Board's design responded well to these substantive concerns, its structure raised constitutional issues that have assailed it since its early formation.

One organizing principle for CRJ appointments is expertise. The CRJs' primary work is to resolve disputes that arise under the Act's various compulsory license regimes. For as long as the copyright system has apportioned compulsory licensing revenues under legislative direction, these ratemaking processes have been highly industry-sensitive and contentious.⁴⁵ The 1994 amendments to the 1976 Act, which added a public performance

³⁷ See Stuart M. Maxey, *That CARP Is No Keeper: Copyright Royalty Arbitration Panels - Change Is Needed, Here Is Why, and How*, 10 J. INTELL. PROP. L. 385, 385 (2003) (summarizing these critiques of the CARPs).

³⁸ See Rate Adjustment for the Satellite Carrier Compulsory License, 62 Fed. Reg. 55742, 55744 (Oct. 28, 1997).

³⁹ See Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, app. I § 1004, 113 Stat. 1501, 1501A-527 (1999) (codified as amended at 17 U.S.C. § 119) (amending the computation of royalty fees for satellite carriers).

⁴⁰ See, e.g., 148 CONG. REC. 7047 (2002) (transcribing remarks of Congressman Berman that small webcasters strongly objected to the CARP's ratemaking).

⁴¹ See Small Webcasters Settlement Act of 2002, Pub. L. No. 107-321, § 5, 116 Stat. 2780, 2783 (2002).

⁴² See generally *Copyright Royalty Arbitration Panel (CARP) Structure and Process: Hearing Before the Subcomm. on Cts., the Internet, and Intell. Prop. of the H. Comm. on the Judiciary, 107th Cong.* (2002).

⁴³ Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (2004) (codified in scattered sections of 17 U.S.C.) (amending title 17 of United States Code to replace copyright arbitration royalty panels with Copyright Royalty Judges).

⁴⁴ See Fagundes & Vishnubhakat, *supra* note 9, at 456.

⁴⁵ See, e.g., *id.* at Part I.C (briefly summarizing the history of copyright compulsory licensing administration from the late 1970s onward).

right for sound recordings, are difficult to interpret⁴⁶ but economically momentous.⁴⁷ Navigating that terrain takes not only keen adjudicatory abilities but also a strong grasp of substantive copyright law, industry dynamics, and ratemaking economics.

These are the very qualities required by statute of CRJs. Each appointee must be an attorney with at least seven years of legal experience.⁴⁸ The Chief Copyright Royalty Judge must also have at least five years of experience “in adjudications, arbitrations, or court trials.”⁴⁹ Of the other two CRJs, one must have “significant knowledge of copyright law” and the other “significant knowledge of economics.”⁵⁰ The Chief CRJ may also hire full-time support staff, further strengthening the Board’s capacity.⁵¹

Also central to the CRB’s creation was the recognition that judges needed to be insulated from political influence. CRJs received significant discretion and independence, spelled out in marked statutory detail.⁵² Furthermore, once appointed, they can be removed only by the Librarian and for cause, such as for violating statutory standards of conduct, other misconduct, or neglect of duty.⁵³ These attributes, however thoughtful, are central to the constitutional problems that have embroiled CRJs’ appointment structure.

Beyond the legislative choices made in crafting CRJ removal restrictions and vesting appropriate authority in them was the separate matter of who would appoint CRJs. The 1976 Act directs the Librarian of Congress to appoint CRJs in consultation with the Register of Copyrights.⁵⁴ Vesting CRJ appointment authority solely in the Librarian is a logical choice, because the Librarian also solely appoints the Register.⁵⁵ But, this was not always the

⁴⁶ See Lionel S. Sobel, *A New Music Law for the Age of Digital Technology*, ENT. L. REP., Nov. 1995, at 3 (calling the 1994 amendments “[i]ncomprehensible” and comparing them to the Internal Revenue Code).

⁴⁷ See, e.g., *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1337–38 (D.C. Cir. 2012) (quoting *SoundExchange, Inc. v. Libr. of Cong.*, 571 F.3d 1220, 1226 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (“[B]illions of dollars and the fates of entire industries can ride on the Copyright Royalty Board’s decisions.”)).

⁴⁸ 17 U.S.C. § 802(a)(1).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* § 802(b).

⁵² *Id.* § 802(f). This section is titled “Independence of Copyright Royalty Judge,” and states that the “Copyright Royalty Judges shall have full independence in making determinations concerning adjustments and determinations of copyright royalty rates and terms, the distribution of copyright royalties, the acceptance or rejection of royalty claims, rate adjustment petitions, and petitions to participate, and in issuing other rulings under this title[.]” *Id.* § 802(f)(a)(i).

⁵³ *Id.* § 802(i).

⁵⁴ *Id.* § 801(a) (“The Librarian of Congress shall appoint 3 full-time Copyright Royalty Judges, and shall appoint 1 of the 3 as the Chief Copyright Royalty Judge. The Librarian shall make appointments to such positions after consultation with the Register of Copyrights.”).

⁵⁵ See *id.* § 701(a) (“All administrative functions and duties under this title . . . are the

case. The five members of the CRT were appointed by the President with Senate advice and consent.⁵⁶ Yet by 1998, with the institution of the CARPs, appointment authority was vested in the Librarian.⁵⁷ And in 2004, when the CRB was established, Congress did not bring the President and Senate back into the mix.

The 2004 revision created the administrative structure of copyright that remains today. At the head of this structure is the Librarian of Congress, who is appointed by the President with advice and consent of the Senate.⁵⁸ Within the Library of Congress are two copyright-related bodies. The first is the Copyright Office, which is headed by the Register of Copyrights, who is appointed by the Librarian and acts under her “general direction and supervision.”⁵⁹ The second is the CRB, which consists of three CRJs to be appointed by the Librarian after consultation with the Registrar.⁶⁰ The Chief CRJ is required to have at least five years’ experience in adjudications, arbitrations, or court trials.⁶¹ Of the other two CRJs, one must have “significant knowledge” of copyright law and the other economics.⁶² The first CRJs were appointed for two, four, or six-year terms, and all succeeding CRJs are appointed for six-year terms.⁶³

Legislative history does not explain these design choices. It is possible that path-dependence and a desire to set aside CARPs with minimal disruption kept the Librarian’s appointment power intact. This would be consistent with an account, now well-rehearsed in the copyright literature, of significant industry influence on Copyright Office operations.⁶⁴ If the creation of the CRB was in fact a product of political bargaining, regulatory capture theory predicts that vesting the appointment power at the agency level is more likely to produce the kinds of appointments that influential stakeholders favor.⁶⁵

responsibility of the Register of Copyrights as director of the Copyright Office of the Library of Congress. The Register of Copyrights . . . shall be appointed by the Librarian of Congress[.]”).

⁵⁶ *Id.* § 802(a) (1978).

⁵⁷ *Id.* § 801(a) (1998) (“The Librarian of Congress, upon the recommendation of the Register of Copyrights, is authorized to appoint and convene copyright arbitration royalty panels.”).

⁵⁸ 2 U.S.C. § 136(1); *see id.* § 136 (“The Librarian of Congress shall make rules and regulations for the government of the Library.”).

