Copyright at a Crossroad: Why Improper Appointment of Copyright Royalty Judges Could Undermine American Copyright Law, and How Congress Can Solve the Problem

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"[B]illions of dollars and the fates of entire industries can ride on the Copyright Royalty Board's decisions."1 As Judge Brett M. Kavanaugh's statement makes clear, the Copyright Royalty Board (Board)'s decisions carry significant consequences for parties subject to its determinations.2 Appointed by the Librarian of Congress (Librarian)3 and housed in the Library of Congress (Library),4 the Board consists of three copyright royalty judges tasked with determining reasonable rates and terms for payments under the compulsory-license provisions of the copyright law.5 Congress created the judgeships in 20046 to reform an underwhelming royalty-distribution system

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1. SoundExchange, Inc. v. Librarian of Cong., 571 F.3d 1220, 1226 (D.C. Cir. 2009) (Kavanaugh, J., concurring). The District of Columbia Circuit highlighted the Copyright Royalty Board's "substantial discretion" in rate proceedings. Id. (majority opinion).

2. See id. (Kavanaugh, J., concurring) (describing the effect that the Board’s decisions may have on various industries).


4. 37 C.F.R. § 301.1 (2009) ("The Copyright Royalty Board is the institutional entity in the Library of Congress that will house the Copyright Royalty Judges . . . .").

5. 17 U.S.C. § 801(a)–(b) (outlining the copyright royalty judges’ duties, and authorizing them "[t]o make determinations and adjustments of reasonable terms and rates of royalty payments as provided in [the Copyright Act]"). A compulsory license is "a license which the holder of a copyright in a work must grant to one who uses the work in any of the ways specified in the Copyright Law." Midge M. Hyman, Note, The Socialization of Copyright: The Increased Use of Compulsory Licenses, 4 CARDOZO ARTS & ENT. L.J. 105, 107 (1985).

long criticized by copyright holders and users. Yet, Congress's legislative efforts are already under attack. Two recent challenges question whether the judges were appointed in violation of the United States Constitution's Appointments Clause, alleging that Congress impermissibly authorized a legislative officer to appoint inferior executive officials.

Under Article II of the U.S. Constitution, Congress may vest appointment authority for inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments." The Appointments Clause and the separation-of-powers principle, however, do not allow a legislative branch officer to appoint legislative officers who perform executive functions. Thus, if a court determines that copyright royalty judges are inferior executive officers—that is, inferior officers who perform executive functions—subject to the Librarian's supervision, then their appointments would violate the Constitution unless the Librarian is a head of department for purposes of the

7. See infra note 83.

8. See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 571 F.3d 69, 75–76 (D.C. Cir. 2009) (per curiam) (describing an appellant's argument that copyright royalty judges are inferior officers inappropriately appointed under the Appointments Clause, but declining to resolve the question); Complaint for Declaratory & Injunctive Relief at 2–3, Live365, Inc. v. Copyright Royalty Bd., 698 F. Supp. 2d 25 (D.D.C. 2010) (No. 09-01662 (RBW)) (seeking a preliminary injunction against the Copyright Royalty Board on the basis that the Librarian unconstitutionally appoints copyright royalty judges).

9. U.S. Const. art. II, § 2, cl. 2. The Appointments Clause vests the President with the power to appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other 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.

Id.


11. In Live365, Inc. v. Copyright Royalty Board, the plaintiff asserted that copyright royalty judges should be deemed to be principal officers of the United States "who must be appointed by the President" or, alternatively, be deemed to be inferior officers of the United States who must be appointed by the President, a head of department, or the courts. Complaint for Declaratory & Injunctive Relief, supra note 8, at 7. 9. The challenge asserted that copyright royalty judges fail either test under Article II and the Supreme Court's interpretation of the Appointments Clause. Id. at 9.

