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Appointment and Removal of Administrative PTO Judges

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Must administrative PTO judges either be presidential appointees or serve at will?

U.S. Const., art. II, § 2, cl. 2 provides, "[The President] ... shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Officers of the United States...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."

Copyright Royalty Judges (CRJs) are appointed by the Librarian of Congress to determine and adjust payments for several compulsory licenses. *See* 17 U.S.C. §§ 801(a), 802(b)(1). In 2009, CRJ appointments were challenged as constitutionally insufficient for "inferior officers." *See Intercollegiate Broadcast Sys., Inc. v. CRB,* 571 F.3d 69 (D.C. Cir. 2009) (Intercollegiate I). Although the issue was raised belatedly, the opinion briefly considers it. But the Librarian also appoints the Register of Copyright. *See* § 701(a). Thus, because resolution of the issue was seen to "call into question the status of every registered American copyright," the opinion refuses to address it on the basis of "hasty, inadequate and untimely briefing." 571 F.3d at 76.

In a related opinion, Judge Kavanaugh changed the focus, saying "billions of dollars and the fates of entire industries can ride on [CRB] decisions." SoundExchange v. Librarian of Congress, 571 F.3d 1220, 1226 (D.C. Cir. 2009) (concurring). That and lack of executive control led him to suggest that CRJs are principal, not inferior officers. *Id.* Soon thereafter, I worried that such a notion could jeopardize prior decisions of the TTAB and BPAI, as well as of the Register. *See Limits to Administrative Appointments*, 50 IDEA 121, 128 (2009).

In a recent sequel, the court adopts Judge Kavanaugh's view. *See Intercollegiate II*, 684 F.3d 1332, 1340 (D.C. Circuit 2012). That opinion may prompt challenges to the appointment of PTO judges. Yet it calls for examination of several factors, including the way challenged personnel are supervised and removed. Considering all factors, I'm skeptical that challenges based on failure to appoint PTO judges as principal officers will succeed.

The Secretary of Commerce, clearly the Head of a Department, appoints administrative trademark and patent judges as well as commissioners. *See* § 17(b) of the Lanham Act (15 U.S.C. § 1067(b)), 35 U.S.C. § 6(a) and § 3(b)(2)(A), respectively.

In light of *Intercollegiate II* and *Edmond v. United States*, 520 U.S. 651 (1997), upon which it relies, whether those PTO officials must, instead, be appointed by the President depends on how they are supervised as well as the conditions for their removal by the Director, a principal officer who serves at the President's pleasure. *See* 35 U.S.C. § 3(a)(1) and (4).

PTO commissioners may be removed "by the Secretary for misconduct or nonsatisfactory (sic) performance…without regard to…Title 5." § 3(b)(2)(C). That reference to Title 5 implies that removal of PTO judges, whose removal is not otherwise explicitly addressed, is governed by Title 5. *See* 35 U.S.C. § 3(c).

Under that title, subject to personnel exclusions irrelevant here, federal employees can be removed "only for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a). Moreover, employees who are removed after notice and hearing may appeal to the Merit Systems Protection Board under § 7513(d) and to the Federal Circuit under § 7703(c).

Removal is relevant to requirements for appointment, however, only in the context of supervision or ability to make final decisions. Administrative law judges, for example, conduct formal hearings with important consequences, but they do not typically make final decisions. *See* 5 U.S.C. § 557(b). Thus, ALJs, found not to be officers, much less principal officers, enjoy Title 5 job security. See Landry v. FDIC, 204 F.3d 1125, 1332-34 (D.C. 2000). *See also Abrams v. Soc. Sec. Adm.*, 2012 WL 6720528 (Fed. Cir.) (upholding an ALJ's discharge for cause).

Intercollegiate II finds that limited supervision, coupled with for-cause removal under 17 U.S.C. § 802(i), warrants CRJs' classification as principal officers. To avoid finding the CRB scheme unconstitutional, however, the court simply deletes for-cause language. So altered, § 802(i) says simply, "The Librarian of Congress may sanction or remove a [CRJ]." *See* 684 F.3d at 1440-41. Moreover, the Librarian, as the "Head of a Department," is found capable of appointing CRJs under § 801(a) as well as supervising them. *See* 684 F.3d at 1442.

What of PTO judges whose powers seemingly match or exceed those of CRJs? Must they be appointed as principal officers because they cannot be removed without cause; because their decisions are unreviewable within the PTO? As in *Intercollegiate II*, they could be supervised through risk of removal if limitations implicit in § 3(c) are ignored. That seems unnecessary, however, if they are otherwise adequately supervised by the Director, a principal officer.

Lanham Act §§ 7(a) and 18 and 35 U.S.C. § 153 are relevant, but Lanham Act § 17(b) and 35 U.S.C. § 6(a) are moreso. Membership of the Director and other high-level executives on boards, combined with his capacity to designate panels

and order rehearing enables the Director to reverse unacceptable decisions. In re Alappat, 33 F.3d 1526 (Fed. Cir. 1994) (en banc), upheld that option despite strong objections to panel packing. See, e.g., 33 F.2d at 1575-76 (Judge Mayer, dissenting).

Given widespread disapproval of the strategy employed in *Alappat*, Directors may be reluctant to use that power, but that is irrelevant. Whatever its practical or political limits, that option seems considerably more robust than the one *Intercollegiate II* confers on the Librarian. Despite misgivings, present and potential PTO judges should regard that option as more tolerable than removal without cause — not to mention running the gauntlet for appointment as principal officers. As for the last, *see, e.g., Canning v. N.L.R.B.,* 2013 WL 276024 at * 7 (D.C. Circuit) (finding three appointments invalid).

Note: Several discussions with James Robinson, a former patent examiner and 2013 UNH Law J.D. candidate, helped crystallizing these views — ones not necessarily his.