⁵⁹ 17 U.S.C. § 701(a).

⁶⁰ *Id.* § 801(a).

⁶¹ *Id.* § 802(a)(1).

⁶² *Id.*

⁶³ *Id.* § 802(c).

⁶⁴ *See, e.g.,* MEREDITH ROSE ET AL., CAPTURED: SYSTEMIC BIAS AT THE U.S. COPYRIGHT OFFICE, PUB. KNOWLEDGE 3 (2016), https://publicknowledge.org/wp-content/uploads/2021/11/Final_Captured_Systemic_Bias_at_the_US_Copyright_Office.pdf [<https://perma.cc/A8DB-VGDP>] (describing “Sources of Regulatory Capture at the Copyright Office”).

⁶⁵ *See generally* Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL’Y 203, 218–19 (2006) (reviewing literature exploring the link between the method for selecting regulators and regulatory outcomes).

Another possibility is that requiring presidential appointment with Senate confirmation has become more costly over time, corresponding with a trend away from summary Senate confirmations of large groups of presidential appointees.⁶⁶ Thus, principal officers—who cannot be appointed except by this costly mechanism⁶⁷—are a group Congress is unlikely to constitute lightly. Inferior officers, whose appointment Congress may properly vest by statute in “Heads of Departments,”⁶⁸ can also be named via presidential appointment and Senate confirmation—but high interbranch cost makes it more rational for Congress to use an inferior-officer-specific mechanism instead.

In any case, the construction of the CRB in this way courts constitutional danger. CRJs fulfill greater responsibilities than their predecessors in the CRT or CARPs and enjoy less oversight and more insulation from removal. Yet they were appointed without the political process required for principal officers. And even their constitutional status as inferior officers may even be infirm, as that status is only constitutional insofar as the Librarian of Congress is actually a Head of Department. If that is not true, then there may be a more fundamental line implicated, that between officers of the United States and non-officers.⁶⁹ These dangers are far from theoretical. In a series of challenges to the Copyright Royalty Board, culminating in the *Intercollegiate Broadcasting* decision, federal courts took the CRB to task for these tensions.

II

FROM *INTERCOLLEGIATE BROADCASTING* TO *ARTHREX*

Congress may have addressed the substantive shortcomings of the CRT and CARPs by replacing them with the CRB, but in so doing it invited a wave of constitutional objections. Parties challenged whether the Librarian was constitutionally capable of appointing CRJs, either because the Librarian was not a Head of Department within the meaning of the Appointments Clause, or because CRJs were principal officers of the United States whose selection required presidential nomination and Senate advice and consent. While the D.C. Circuit created a rickety remedy to these problems in *Intercollegiate Broadcasting*, the Supreme Court’s recent

⁶⁶ E.g., David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L. REV. 1487, 1497 (2015) (noting that in recent years, “Congress has been willing to create other presidentially appointed positions that do not require Senate confirmation”).

⁶⁷ See U.S. CONST. art. II, § 2, cl. 2 (vesting power in the President to appoint officers with advice and consent of the Senate).

⁶⁸ *Id.*

⁶⁹ See generally *Freytag v. Comm’r*, 501 U.S. 868, 885–88 (1991) (discussing the relationship between the Appointments Clause’s references to “Heads of Departments” and “Officers of the United States”).

Arthrex decision exposed the infirmity of the *Intercollegiate Broadcasting* strategy and again opened the CRB to constitutional challenge.

A. *Judge Kavanaugh and the Intercollegiate Broadcasting Saga*

Congress's hopes that the CRB would settle matters were in vain. Parties objecting to ratemaking outcomes soon honed in on the CRB's constitutional defects. A federal district court decision, *Live365 v. Copyright Royalty Board*,⁷⁰ first highlighted this issue. *Live365* involved a suit for declaratory judgment that CRJs had been unconstitutionally appointed.⁷¹ Plaintiff *Live365* argued that regardless of whether CRJs are principal officers, the Librarian of Congress is not a "Head of Department" under the Appointments Clause and thus incapable of appointing even inferior officers.⁷² *Live365*'s argument, if true, meant that CRJ appointments could avoid unconstitutionality only if the judges were not officers of the United States at all, but mere employees.

The district court disagreed, relying on the Supreme Court's decision in *Freytag v. Commissioner*.⁷³ *Freytag* suggested that Heads of Departments were cabinet-level positions within the executive branch.⁷⁴ Observing that the Librarian is appointed by the President with Senate advice and consent, is supervised by the executive branch, and is removable by the President at-will, the court dismissed the Librarian's location in the legislative branch as irrelevant "code-grouping" and concluded that the office is a Head of Department within the meaning of the Appointments Clause.⁷⁵

This holding, though, did not fully resolve the constitutional problem. As a Head of Department, the Librarian was authorized to appoint inferior officers, but not principal ones.⁷⁶ The district court thus needed to resolve the status of the CRJs as officers of the United States. It concluded that CRJs did exercise "significant authority pursuant to the laws of the United States" under *Freytag*⁷⁷ and so were officers, but no more than inferior officers.⁷⁸ For this latter point, the court cited *Edmond v. United States*⁷⁹ and *Morrison v. Olson*,⁸⁰ stressing that CRJs were subject to "direction and supervision by

⁷⁰ 698 F. Supp. 2d 25 (D.D.C. 2010).

⁷¹ Complaint for Declaratory & Injunctive Relief at 2–3, *id.* (No. 09-01662).

⁷² *See id.* at 5, 7.

⁷³ 501 U.S. 868 (1991); *Live365*, 698 F. Supp. 2d at 39.

⁷⁴ *Freytag*, 501 U.S. at 885–88.

⁷⁵ *Live365*, 698 F. Supp. 2d at 42–43 (quoting *Eltra Corp. v. Ringer*, 579 F.2d 294, 301 (1978)).

⁷⁶ *See* U.S. CONST. art. II, § 2, cl. 2 ("[T]he 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.").

⁷⁷ 501 U.S. at 881 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

⁷⁸ *Live365*, 698 F. Supp. 2d at 35–40.

⁷⁹ 520 U.S. 651 (1997).

⁸⁰ 487 U.S. 654 (1988).

both the Librarian of Congress and the Register of Copyrights.”⁸¹ The court concluded that CRJs were validly appointed, though it hedged by noting that other courts may differ due to the lack of clear guidance on the principal/inferior distinction.⁸²

Other courts did indeed differ. In a dispute decided shortly before *Live365* in the D.C. Circuit, the collective rights organization *SoundExchange* had sought review of a ratemaking decision of the Board, though without raising a constitutional challenge.⁸³ In concurrence, then-Judge Kavanaugh wrote that the high stakes—measured in billions of dollars—of royalty rate decisions, the “apparently unsupervised” work of CRJs, and the restriction of CRJ removal to for-cause scenarios suggested that CRJs “appear to be principal officers.”⁸⁴ In that case, even a Head-of-Department Librarian would not save CRJ appointments, for principal officers must be appointed by the President with Senate advice and consent.⁸⁵ Judge Kavanaugh laid the foundation for *Intercollegiate Broadcasting*.