This Comment focuses on the second prong of the Live365 challenge and does not discuss commentary regarding the plaintiff's principal-officer assertion. However, significant evidence suggests that copyright royalty judges may be principal officers, not inferior officers, and therefore their appointments violate the Appointments Clause. See SoundExchange, Inc. v. Librarian of Cong., 571 F.3d 1220, 1226–27 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (observing that copyright royalty judges resemble principal officers because "they are not removable at will and their decisions regarding royalty rates apparently are not reversible by the Librarian of Congress or any other Executive Branch official"). If copyright royalty judges are determined to be principal officers rather than inferior officers, then "the present means of appointing Board members is unconstitutional." Id. at 1227.
Appointments Clause.12 Furthermore, a conclusion that the appointments violate the Constitution would not only "invalidate the Judges' determinations," it would also "call into question the status of every registered American copyright."13

Part I of this Comment explores this constitutional problem by providing an introduction to the separation-of-powers principle used by the Framers in crafting the Appointments Clause, followed by an evaluation of Supreme Court jurisprudence interpreting the Clause. Next, Part I assesses inferior federal courts' evaluations of the Library's role in this country's tripartite government. The Comment then explores the legislative history of the Board's creation. Part II applies federal jurisprudence to the Librarian's appointment of copyright royalty judges and asserts that the Librarian (1) is not a head of department under the Appointments Clause, and (2) should be deemed a legislative officer subservient to Congress. As a result, the Librarian cannot constitutionally appoint copyright royalty judges, and a federal court reaching the constitutional issue should determine that the Board's authorizing statute is unconstitutional. However, legislative attention can mend the statutory malady responsible for the Board's precarious constitutional status; therefore, Part III recommends that Congress amend title 17 of the United States Code to provide direct presidential appointment of copyright royalty judges independent of the legislative branch.

I. THE APPOINTMENTS CLAUSE, FEDERAL COURTS' INTERPRETATIONS OF THE CLAUSE, AND THE EMERGENCE OF THE COPYRIGHT ROYALTY BOARD

A. The Appointments Clause: The Framers Adopt a Mechanism to Promote Separation of Powers

The doctrine of separation of powers courses through the U.S. Constitution, and the Appointments Clause is no exception.14 The Appointments Clause, infused with the separation-of-powers principle, functions as a structural and political tool (1) to prevent one branch of the government from aggrandizing power at the expense of another, and (2) to ensure that the appointment power remains concentrated in the intended actors.15 These motivating ideals lie at the foundation of American self-governance16 and were considered "a felt
necessity” to promote the Framers’ vision of a divided yet coequal government.\textsuperscript{17}

To achieve that goal, the Appointments Clause vests the President with the power, “with the Advice and Consent of the Senate, . . . [to] appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States.”\textsuperscript{18} The Clause also limits the President’s appointment power by granting Congress the power to determine the appointment of “inferior Officers”\textsuperscript{19}: their appointments may be vested “in the President alone, in the Courts of Law, or in the Heads of Departments.”\textsuperscript{20} As a result, the Clause prevents executive-branch officials from claiming sole control of the appointment process.\textsuperscript{21} At the same time, the Clause and the separation-of-powers principle restrict Congress from appointing legislative officers who perform executive functions.\textsuperscript{22} The Appointments Clause thus upholds the Framers’ vision by diffusing appointment power among coequal branches of government and preventing Congress from aggrandizing governmental control.\textsuperscript{23}

\textsuperscript{17} Secondat, baron de Montesquieu, a French philosopher, and appearing throughout the Framers’ writings).

\textsuperscript{18} U.S. CONST. art. II, § 2, cl. 2.

\textsuperscript{19} See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3162-65 (2010) (denying petitioners’ Appointments Clause challenge, and determining that Public Company Accounting Oversight Board members are properly appointed inferior officers under the appropriate supervision of a principal officer in the form of the Securities and Exchange Commission); Edmond v. United States, 520 U.S. 651, 662–66 (1997) (indicating that an inferior officer’s status depends on (1) whether the inferior officer’s work is directed and supervised by a principal officer appointed by the President with the advice and consent of the Senate, (2) whether that principal officer has the power to reverse decisions made by the inferior officer, and (3) whether the principal officer can remove the inferior officer); Morrison v. Olson, 487 U.S. 654, 671–73 (1988) (finding that inferior officers are those having limited duties, limited jurisdiction, and a temporary tenure, unlike principal officers, who perform more significant duties and are subject to removal at will by the President).

\textsuperscript{20} See id.

\textsuperscript{21} See id.


