Must the President Appoint PTO Administrative Judges?

Thomas G. Field, Jr.

A case can be made, but Professor Field is skeptical.

Under Art. II, § 2, cl. 1-2 of the U.S. Constitution, "[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." As I have discussed here and elsewhere, that provision's applicability to administrative judges in the PTO and the Copyright Office (COUS), has been a festering issue since 2008.

Most recently, Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Bd., 684 F.3d 1332 (D.C. Cir. 2012), cert. den. 133 S.Ct. 2735 (2013) (Intercollegiate II), addresses the requirements for appointing administrative judges. The President must appoint personnel who do not qualify as inferior officers. That would be more bothersome for the PTO than the COUS, which employs only three administrative judges. *See* 17 U.S.C. § 801(a). In contrast, the PTO employs roughly 200.

The issue first arose in the PTO after Congress gave the Director power to appoint administrative PTO judges. Worried that he might not qualify as a department head, it then returned power to a cabinet officer with undisputed authority to appoint inferior officers. Details are unimportant, but see my article, *Limits to Administrative Appointments*, 50 IDEA 121 (2009) (Limits).

Inspired by PTO controversy, attorneys brought the issue to bear on the Copyright Royalty Board (CRB). They claimed that the Librarian of Congress, who appoints its Copyright Royalty Judges (CRJs), is not a department head. That challenge was initially skirted. *See* Intercollegiate Broadcasting System, Inc.

v. Copyright Royalty Bd., 571 F.3d 69, 72 (D.C. Cir. 2009) (per curiam) (Intercollegiate I). In related dicta, however, Judge Kavanaugh ignores that issue and urges that the President must appoint CRJs. SoundExchange, Inc. v. Librarian of Congress, 571 F.3d 1220, at 1226 (D.C. Cir. 2009) (concurring).

That sparked concern about the consequences if his views were to prevail and the CAFC were to agree. *See Limits* at 124. It has yet to weigh in, but the CADC has, indeed, adopted Judge Kavanaugh's position. *See* 684 F.3d at 1340.

That court first finds the Librarian, a presidential appointee, to be a department head. *See* 684 F.3d at 1541-42. Having resolved the long-standing underlying question, the CADC then rules that Congress provided insufficient supervision for CRJs to qualify as inferior officers.

Two factors drove the result. The statute does not provide for full appeal of CRB decisions to the Librarian or the Register of Copyright, who serves at his pleasure. Nor do CRJs serve at his pleasure. Addressing the latter, the court preserves the legitimacy of CRJ appointments and CRB decisions by striking language restricting the Librarian's ability to remove.

As I've explained elsewhere, most concerns about CRJ appointments are equally applicable to those of PTO judges. *See Reciprocal Influences of Changes in the Perceived Status of Intellectual Property Officials*, 41 AIPLA Q.J. 593 (2013) (Reciprocal Influences). Important substantive decisions are likewise immune from intramural appeal and PTO judges can be removed only for cause. Thus, the question is whether means for adequate executive supervision nevertheless exist.

In re Alappat, 33 F.3d 1526, 134-35 (Fed. Cir. 1994) (en banc), addresses a supervisory strategy once employed by Commissioner Manbeck. It would surely meet the need, but *Alappat* offers only modest for its legitimacy. *See Reciprocal*

Influences at 625. Here, my primary aim is to call attention to an option mentioned by Judge Rich but not before the court. He said, “if the Board rejects an application, the Commissioner can control the PTO’s position in any appeal through the Solicitor of the PTO; the Board cannot demand that the Solicitor attempt to sustain the Board's position. Conversely, if the Board approves an application, the Commissioner has the option of refusing to sign a patent…. “ 33 F.3d at 1535.

Although its own counsel often defends PTO actions, the U.S. Attorney General (AG) is in the driver’s seat. *See* 28 U.S.C. § 516 (2012) (“Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested… is reserved to officers of the Department of Justice….”).

According to apparently unpublished criteria, other counsel, including the PTO Solicitor, may appear at the pleasure of the AG. *See, e.g.*, Wyden v. Commissioner, 807 F.2d 934, 937 (Fed. Cir. 1986). As suggested there, even when PTO counsel appear, their views are subordinate. *See also*, In re Zurko, 142 F.3d 1447, 1449 n.2 (Fed. Cir, 1998) (the AG apparently favored a position differing from long-held views of the PTO).

Intercollegiate II emphasizes, “CRJs' rate determinations are not reversible or correctable by any other officer or entity within the executive branch.” 684 F.3d at 1340. Yet the Department of Justice represented the COUS, and presumably the Librarian, in that litigation. It is unfortunate that the court does not mention the capacity of the AG to refuse to defend CRB decisions lacking the Librarian’s or Register of Copyright’s approval.

Judge Rich as quoted above strongly suggests that agency counsel represent Commissioners (now Directors), not boards, thereby furnishing means of supervisory control. Influenced by other considerations, the AG might take a

different view. Yet, whether that view favors or disfavors those of the Director, its holder, a presidential appointee, exercises high-level executive supervision.

Directors have no straightforward means to review board decisions and lack the power to remove PTO judges absent cause, but neither prevents their being regarded as inferior officers. The CAFC, despite misgivings, might find the *Alappat* approach acceptable. If not, potential intervention by internal counsel or the AG would seem to meet the need.

Whatever the means, avoiding the need for the presidential appointment of roughly 200 officials, particularly in today's political climate, seems worthy of pursuit.