This challenge came two years later, again in the D.C. Circuit, when noncommercial broadcaster *Intercollegiate* frontally challenged CRJ appointments. *Intercollegiate* had already challenged the CRB’s royalty rate for educational and other noncommercial broadcasters without success.⁸⁶ It now renewed its objection as a constitutional challenge—arguing that an unconstitutionally appointed board’s ratemaking was void *ab initio*—and the D.C. Circuit, relying on the *SoundExchange* Kavanaugh concurrence, held that CRJs do exercise principal officer authority, thus making their appointments unconstitutional.⁸⁷ Two aspects of the *Intercollegiate Broadcasting* decision are especially relevant now. One is the set of institutional details the court found satisfied the *Edmond* framework in favor of principal officer status.⁸⁸ The other is the D.C. Circuit’s remedy for curing the constitutional defect.⁸⁹

To determine whether an officer is inferior, *Edmond* asks whether the officer’s work is “directed and supervised at some level” by a principal

⁸¹ *Live365*, 698 F. Supp. 2d at 38.

⁸² *See id.* at 39 (lamenting the “gray area where cases like this case will inevitably fall due to the case-by-case analysis lower courts are required to conduct”).

⁸³ *SoundExchange, Inc. v. Libr. of Cong.*, 571 F.3d 1220, 1221–22 (D.C. Cir. 2009).

⁸⁴ *Id.* at 1226 (Kavanaugh, J., concurring).

⁸⁵ *Id.* (citing U.S. CONST. art. II, § 2, cl. 2).

⁸⁶ *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 76 Fed. Reg. 13026, 13042/1 (Mar. 9, 2011).

⁸⁷ *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1340 (D.C. Cir. 2012).

⁸⁸ *See id.* at 1338–41 (noting that CRJs’ broad discretion, limited removability, and authority to promulgate irreversible rate determinations demonstrate CRJs’ principal officer status).

⁸⁹ *Id.* at 1340 (holding that “invalidating and severing the restrictions on the Librarian’s ability to remove the CRJs eliminates the Appointments Clause violation and minimizes any collateral damage”).

officer.⁹⁰ This analysis looks to the former's (1) supervision and oversight by a principal officer, (2) removability by a principal officer, and (3) reversibility by a principal officer.⁹¹ The *Intercollegiate Broadcasting* court found that the Librarian and the Register do supervise CRJs, "but in ways that leave [CRJs] broad discretion," because the supervision is procedural and logistical and leaves substantive decisionmaking relatively untouched.⁹² The court noted that the authority of the Register, whom the Librarian also appoints, to interpret copyright law and review the legal findings of CRJs reflected "a non-trivial limit on the CRJs' discretion."⁹³ However, in the court's view, pure issues of law are of relatively modest importance compared to the broadly factual nature of ratemaking, which includes judgments about creative and technological contribution, capital investment, and relevant market conditions.⁹⁴

The court found this modest supervision to be indicative of principal officer status, especially in light of the other *Edmond* factors. The Librarian could remove a CRJ only for good cause, specifically "misconduct or neglect of duty," a marker of independence that was not inconsistent with inferior officer status but contrary to the principle of control of a principal officer.⁹⁵ And CRJ decisions were, in important respects, the final word on disputes prior to judicial review—for while the Librarian approved their procedural rules and the Register reviewed their legal findings, CRJs statutorily enjoyed "full independence" on setting and adjusting royalty rates and terms, royalty distribution, the acceptance (or not) of royalty claims, and a host of other outcome-determinative factual issues.⁹⁶

Having held that CRJs were appointed unconstitutionally, the D.C. Circuit next considered a remedy. This set up *Intercollegiate Broadcasting's* other big implication—its parsimonious strategy for curing the constitutional infirmity of the CRB. The court looked to a then-recent Supreme Court decision, *Free Enterprise Fund v. PCAOB* to inform its determination.⁹⁷ *Free Enterprise Fund* was a separation-of-powers case about restrictions on officer removal. Members of the Public Company Accounting Oversight Board were removable by the commissioners of the Securities and Exchange Commission (SEC), who were removable by the President.⁹⁸ The problem

⁹⁰ *Edmond v. United States*, 520 U.S. 651, 664–65 (1997).

⁹¹ *Id.*

⁹² *Intercollegiate Broad. Sys., Inc.*, 684 F.3d at 1338 (explaining that the Librarian's supervisor role does not "seem to afford the Librarian room to play an influential role in the CRJs' substantive decisions").

⁹³ *Id.* at 1338–39.

⁹⁴ *Id.* at 1339 (noting that ratemaking formulas which CRJs apply are "even more open-ended" than CRJs' discretion to resolve "pure issues of law," including "rates and terms").

⁹⁵ *Id.* at 1339–40.

⁹⁶ *Id.* at 1340.

⁹⁷ *Free Enterprise Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

⁹⁸ *Id.*

was that the President could remove SEC commissioners only for “inefficiency, neglect of duty, or malfeasance in office,”⁹⁹ and they could remove PCAOB members only “for good cause shown.”¹⁰⁰ This scheme of interposing multiple layers of protection from removal improperly obstructed the President’s ability to “take Care that the Laws be faithfully executed.”¹⁰¹

To remedy this violation, the Court severed the offending removal protections, leaving members of the PCAOB removable at-will by the SEC commissioners and thus subject to enough control by principal officers to resolve the constitutional concern.¹⁰² The D.C. Circuit in *Intercollegiate Broadcasting*, adopting this logic, severed the CRJ for-cause removal statute, allowing the Librarian to remove CRJs at-will and thereby establish sufficient control and supervision over them.¹⁰³

The D.C. Circuit did not hide its ambivalence about this resolution, which addressed only one *Edmond* factor: ease of removal. While claiming to be “confident that [with this approach] the CRJs will be inferior rather than principal officers,” it also noted that “individual CRJ decisions will still not be directly reversible” by the Register or Librarian.¹⁰⁴ The court took comfort that “the Librarian would be free to provide substantive input on non-factual issues via the Register, whom the Judges are free to consult. This, coupled with the threat of removal satisfies us that the CRJs’ decisions will be constrained to a significant degree by a principal officer (the Librarian).”¹⁰⁵ This language seemed like an invitation for higher review, but ultimately it was not taken up. The D.C. Circuit declined to rehear the case, and the Supreme Court denied certiorari,¹⁰⁶ leaving the panel opinion as the last word on the matter—at least temporarily.

B. The CRB’s Arthrex Problem

While the Supreme Court showed no inclination to take up *Intercollegiate Broadcasting*, it has recently shown renewed interest in the Appointments Clause, bringing the tentatively settled Copyright Royalty Board issues back to the fore. In 2020, the Court held in *Seila Law LLC v. Consumer Financial Protection Bureau* that separation of powers does not allow Congress to require for-cause removal of the head of a single-member

⁹⁹ *Id.* at 486–87 (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 622 (1935)).

¹⁰⁰ *Id.* at 486–87 (quoting 15 U.S.C. § 7211(e)(6)).

¹⁰¹ *Id.* at 484 (quoting U.S. CONST. art. II, § 3).