\textsuperscript{23} See Buckley v. Valeo, 424 U.S. 1, 129 (1976) (per curiam) (“[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.”); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (discussing the interplay of congressional and presidential powers).
B. Supreme Court Evaluation of Appointments Clause Challenges

1. The Significance of Bowsher v. Synar: An Analytic Framework for Assessing Inferior Officer Challenges Under the Appointments Clause

The separation-of-powers principle prohibits Congress from entrusting executive responsibilities to an officer under its control. Moreover, Congress enjoys no authority to remove executive officers beyond the confines of impeachment proceedings. As the Court has stated, the power to remove is powerful leverage over a subordinate’s loyalty.

In Bowsher v. Synar, the Court applied this doctrine to strike down a legislative provision intended to eliminate budget deficits by reducing federal spending. The offending provision improperly accomplished this goal by requiring the Comptroller General of the General Accounting Office (GAO), an officer removable only by Congress, to execute targeted budget cuts in a report the President was mandated to follow. Because of this mandate, the Comptroller was performing executive functions.

To establish the Comptroller’s subservience to Congress, the Court highlighted three facts: (1) the Comptroller represented “an instrumentality of the United States Government independent of the executive departments,” (2) the Comptroller represented “an instrumentality of the United States Government independent of the executive departments,” and (3) the Comptroller represented “an instrumentality of the United States Government independent of the executive departments.”

24. See Bowsher, 478 U.S. at 733–34 (finding that “implement[ing] the legislative mandate is the very essence of ‘execution’ of the law,” and that Congress may not retain removal authority over officers vested with such power). The Supreme Court's landmark 1986 ruling illustrated that the power to remove is a consequence of the power to appoint and extended the Court's removal doctrine dating back to the decision in Myers v. United States. Id. at 722–23; see Myers v. United States, 272 U.S. 52, 176 (1926) (holding that the President enjoys the power to remove executive officials whom he appoints).

25. U.S. Const. art. I, § 2, cl. 5 (granting the United States House of Representatives “the sole Power of Impeachment”); id. art I, § 3, cl. 5 (granting the United States Senate “the sole Power to try all Impeachments”); id. art. II, § 4 (subjecting “[t]he President, Vice President and all civil Officers of the United States” to removal by impeachment). Impeachment charges may rest only on “Treason, Bribery or other high Crimes and Misdemeanors.” Id.

26. See Bowsher, 478 U.S. at 726.


28. 31 U.S.C. § 703(e)(1)(B) (2006). The Comptroller General of GAO is appointed by the President upon the advice and consent of the Senate and selected from a list of candidates presented by the Speaker of the House and President pro tempore of the Senate. Id. § 703(a)(1)–(2). However, Congress can remove the Comptroller by impeachment or joint resolution upon a finding that the Comptroller is permanently disabled, inefficient, neglectful, malfeasant, or involved in a felony indicative of moral turpitude. Id. § 703(e)(1)(B).

29. See Bowsher, 478 U.S. at 718 (stating that the Act required the Comptroller to report to the President budget-reduction levels necessary to prevent the deficit from exceeding a maximum amount and required the President to issue “a sequestration” order to execute the reductions).

30. Id. at 733–34.

31. Id. at 730 (quoting 31 U.S.C. § 702(a)). According to the Court, Congress created GAO to review the executive branch’s application of appropriated funds in an independent manner. See
he was viewed by Congress as a legislative officer, and (3) he viewed himself as a member of the legislative branch. Therefore, the Comptroller was an executive officer impermissibly subject to congressional control. The Court’s conclusion illustrates that an officer vested with executive authority and concurrently under congressional control cannot meet the Constitution’s separation-of-powers requirements. The legislation at issue in Bowsher violated those requirements by allowing Congress to retain inordinate power, and was therefore struck down by the Court.


In Freytag v. Commissioner, the Court articulated a two-part test for determining “Head of Department” status under the Appointments Clause. Although the term itself is not defined in the Constitution, Freytag established that a head of department leads a government agency that is (1) part of the executive branch, and (2) a “department.”

In analyzing the second element to determine a head of department, the Freytag Court confined the definition of “department” strictly to “executive divisions like the Cabinet-level departments.” The Court’s definition relied on reasoning first established in United States v. Germaine—and later extended by United States v. Mouat and Burnap v. United

id. (citing H. Mansfield, THE COMPTROLLER GENERAL: A STUDY IN THE LAW AND PRACTICE OF FINANCIAL ADMINISTRATION 65 (1939)).

