Limits to Administrative Appointments
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Professor John F. Duffy's short article, "Are Administrative Patent Judges Unconstitutional?" 2007 Patently-O Patent L.J. 21, flags recent BPAI appointments as likely to be invalid. Relying primarily on Art. II, § 2, cl. 2 of the U.S. Constitution, the Appointments Clause, and Freytag v. Commissioner of Internal Revenue, 501 U.S. 868 (1991), it argues that 35 U.S.C. § 6(a) does not conform because appointments to the board are made by the Director, instead of the Secretary of Commerce. If so and, as also seems true, appointments to the TTAB are governed solely by § 17(b) of the Lanham Act, appointees under that section are equally suspect.

No related challenge to a TTAB decision seems yet to have been raised, but one was belatedly made to a BPAI decision in In re Translogic Technology, Inc., 504 F.3d 1249 (Fed. Cir. 2007). Despite arguments made in a petition for rehearing en banc, 2007 WL 3388523 *8-16, the court chose not to consider the issue. News of that case nonetheless apparently inspired another belated challenge — this time to members of the Copyright Royalty Board appointed under 17 U.S.C. § 801(a). It was filed before the D.C. Circuit in Royalty Logic v. CRB (docket 07-1168) on May 13th.

The Appointments Clause states in part, "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." That language was construed narrowly in *Freytag,* but that opinion nevertheless upholds, 501 U.S. at 890-92, appointment of a special trial judge by the Chief Judge of the U.S. Tax Court. Agreeing with the result and with the characterization of the special trial judge as an "inferior Officer," Justices O'Connor, Kennedy and Souter joined an opinion written by Justice Scalia. It objects to the Court's reaching the issue and, 501 U.S. at 901, the majority's characterizing the appointment in question as one made by a "Court of Law" rather than as the "Head of a Department."

Presuming, as I do, that members of the BPAI, CRB or TTAB are all "inferior Officers" subject to the Appointments Clause, I'm still skeptical that courts will regard their appointments as invalid under *Freytag.* One option is to regard the BPAI and the TTAB, as suggested by the *Freytag* majority, as "Courts of Law" despite their being created under Article I rather than Article III. If so, the PTO Director, as a member of each board, becomes the equivalent of the Chief Judge of the U.S. Tax Court.

Alternatively, the PTO Director, although subject to limited supervision by the Secretary of Commerce, could be regarded as the head of a department. In that regard, Butterworth v. United States ex rel. Hoe, 112 U.S. 50 (1884), seems compelling. *Butterworth* finds the Patent Commissioner to be independent of the Secretary with regard to adjudicative matters and subject to review by only the courts. To see such people as other than heads of departments seems to exalt form over substance.

The stakes at the PTO make it difficult to believe that courts will choose neither.

The first option, however, cannot work for the CRB. Although it may be slightly less of a stretch to view the CRB as a court of law under *Freytag,* the Librarian of Congress who appoints its members is not part of that board. To regard the Librarian as other than the head of a department, however, is difficult. The name of the office suggests otherwise, but the Librarian is appointed by the President; *see* Eltra Corp. v. Ringer, 579 F.2d 294 (4th Cir. 1978).

Moreover, it seems indisputable that Registers, like members of the CRB, are inferior officers, and it is difficult to think of any basis for distinguishing their legitimacy under the Appointments Clause. No one seems to dispute the Librarian's power to appoint under 17 U.S.C. § 701(a) or, despite the arguably legislative tasks assigned the official making the appointment, the Register's capacity to adjudicate under 17 U.S.C. § 410(a). In both regards, *see* Librarian James H. Billington's testimony at 139 Cong. Rec. E810 (1993).

Thus, notwithstanding that the number of CRB decisions at stake is fewer than those of the BPAI or TTAB, the result, if anything is clearer.

Notes:

1. I appreciate helpful suggestions made by my colleague, Professor William Grimes.
2. Several documents referenced above are excerpted in my casebook, **Introduction to Administrative Process** (2008), at http://www.piercelaw.edu/tfield/aprobk.pdf. *See, e.g.,* at 6.7 (*Butterworth*), 6.15 (*Eltra*) and 6.19 (Billington). *See also,* United States v. Brooks, at 6.21 — I do not regard *Brooks* as particularly relevant to this discussion, but some may disagree.