¹⁰² *Id.* at 508–09.

¹⁰³ *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1340–41 (D.C. Cir. 2012).

¹⁰⁴ *Id.* at 1340–41.

¹⁰⁵ *Id.*

¹⁰⁶ *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012), *cert. denied*, 569 U.S. 1004 (2013).

independent agency exercising significant executive power.¹⁰⁷ And last year in *United States v. Arthrex*, the Court held that administrative patent judges of the PTO Patent Trial and Appeal Board (“PTAB”) exercised powers that were consistent with principal officer status and thus inconsistent with their appointment by the Secretary of Commerce.¹⁰⁸ These two recent forays by the Court have produced a new doctrinal synthesis that portends trouble for the CRB.

The Court in *Seila Law* expressed skepticism of constrained removal authority over principal officers exercising significant executive power, reading contrary precedents narrowly. The Court’s 1935 decision in *Humphrey’s Executor v. United States* had approved a congressional scheme to limit presidential removal of Federal Trade Commission (FTC) commissioners.¹⁰⁹ However, the *Seila Law* Court justified that decision as merely “an exception” to its broader view, articulated in *Free Enterprise Fund*, that the President generally holds “unrestricted removal power.”¹¹⁰ The Court also emphasized that “the contours of the *Humphrey’s Executor* exception depend upon the characteristics of the agency before the Court”—expressly invoking language in *Humphrey’s Executor* that tolerated an FTC commissioner as “an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.”¹¹¹ This was not true of the Consumer Financial Protection Bureau which, the Court said, is formally within the executive branch and exercises significant executive power.¹¹² That alone might not threaten the CRB, at least too seriously, as *Seila Law* suggests that finding an officer as wielding principal officer authority is best remedied by rendering them removable at-will—the precise remedy of *Intercollegiate Broadcasting*.¹¹³

Yet *Arthrex* undermines this approach. There, the panel opinion of the Federal Circuit below did, indeed, sever the for-cause removal protections of administrative patent judges and make them removable at-will by the Secretary of Commerce—seeking to subordinate them enough to be inferior officers.¹¹⁴ For that approach, the panel relied explicitly on *Intercollegiate Broadcasting* and *Free Enterprise Fund*.¹¹⁵ However, the Supreme Court in *Arthrex* rejected this remedy and charted a new path.

The Court instead made the decisions of administrative patent judges

¹⁰⁷ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).

¹⁰⁸ *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021).

¹⁰⁹ 295 U.S. 602 (1935).

¹¹⁰ 140 S. Ct. at 2198.

¹¹¹ *Id.*

¹¹² *Id.* at 2192.

¹¹³ *Id.* at 2194–95.

¹¹⁴ *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1335–37 (Fed. Cir. 2019).

¹¹⁵ *Id.* at 1337.

unilaterally reviewable by the Director of the PTO.¹¹⁶ The enacted supervisory structure of the PTAB was that cases accepted for agency review “shall be heard by at least 3 members of the [PTAB]” and that “only the [PTAB] may grant rehearings.”¹¹⁷ Even the Precedential Opinion Panel that the PTO established in 2018 for agency leadership to hear cases and give them precedential effect within the agency was not enough to avoid the problem. The Precedential Opinion Panel placed the Director merely on coequal footing with two inferior officers, typically the Commissioner for Patents and the Chief Judge of the PTAB, who had the ability to outvote her.¹¹⁸ And even though the Panel could limit the prospective precedential effect of an APJ opinion, all APJ opinions were still final within the agency. The *Arthrex* Court explained that unilateral review is “the almost-universal model of adjudication in the Executive Branch . . . and aligns the PTAB with the other adjudicative body in the PTO, the Trademark Trial and Appeal Board.”¹¹⁹

The Court could simply have affirmed the Federal Circuit’s remedy and deployed its own prior approach in *Free Enterprise Fund*, but it surprisingly—and expressly—declined to do so. The Government, as petitioner in the lead case,¹²⁰ had followed the Federal Circuit’s logic: If APJs became removable at-will, then they would become inferior officers under *Free Enterprise Fund*.¹²¹ To this, the Court tellingly responded that “regardless whether the Government is correct that at-will removal by the Secretary would cure the constitutional problem, review by the Director better reflects the structure of supervision within the PTO and the nature of APJs’ duties.”¹²² Given the Court’s emphasis and concern that the panel decisions of APJs were the final word of the executive branch—and that this is the touchstone of principal officer status—the government’s position now seemed untenable. At-will removal alone may no longer cure the constitutional problem if unreviewable finality remains.

Normatively, the Supreme Court’s resolution in *Arthrex* was certainly an improvement on the Federal Circuit’s decision below. Whatever the merits of the formalism that led both courts to conclude that APJs are principal officers, the Federal Circuit’s remedy of making APJs removable at-will inappropriately cast a cloud of job insecurity over an expert agency

¹¹⁶ *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1986–87 (2021).

¹¹⁷ *Id.* at 1986 (quoting 35 U.S.C. § 6(c)).

¹¹⁸ *Revisions to Standard Operating Procedures: Paneling and Precedential Decisions*, U.S. PAT. & TRADEMARK OFF. (Sept. 21, 2018), www.uspto.gov/patents/ptab/procedures/revisions-standard-operating [https://perma.cc/M4D5-MJGJ].

¹¹⁹ *Arthrex*, 141 S. Ct. at 1987 (internal quotations omitted).

¹²⁰ The *Arthrex* dispute was a consolidation of multiple cross petitions for certiorari. *See id.* at 1978.

¹²¹ *Id.* at 1987.

¹²² *Id.*

adjudication system. The Supreme Court properly restored the protections that APJs had previously enjoyed and thus removed a major distortionary influence from PTAB decisionmaking. To be sure, the Director's political ability to reverse or modify the expertise of APJs—expertise that was central to justifying PTAB trial proceedings—is also suboptimal as a matter of regulatory design, but it is a smaller distortion than the one it replaces.

This brings us back to the status quo of the Copyright Royalty Board since *Intercollegiate Broadcasting*. The structures and duties relevant to the Court's treatment of the PTAB also characterize the Copyright Royalty Board to a virtually conclusive degree. Administrative adjudication involving profoundly high economic stakes takes place under a procedural framework set by an agency head: the Register of Copyrights. The adjudicators are appointed by a principal officer who is likely a Head of Department: the Librarian of Congress. Yet in the Copyright Royalty Board, review of the adjudicators' substantive decisions remains partial and indirect. By comparison to the PTO's Patent Trial and Appeal Board after *Arthrex*, to the PTO Trademark Trial and Appeal Board after a legislative fix in the Trademark Modernization Act of 2020,¹²³ and to “the almost-universal model of adjudication in the Executive Branch,”¹²⁴ the continued irreversibility of major determinations by Copyright Royalty Judges is a conspicuous outlier.