32. Id. at 731; see Budget and Accounting Procedures Act of 1950, Pub. L. No. 784, § 111, 64 Stat. 832, 835 (providing that GAO is an independent legislative office); Reorganization Act of 1949, Pub. L. No. 109, § 7, 63 Stat. 203, 205 (same); Reorganization Act of 1945, Pub. L. No. 263, § 7, 59 Stat. 613, 616 (same).

33. Bowsher, 478 U.S. at 731 (noting that Comptroller General McCarl once stated, “Congress . . . is . . . the only authority to which there lies an appeal from the decision of this office,” unequivocally asserting the office’s independence from the executive branch).

34. Id. at 734; see also id. at 737 (Stevens, J., concurring) (agreeing with the Court that the Act violated the principle of separation of powers regardless of Congress’s removal authority, because the Comptroller General, as a legislative officer, exercised executive responsibilities).

35. See id. at 734 (majority opinion).

36. Id.


40. Id. at 886.

41. United States v. Germaine, 99 U.S. 508, 510–11 (1879) (defining the term “department” as “part or division of the executive government, as the Department of State, or of the Treasury”).

42. United States v. Mouat, 124 U.S. 303, 307 (1888) (reaffirming United States v. Germaine and finding that “heads of the Departments were defined in that opinion to be what are now called the members of the Cabinet”); see also Katzer v. United States, 49 Ct. Cl. 294, 296 (Ct. Cl. 1914) (holding that heads of departments “are now called members of the Cabinet”)
—that heads of departments are cabinet-level officers. The Court’s analysis stems from the principle that cabinet-level executives are “subject to the exercise of political oversight and share the President’s accountability to the people.” As a result, the power to appoint inferior officers is limited to the senior-most officials still accountable to the ballot. Under Freytag’s majority view, expanding the definition beyond cabinet-level agencies would impermissibly diffuse appointment power within a single government branch and violate the separation-of-powers principle that informs the Appointments Clause. As the Court found, a strict interpretation of “head of department” ensures that the term is applied consistently across various constitutional provisions.

In applying this test, Freytag held that the chief judge of the United States Tax Court failed both prongs of the head-of-department test. First, Congress expressly established the Tax Court as an “Article I court,” not an executive agency, to avoid having one executive agency adjudicate the work of another. Second, the Court reasoned that treating the Tax Court as a department and its chief judge as the “head” would “defy the purpose of the Appointments Clause” by placing too much authority outside the executive branch.

Scully v. United States, 193 F. 185, 188 (C.C.D. Nev. 1910) (“[T]he Supreme Court has defined ‘heads of departments’ . . . to be what are now called members of the President’s cabinet.”); Surowitz v. United States, 80 F. Supp. 716, 719 (S.D.N.Y. 1948) (reasoning that heads of departments are limited to members of the President’s cabinet); Brooks v. United States, 33 F. Supp. 68, 69 (E.D.N.Y. 1939) (concluding that heads of departments are cabinet members, not bureau heads).

43. Burnap v. United States, 252 U.S. 512, 515 (1920) (“[H]ead of Department means . . . the Secretary in charge of a great division of the executive branch of the Government, like the State, Treasury, and War, who is a member of the Cabinet.”).

44. Freytag, 501 U.S. at 886.

45. Id.

46. Id.

47. Id.; supra note 23 and accompanying text.

48. Freytag, 501 U.S. at 886 (concluding that “department” should have the same meaning in the Appointments Clause and the Opinions Clause). The Opinions Clause, for example, authorizes the President to “require the Opinion, in writing, of the principal Officer in each of the executive Departments.” U.S. CONST. art. II, § 2, cl. 1. As the Court reasoned in Germaine, the Appointments Clause must be read in conjunction with the Opinions Clause because a “principal officer in the one case is the equivalent of the head of department in the other.” United States v. Germaine, 99 U.S. 508, 511 (1879).

49. See Freytag, 501 U.S. at 888. However, it is important to note that the Court ultimately upheld the chief judge’s authority to appoint inferior officers as a court of law. Id. at 892 (finding that Article I courts, including the Tax Court, that “perform exclusively judicial functions” conform with the Appointments Clause authorization and do “not significantly expand the universe of actors eligible to receive the appointment power”); see also Ex parte Hennen, 38 U.S. (13 Pet.) 230, 258 (1839) (holding that district court judges have the power to appoint clerks).