III

CONSTITUTIONALIZING COPYRIGHT ROYALTY JUDGES

For nearly a decade, the D.C. Circuit's fragile solution to the CRB's Appointments Clause problem remained undisturbed. By making CRJs removable at-will, the court crafted a remedy that was plausible under Supreme Court precedent, even if it did not address all the *Edmond* factors for distinguishing principal and inferior officers. The two recent Supreme Court cases discussed in Part II, though, signal renewed interest in Appointments Clause issues and counsel skepticism about the *Intercollegiate Broadcasting* remedy. Especially in declining to use at-will removal as a remedy in *Arthrex*, the Supreme Court has stated its view that such an approach is not ideal and suggested that it is insufficient. This outcome likely spells doom for the CRB even after the D.C. Circuit's

¹²³ Pub. L. No. 116-159, 134 Stat. 2209 (2020).

¹²⁴ *Arthrex*, 141 S. Ct. at 1987. Academic consensus bears out this view. See, e.g., Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 157, 171 (referring to vesting final decisionmaking authority in agency heads as a “common feature” and “prevalen[t]”); *id.* at 172 (counting only “a handful” of exceptions to this general practice) (citing KENT BARNETT, LOGAN CORNETT, MALIA REDDICK & RUSSELL WHEELER, NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS, SELECTION, OVERSIGHT, AND REMOVAL (2018), https://www.acus.gov/sites/default/files/documents/Non-ALJ%20Draft%20Report_2.pdf [<https://perma.cc/MHE2-UPYA>]).

Intercollegiate Broadcasting remedy and invites interrogation of what can be done to cure this looming constitutional defect.

A. *Distinguishing CRJs from APJs*

We consider first how the CRB operates differently from the PTAB. The two are closely similar in structure, as we have explained, but they are not identical. In this Section, we engage with the key differences between CRJs and APJs: While there are distinctions, they are not critical for Appointments Clause purposes.

The first and most apparent distinction between the CRB and the (pre-*Arthrex*) APJ panels is that APJ panel decisions were fully unreviewable by an executive officer, whereas CRJ decisions are at least partly reviewable. The Copyright Act gives the Register of Copyrights several sources of oversight over CRJs. The Register reviews and corrects any legal errors in CRJs' determinations.¹²⁵ She also has the authority to interpret and provide written opinions on "novel material question[s]" of law, which the CRB is required by statute to follow.¹²⁶

These provisions render the purely legal aspects of CRJ decisions subject to correction and revision by the Register, in contrast to APJ panels which were immune from intrabranch review.¹²⁷ The Register does not tell CRJs how to decide issues of law; she lets them make legal decisions freely and intervenes only when they err. Still, this statutory oversight renders CRJs' legal opinions non-final and subject to at least some change.¹²⁸

This distinction might seem to explain why the Court in *Arthrex* rejected the more modest remedy imposed in *Intercollegiate Broadcasting* (and *Free Enterprise Fund*). The decisions of APJ panels were entirely unreviewable by any principal officer, so simply making APJs removable at-will would still have left them with a degree of authority inappropriate for inferior officers. This framing of the *Arthrex* issue, though, highlights why the case still presents a problem for the CRB. The question is not whether a tribunal is subject to any review, but whether the quantum of authority reserved to that tribunal is excessive for an inferior officer.

The amount of CRJ authority remains substantial for two reasons, notwithstanding legal review by the Register. First, the Copyright Act gives CRJs final and unreviewable power to make factual determinations, and the

¹²⁵ 17 U.S.C. § 802(f)(1)(D).

¹²⁶ *Id.* § 802(f)(1)(B).

¹²⁷ As the *Intercollegiate Broadcasting* court observed, though, *judicial* reviewability is a separate matter. See *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1335–36 (D.C. Cir. 2012) (noting the distinction between a court reviewing an agency decision for compliance with a statute and a court substituting its own determination for that of an agency).

¹²⁸ See *id.* at 1339 (observing that review by the Librarian is a "non-trivial limit on the CRJs' discretion").

facts are mostly where the action is. The CRB's ratemaking decisions are supposed to be reasonable.¹²⁹ The Register has almost no practical ability to review CRB ratemakings for legal error. Indeed, the Act specifies that CRJs have "full independence in making determinations concerning adjustments and determinations of copyright royalty rates and terms."¹³⁰ Second, the rates made by CRJs are hugely consequential: As the former Judge Kavanaugh cautioned in *SoundExchange*, "billions of dollars and the fates of entire industries can ride on the Copyright Royalty Board's decisions."¹³¹ So, both the character and consequence of the CRB's factual determinations bespeak an exercise of authority more typical of principal officers.

But didn't the *Intercollegiate Broadcasting* court address this very issue? They tried, but the efficacy of their response is what *Arthrex* now calls into question. The D.C. Circuit cited the CRB's "vast discretion" over copyright rates and terms as their leading feature that was inconsistent with inferior officer status.¹³² The threat of at-will removal was intended to approximate the oversight otherwise absent from CRJs' factual decisions.¹³³ But the Court rejected this remedy in *Arthrex*, expressing ambivalence about whether severing for-cause removal provisions would cure an Appointments Clause issue for an administrative tribunal with outsized decisional authority that was also final and unreviewable.¹³⁴ That characterization fits the post-*Intercollegiate Broadcasting* CRB just as well as it did the pre-*Arthrex* APJ panels.

The other reason the Register's power to review questions of law is not conclusive is that the Register is herself presumably an inferior officer.¹³⁵ This means that even apart from CRJs' unreviewable authority as to fact issues, no principal officer reviews their legal determinations either. The intrabranched review provisions of the Copyright Act governing CRJ determinations authorize only the Register, not the Librarian, to review or reverse anything at all.¹³⁶ As a constitutional matter, this lack of principal officer review is a key parallel between the autonomy of CRJs and the pre-*Arthrex* autonomy of Patent Office APJs. This parallel is what portends an *Arthrex*-like fate for the CRB unless reforms are made.

¹²⁹ See 17 U.S.C. § 801(b)(1) ("[M]ake determinations and adjustments of reasonable terms and rates of royalty payments as provided in sections 112(e), 114, 115, 116, 118, 119, and 1004.").

¹³⁰ *Id.* § 802(f)(1)(A)(i).

¹³¹ *SoundExchange, Inc. v. Libr. of Cong.*, 571 F.3d 1220, 1226 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

¹³² *Intercollegiate Broad.*, 684 F.3d at 1339.

¹³³ See *id.* at 1341 ("[T]he threat of removal satisfies us that the CRJs' decisions will be constrained to a significant degree by a principal officer (the Librarian).").

¹³⁴ *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1987 (2021).

¹³⁵ No court has considered the Register's status as an officer of the United States. But since she is appointed by the Librarian, not the President with Senate approval, the only kind of officer she could (validly) be is an inferior one.

¹³⁶ See 17 U.S.C. § 802(f)(1)(A)–(E).

B. Making the CRB Constitutional (Again)

Though APJs are not identical to CRJs, they are similar enough that *Arthrex* would render their selection violative of the Appointments Clause. How could the CRB be restructured to cure this defect? The following discussion considers two solutions—enhancing CRJ selection formalities and increasing CRB decision reviewability—and explores the benefits and costs of each.