50. Freytag, 501 U.S. at 887–88 (quoting S. REP. NO. 91-552, at 301-03 (1969)).

51. Id.
Yet, Freytag’s majority opinion does not represent the final word in interpreting a “department” for Appointments Clause purposes. In fact, the concurring opinion in Freytag provides an equally influential foundation for Free Enterprise Fund v. Public Company Accounting Oversight Board, a case in which the Court recently held that the Securities and Exchange Commission (SEC), a multimember executive commission, constitutes a “department” for purposes of the Appointments Clause. Seeking to expand the definition of “department” beyond the cabinet-level to include “all agencies immediately below the President in the organizational structure of the Executive branch,” Justice Antonin Scalia’s concurring opinion in Freytag provided the key legal support for Free Enterprise Fund’s holding that a “freestanding component of the Executive Branch, not subordinate to or contained within any other such component[,] . . . constitutes a ‘Department[ ]’ for the purposes of the Appointments Clause.” However, an officer’s “department” cannot merely reside in the executive branch’s hierarchical appointment structure; rather, the agency must remain independent of countervailing political influence outside of the executive branch and must not be “subordinate to or contained within any other such component” of the government.

C. Lower Federal Courts Hold that the Librarian of Congress Is an Officer of the Legislative Branch

Bowsher, Freytag, and Free Enterprise Fund provide the structure for evaluating Appointments Clause challenges to inferior officer appointments, but lower court decisions applying statutory provisions to the Library provide important context. These decisions consistently demonstrate the Librarian’s attachment to the legislative branch and parallel the three factors enumerated in Bowsher.

In Harry Fox Agency, Inc. v. Mills Music, Inc., for example, the Second Circuit determined that the Library is “part of the legislative branch itself.” The court relied on two sections of the Library’s enabling statute that effectively gives Congress control of the Library’s budget beyond the annual

53. Freytag, 501 U.S. at 918 (Scalia, J., concurring).
54. Free Enter. Fund, 130 S. Ct. at 3163 (second alteration in original) (affirming the lower court’s determination that independent agencies, such as the SEC, are departments for purposes of the Appointments Clause); see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 676–78 (D.C. Cir. 2008), aff’d in relevant part, 130 S. Ct. 3138 (2010).
56. See supra text accompanying notes 31–33.
58. The Library’s enabling statute requires the Joint Committee of Congress on the Library, which consists of five members each from the House and Senate, to direct any unexpended
appropriations process.\textsuperscript{59} Informed by Congress’s direct reservation of control, the Second Circuit determined that the Library is part of the legislative branch, and consequently it is independent of the executive branch.\textsuperscript{60}

Moreover, courts have found that statutes aimed at regulating the executive branch exempt the Library from their provisions. In \textit{Ethnic Employees of the Library of Congress v. Boorstein}, for instance, the District of Columbia Circuit found the Library exempt from the Administrative Procedure Act (APA) because the APA’s provisions do not apply to the legislative branch.\textsuperscript{61} The District of Columbia Circuit also relied on this reasoning in \textit{Washington Legal Foundation v. United States Sentencing Commission}, a case in which the court found the APA inapplicable to the Library as a member of the legislative branch,\textsuperscript{62} and in \textit{Judd v. Billington}, a case in which the court declined to apply provisions of the Rehabilitation Act to employees of the Library because that act’s language explicitly limits its scope to cover executive employees.\textsuperscript{63}
Parallel to the third factor enunciated by Bowsher, Keefe v. Library of Congress illustrated that the Librarian views himself as a member of the legislative branch. In Keefe, which upheld the Library’s rules prohibiting employees from engaging in partisan political activity, the court described three actions taken by the Librarian to ensure that Hatch Act restrictions on executive employees’ political activity would apply to Library employees. These actions were necessary because the Hatch Act specifically exempts legislative branch employees.