1. Leveling Up CRJ Selection Processes

Arthrex has again thrown into doubt the constitutionality of the CRB, suggesting that CRJs are principal officers who must be appointed by the President with Senate advice and consent, not by the Librarian. This points to a simple solution: Make CRJs subject to that form of appointment and confirmation. This would render moot the question whether CRJs are principal or inferior officers by selecting them in a way that satisfies the Appointments Clause regardless. And while full presidential and Senate approval would probably be unworkable for APJs, who number in the hundreds,¹³⁷ there are only three members of the CRB. They also serve staggered six-year terms (subject to reappointment without term limitation), so this enhanced appointment process would require attention only once every other year. And while this change would create some problems, many could be addressed by making determinations of the CRB final and unreviewable agency action, appealable thereafter only to Article III courts.¹³⁸

Such a move would entail some practical and political costs, though none are fatal to our proposal. For one, the President and Senate have numerous more pressing priorities. Routing CRJ appointments through the highest ranks of government could cause the process to stall out—as other appointments processes often have in recent years¹³⁹—leaving CRB seats vacant. And were the President and Senate to act to appoint CRJs, different concerns would arise. Such a process would be much more visible than action by the Librarian and would risk embroiling CRJ appointees in protracted appointment battles. Here, too, recent years have seen many examples of appointees to relatively humdrum posts become the targets of

¹³⁷ See *Arthrex*, 141 S. Ct. at 1973 (noting the existence of “200-plus” APJs).

¹³⁸ We thank Ron Levin for helpful discussion of this possibility.

¹³⁹ See Elizabeth Williamson, *Hundreds of Biden Nominees Stuck in Senate Limbo Amid G.O.P. Blockade*, N.Y. TIMES (Jan. 8, 2022), <https://www.nytimes.com/2022/01/08/us/politics/biden-nominees-senate-confirmation.html> [https://perma.cc/P4RR-N2RR] (reporting that only 41% of nominees for Senate confirmed posts have been appointed as of the article’s date). See also generally Christopher Piper, *Presidential Strategy Amidst the “Broken” Appointments Process*, PRESIDENTIAL STUD. Q., 2022, at 1, 1–3 (detailing increasing vacancies in agency posts due to stalled appointments processes).

political ire, leading to failed appointments and withdrawn nominations.¹⁴⁰ Even copyright lawmaking, formerly a site of bipartisan agreement,¹⁴¹ has at times become a flashpoint in partisan political theater.¹⁴²

Relatedly, vesting appointment with the President rather than the Librarian of Congress might risk the selection of political favorites rather than skilled experts as CRJs.¹⁴³ Considering the sophisticated, specialized subject matter of the CRB docket, any such loss of expertise would be costly. Short of the risk of outright favoritism, the President may still experience pressure from industry representatives whose support he coveted to nominate one of “their people,” earning them a systemic advantage in CRB decisionmaking.¹⁴⁴ For example, a President who enjoyed the support of the entertainment industry could feel pressure from influential interest groups to pick a CRJ who was an industry insider likely to favor their interests.

But while these concerns are plausible, several factors militate against them. Copyright is not immune from political controversy, but it is less freighted with partisan overtones than most other subjects likely to come before the Senate. Recent copyright reforms, such as the Copyright Alternative in Small-Claims Enforcement Act of 2020¹⁴⁵ and the Music Modernization Act of 2018,¹⁴⁶ engendered some opposition but still became law despite contemporary partisan gridlock.¹⁴⁷

Senate confirmation of CRJs might also be saved from political quicksand by the CRB’s technical work. The optics of administering compulsory license are boring, incentivizing members of Congress to

¹⁴⁰ See Williamson, *supra* note 138 (observing that the rate of approval of Presidential nominees is the lowest rate in decades).

¹⁴¹ The Copyright Term Extension Act of 1998, for example, passed the Senate 99-0. See 144 CONG. REC. 23943 (1998).

¹⁴² Senator Josh Hawley, for example, introduced a bill (Copyright Clause Restoration Act of 2022, S. 4178, 117th Cong. (2022)) to strip Disney of copyright protections as part of a brief Republican backlash against Disney’s opposition to Florida’s so-called “Don’t Say Gay” policy. Arthur Delaney, *Josh Hawley Jumps on Anti-Disney Bandwagon with Copyright Bill*, HUFFPOST (May 10, 2022), www.huffpost.com/entry/josh-hawley-disney-copyright_n_627ac821e4b046ad0d82c098 [https://perma.cc/E44Q-X866].

¹⁴³ See Gary E. Hollibaugh, Jr., *Naïve Cronyism and Neutral Competence: Patronage, Performance, and Policy Agreement in Executive Appointments*, 25 J. PUB. ADMIN. RSCH. & THEORY 341, 342 (2015) (citing studies showing that Presidents often emphasize loyalty over expertise in appointments).

¹⁴⁴ See Aaron Perzanowski, *The Limits of Copyright Office Expertise*, 33 BERKELEY TECH. L.J. 733, 743 (2018) (noting that “[i]ndustry connections have shaped Office staffing in the past”).

¹⁴⁵ Copyright Alternative in Small-Claims Enforcement Act of 2020, Pub. L. No. 116-260, § 212, 134 Stat. 1182, 2176 (2020).

¹⁴⁶ Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264 (2018).

¹⁴⁷ The CASE Act, for example, was opposed by several interest groups, see Makena Kelly, *Sweeping New Copyright Measures Poised to Pass in Spending Bill*, THE VERGE (Dec. 21, 2020), <https://www.theverge.com/2020/12/21/22193976/covid-relief-spending-congress-copyright-case-act-felony-streaming> [https://perma.cc/QZ74-L9EK], but still passed the House 410-6, see *Final Vote Results for Roll Call 578*, OFF. OF THE CLERK, U.S. H.R. (Oct. 22, 2019, 6:59 PM), <https://clerk.house.gov/evs/2019/roll578.xml> [https://perma.cc/WAG5-YAGF].

approve appointees quickly and move on to more theatrical matters. The six-year terms that CRJs serve would outlast the four-year administration of the President who appointed them, offering further insulation at least from CRB decisionmaking that is directly calculated to secure reappointment from the same President.¹⁴⁸

Industry capture might remain a concern, but by no means a greater concern than with appointment by the Librarian. Industry already influences the selection procedures for agency heads even when they are not picked by the executive with legislative approval.¹⁴⁹ This is partly because non-presidential appointments are less visible and thus less likely to engender public controversy, but likely also because the Senate is not available to serve as a check on such selections. This is true of the Copyright Office, which is subject to outsized influence by wealthy content industries.¹⁵⁰ Involving the Senate in the selection of CRJs may, in fact, serve as a valuable way to make sure they are not political cronies or industry loyalists. Finally, the CRB is distinctive in that its members are required by statute to have demonstrated expertise in a particular subject matter—economics for one post, copyright for another¹⁵¹—providing further protection against the appointment of uninformed political hacks.

Finally, it should be noted that there may be potential for confusion within the Copyright Office if CRJs formally become presidentially-appointed and Senate-confirmed principal officers while the Register who reviews certain aspects of their work remains an inferior officer appointed by the Librarian of Congress. Making CRB decisions final, as suggested above, would avoid this complication altogether. Nonetheless, while this arrangement is perhaps peculiar, it is not unworkable. The notion of CRJs constitutionally outranking their boss conflates the narrower but deeper purview of CRB adjudication with the broad Office-wide administrative duties of the Register. Just because the Register might stay an inferior officer, it does not follow that she would be inferior to the CRB in any organizational sense. Indeed, the CRJs do not report to the Register. Rather, the CRJs and the Register all report to the Librarian.¹⁵²

¹⁴⁸ We do not argue, of course, that this would be a panacea against indirect efforts to curry favor if one's appointing President were reelected or were succeeded by another of the same party, etc.

¹⁴⁹ See generally PAUL J. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* (1981).

¹⁵⁰ See ROSE ET AL., *supra* note 64, at 3–4 (“The [Copyright] Office has a well-trodden revolving door between its leadership, its other legal and policy staff and major rightsholders and their representatives.”).

¹⁵¹ 17 U.S.C. § 802(a)(1) (requiring of the two CRJs other than the chief, “1 shall have significant knowledge of copyright law, the other shall have significant knowledge of economics.”).

¹⁵² See *Organization Chart*, LIBR. OF CONG. (June 20, 2022), www.loc.gov/static/portals/about/documents/current-library-org-chart.pdf [<https://perma.cc/Q6YD-DJSL>].

Still, to avoid this organizational anomaly, we suggest that CRJs should not only be appointed by the President with advice and consent of the Senate, but that their decisions be final agency action, reviewable only by Article III courts. This would simplify the review process for copyright ratemakings by eliminating the Register's current review authority over legal components of CRB decisions. And while it would mean that CRB decisions no longer have the benefit of oversight by the Register, her oversight of the CRB is largely redundant. While the Register has significant expertise on the Copyright Act, there is no reason to think it is any greater than the expertise of the CRB, which includes a subject-matter expert in copyright by statute and which engages in the regular business of applying the statutory license provisions of the Act. This would also make the CRB more analogous to other high-level adjudicators who have policy responsibility and are presidentially appointed, such as the Tax Court and the Occupational Safety and Health Review Commission.

For all these reasons, appointing CRJs as principal officers engaged in final agency action would strike the right constitutional balance for the adjudicatory work that they do. It would preserve the valuable independence and finality of their decisions while tempering that power with the constitutional check of presidential appointment and Senate confirmation. Meanwhile, this reform would not disrupt the separate matter of Copyright Office administration, which would remain the Register's duty and for which a separate balance must be struck (between the Register's policy subordination to the Librarian and the inferior officer mechanism for appointing the Register).

2. *Leveling Down CRB Authority*

Another solution to the CRB's *Arthrex* problem might be to apply the *Arthrex* approach to the CRB, making its decisions fully reviewable by the Register of Copyrights. This would eliminate the extant ambiguity with respect to the principal or inferior officer status of CRJs, following the Supreme Court's recent roadmap that places them in the former category. As the Court held, "the structure of the PTO and the governing constitutional principles chart a clear course: Decisions by APJs must be subject to review by the Director."¹⁵³ Importantly, this approach was available to the Court because the PTO Director, as a statutory baseline, already has authority to provide "policy direction and management supervision for the Office"¹⁵⁴—a fact expressly cited in *Arthrex*.¹⁵⁵ The Register of Copyrights is, correspondingly, the director of the Copyright Office and might seem

¹⁵³ *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1986 (2021).

¹⁵⁴ 35 U.S.C. § 3(a)(2)(A).

¹⁵⁵ *Arthrex*, 141 S. Ct. at 1977.

similarly well-suited as a baseline matter.

This move alone, though, would not solve the CRB's looming constitutionality problem. *Arthrex* rendered APJ decisions subject to review by the PTO Director, who is herself a presidential appointee. This is consistent with the directive of *Edmond* that an inferior officer must be "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."¹⁵⁶ Lack of direct supervision by a presidential appointee concerned the *Arthrex* Court because it rendered the responsibility of inferior officers over their decisions diffuse.¹⁵⁷ By making APJ decisions reviewable by the Director, the Court sought more direct executive branch accountability for those decisions.

But the Register of Copyrights, unlike the PTO Director, is not a presidential appointee. She is, like CRJs, an inferior officer appointed by the Librarian.¹⁵⁸ This means that the remedy is not as easy as making CRB decisions fully reviewable by the Register. This problem might be solved by making the Register subject to appointment by the President with Senate advice and consent.¹⁵⁹ But while that would eliminate one concern, critics have argued that making the Register a presidential appointee would give the Copyright Office less independence, further strengthening content industries' influence over copyright policy.¹⁶⁰ Another option would be to make CRB decisions fully reviewable by the Librarian, who is already a presidential appointee.¹⁶¹ But while this would fix the formal problem, it would raise serious practical ones. The Librarian lacks the detailed knowledge of copyright law and policy that the Register and CRJs possess and, indeed, would be quite ill-suited to substantively review CRB ratemaking decisions on either the facts or the law.

Moreover, making CRJs inferior officers does not necessarily resolve all possible constitutional problems. The Appointments Clause allows Congress to vest the power to appoint inferior officers in, inter alia, "the

¹⁵⁶ *Edmond v. United States*, 520 U.S. 651, 663 (1997).

¹⁵⁷ *See Arthrex*, 141 S. Ct. at 1981 ("The restrictions on review relieve the Director of responsibility for the final decisions rendered by APJs purportedly under his charge."); *cf. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497 (2010) ("The diffusion of power carries with it a diffusion of accountability.").

¹⁵⁸ *See* 17 U.S.C. § 701(a) ("The Register of Copyrights, together with the subordinate officers and employees of the Copyright Office, shall be appointed by the Librarian of Congress.").

¹⁵⁹ In 2017, several Members of Congress introduced the Register of Copyrights Selection and Accountability Act, proposing to make the Register a presidential appointee. Register of Copyrights Selection and Accountability Act of 2017, H.R. 1695, 115th Cong. (2017). The bill passed the House in 2017 and was referred to the Senate, which took no action. Register of Copyrights Selection and Accountability Act of 2017, S. 1010, 115th Cong. (2017).

¹⁶⁰ *E.g.*, Mike Masnick, *Congress Is Trying to Give Even More Power to Hollywood*, VERGE (Apr. 3, 2017), www.theverge.com/2017/4/3/15161522/mpaa-riaa-copyright-office-library-of-congress-dmca-infringement [<https://perma.cc/2PYF-K833>].

¹⁶¹ *See* 2 U.S.C. § 136-1 (stating the Librarian of Congress is appointed by the President with Senate approval for a ten-year term).

Heads of Departments.” Yet as we noted in Part I, there is an unresolved argument that neither the Librarian nor the Register are “Heads of Departments” within the meaning of this Clause. If they are not, then they would lack authority to select CRJs regardless of what kind of officer they are.

The Supreme Court’s *Freytag* decision, the leading authority on this point, understands “Heads of Departments” to be cabinet-level executives, a view that might seem to exclude the Librarian of Congress, who is an Article I official well outside the President’s cabinet.¹⁶² The district court in *Live365* rejected this claim, dismissing it as formalistic “code-grouping.”¹⁶³ The D.C. Circuit in *Intercollegiate Broadcasting* agreed, holding that “the Library of Congress is a freestanding entity that clearly meets the definition of ‘Department’” on the court’s reading of *Free Enterprise Fund*.¹⁶⁴

Yet even if these legal hurdles could be overcome, administrative concerns would remain. The statute currently locates final authority over factual (but not legal) elements of CRB decisions in the CRB itself. The rationale for this finality is that the CRB’s docket exclusively entails disputes under the Copyright Act’s compulsory licensing provisions, requiring command of extensive factual records and industry-specific knowledge. This, after all, is also why the Act requires that CRJs have economic and copyright expertise. Making the factual aspects of CRB decisions reviewable by the Librarian would invite error to the extent that the Librarian is not as familiar with a complex factual record as CRJs. It would also add to the Librarian’s already significant workload, detracting from her other duties with no practical upside. A core purpose of agency decisionmaking is to empower experts to leverage their expertise; subordinating CRJs’ factual determinations to the Librarian would subvert this aim.

Here, too, the problem of agency capture arises. No administrative body is fully insulated from industry and executive pressure, but the CRB at least has the virtue of knowing that the factual aspects of its decisions are insulated from intrusion. Opening those factual aspects to review by the Librarian would infect CRJ decisionmaking, imposing pressure on the CRJs to comport with any preferences that they knew the Librarian may have about the parties to a given ratemaking matter.¹⁶⁵ Or the Librarian herself could

¹⁶² *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 885–88 (1991).

¹⁶³ See *Live365, Inc. v. Copyright Royalty Bd.*, 698 F. Supp. 2d 25, 42–43 (D.D.C. 2010) (“[C]ode-grouping cannot determine whether a given function is executive or legislative.” (quoting *Eltra Corp. v. Ringer*, 579 F.2d 294, 301 (4th Cir. 1978))).

¹⁶⁴ *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1341 (D.C. Cir. 2012) (citing *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 510–11 (2010)).

¹⁶⁵ Indeed, this is the very point of the Court’s holding in *Arthrex* that full reviewability renders APJs inferior officers. By exposing their decisions to review by, in that case, the Director of the PTO, those decisions become more directly connected to a presidential appointee and subject to executive authority and control.

invalidate factual findings of the CRB that disfavored a preferred entity. Given that numerous critics have warned that the Librarian and the Office are vulnerable to capture by industry actors, removing the current insulation that CRB factual decisions enjoy could inflame the capture problem.

This Part began by acknowledging that APJs had a different relationship to the PTO Director than CRJs have to the Register of Copyrights. But it showed that for Appointments Clause purposes, these are distinctions without a meaningful difference, and that in light of *Arthrex*, the CRB has once again become unconstitutional. It then considered two potential cures to this constitutional infirmity: (1) subjecting CRJ appointments to presidential selection with Senate advice and consent or (2) rendering all aspects of CRB decisions reviewable by either the Register of Copyrights or the Librarian of Congress—advocating for the former over the latter.

We bracket some further complications that would merit treatment in more detailed work. One is our discussion of *Arthrex* as a two-step analysis of untenable principal officer status remedied by unilateral agency-head review. That discussion simplifies the fragmentation of opinions, four in all, issued by the Justices as shown in Figure 1 and describes a consensus that one may fairly consider unstable.

FIGURE 1: OPINIONS AND VOTES IN *ARTHREX*

	Justice	Conclusion that APJs are Principal Officers	Remedy of Agency-Head Review
Lead Opinion	Roberts, C.J.	Yes	Yes
Lead Opinion	Alito, J.	Yes	Yes
Lead Opinion	Kavanaugh, J.	Yes	Yes
Lead Opinion	Barrett, J.	Yes	Yes
Gorsuch Opinion	Gorsuch, J.	Yes	No
Breyer Opinion	Breyer, J.	No	Yes
Breyer Opinion	Kagan, J.	No	Yes
Breyer Opinion	Sotomayor, J.	No	Yes
Thomas Opinion	Thomas, J.	No	No

Another is the possibility that the constitutional defect we have identified will come before the courts before Congress has the chance or political will to act. Congress may be slow to heed our proposed plan of reform, even as litigants may be eager to follow our proposed plan of attack. The question of remedy would then become quite salient, as would the

related matter of retroactive effect.¹⁶⁶ Still, the animating posture of this Essay is that because of the Court's likely disapproval, Congress should act expeditiously rather than let the matter come before the courts at all.

CONCLUSION

The scholarly responses to *Arthrex* have focused on implications for administrative law, patent law, and the relationship between those fields. This has overlooked, though, a major implication of the decision for the law and institutions of copyright. The strict remedial approach of *Arthrex* reveals that the strategy used a decade ago to cure the CRB's similar constitutional problem in *Intercollegiate Broadcasting* is no longer valid. Because patent law has made CRJs unconstitutional (again), action is necessary, and the best fix is for Congress to make CRJs presidential appointees subject to Senate approval. This Essay not only identifies a novel implication of *Arthrex* and proposes a remedy for it, but further illustrates the unappreciated richness of the nexus between administrative law and copyright and the importance of attending to this connection that legal scholars have to date largely ignored.

More broadly, there is also a contradiction—perhaps a fundamental one—in our synthesis of the latest Appointments Clause jurisprudence. It is a tension between administrative law's familiar technocratic aspiration for expert decisionmaking and the Court's post-*Arthrex* view of political accountability as it inflects the selection of executive officers. The more technocratic—and insulated from politics—Congress makes agency adjudicators, the less review and oversight those adjudicators get from the chain of presidential command. But this same diminution is, as the latest Appointments Clause cases suggest, where constitutional problems arise. It is tempting to depoliticize such appointees through non-presidential appointment, which more effectively shields them from direct public scrutiny, but the Court's preference seems to be that this is a bridge too far.

Presidential appointment and Senate confirmation does raise the political stakes and, to that extent, does risk undermining Wilsonian visions of apolitical public administration.¹⁶⁷ It is well to remember, though, that the single politically accountable entry point for principal-officer appointments is not self-justifying. The benefits of that accountability must be weighed against the ongoing injection of politics into the decisions of inferior officers, as those officers must continually answer to political superiors in order for

¹⁶⁶ These issues received considerable discussion at the Federal Circuit stage both during *Arthrex* and in its immediate aftermath, and they have also been impressively elaborated upon and generalized by Andrew Michaels to consider the law of retroactivity in other Appointments Clause contexts and more broadly across the law. See Michaels, *supra* note 6.

¹⁶⁷ See generally WOODROW WILSON, *The Study of Administration*, in WOODROW WILSON: THE ESSENTIAL POLITICAL WRITINGS 231, 231–48 (Ronald J. Pestritto ed., 2005) (arguing that public “administration lies outside the proper sphere of politics”).

their appointments to remain constitutional. This comparison is especially stark in adjudication, where the prospect of at-will removal by overtly political actors as a mechanism for supervision poses countervailing risks to due process values of impartiality, transparency, and reason-giving. These concerns are far from unique to the copyright system, and our analysis here is also a contribution to that discourse on technocracy and agency expertise.