Federal case law deeming the Library part of the legislative branch remains uniformly supported with two exceptions. In 1978, the Fourth Circuit concluded in Eltra Corporation v. Ringer that the U.S. Copyright Office, and by extension the Library, was a part of the executive branch properly appointed by a superior principal officer. In support of this conclusion, the court turned to three Supreme Court decisions that upheld the Register of Copyright (Register)’s interpretation of the Copyright Act. According to the court, the Register’s interpretive power is indicative of executive authority, and it relied on the Supreme Court’s tacit acceptance of that proposition to determine that the Register is an executive officer.

Moreover, Eltra distinguished the Register’s appointment from the appointment of Federal Elections Commission (FEC) members at issue in Buckley v. Valeo. In Buckley, the Supreme Court held that Congress’s appointment of FEC members violated constitutional principles requiring separation of legislative and executive powers. Eltra, on the other hand,

67. See id. at 1575.
68. See Eltra Corp. v. Ringer, 579 F.2d 294, 301 (4th Cir. 1978) (holding that it is “indisputable that the operations of the Office of Copyright are executive”).
69. See Goldstein v. California, 412 U.S. 546, 567–69 (1973) (upholding a California statute criminalizing the act of pirating recorded works, and relying upon an interpretation of the Copyright Office on a similar point of law); Desylva v. Ballenstine, 351 U.S. 570, 577–78 (1956) (upholding the decision of the Copyright Office to “register renewal claims by children during the lifetime of an author's widow or widower”); Mazer v. Stein, 347 U.S. 201, 211–14 (1954) (relying upon a rule issued by the Register under authorization provided by the 1909 Act).
70. See Eltra, 579 F.2d at 299.
71. Id. at 299–301.
72. Id. at 299–300; see also Buckley v. Valeo, 424 U.S. 1, 118–19 (1976) (per curiam) (holding that Congress may not vest appointment authority outside of the strictures demanded by the Appointments Clause).
73. Buckley, 424 U.S. at 118–19. As the Court stated, if the Legislature wishes the Commission to exercise all of the conferred powers, then its members are in fact “Officers of the United States” and must be appointed under the Appointments Clause. But if Congress insists upon retaining the power to appoint, then the members of the Commission may not discharge those many functions of the
found Buckley's holding inapplicable to the Register because the President appoints the Librarian, who in turn appoints the Register. The Fourth Circuit concluded that the Appointments Clause was respected because the Librarian is an "officer of the United States," who oversees and appoints inferior officers to an executive agency.

Although Eltra represents the only federal holding to address the Register's appointment directly, no subsequent decision reaching the Library's status on the merits cites to the Fourth Circuit with approval on this point. In fact, one district court in the Third Circuit rejected Eltra's holding entirely. In United States v. Brooks, the court deemed the Copyright Office, as part of the Library, a member of the legislative branch. Eltra found the Register and Librarian's codification and appropriation under the legislative branch irrelevant, but Brooks criticized the Eltra analysis as "unpersuasive" and rejected the Fourth Circuit's conclusion.

D. Creation of the Copyright Royalty Board

1. Congress Adopted the Copyright Royalty and Distribution Reform Act to Reform a Broken Process

Congress established the Copyright Royalty Board by passing the Copyright Royalty and Distribution Reform Act of 2004 (2004 Act). The 2004 Act replaced a patchwork of generally unpopular Copyright Commission which can be performed only by "Officers of the United States" as that term must be construed within the doctrine of separation of powers.

Id. at 300-01.

But see Live365, Inc. v. Copyright Royalty Bd., 698 F. Supp. 2d 25, 43 (D.D.C. 2010) (citing Eltra with approval and finding, in denying the plaintiffs' request for a preliminary injunction, that "even though the Library is codified under Title II and is a free standing entity that operates independently from the Executive Branch in conducting its daily operations, the Librarian appears to nonetheless qualify as a Head of Department").

80. Eltra, 579 F.2d at 301.

81. Eltra, 579 F.2d at 301.


Arbitration Royalty Panels (CARPs) and substituted the Board in their place.  

To fulfill the Board’s mission, Congress required the Librarian to appoint three copyright royalty judges tasked with making “determinations and adjustments of reasonable terms and rates of royalty payments.” The Board’s creation followed a lengthy congressional investigation into the failings of the CARP process and reflected collaboration between copyright holders and users. However, in creating the copyright royalty judgeships, Congress failed to heed the lessons of the past. As unpopular as the CARPs may have been, Congress avoided a thorough analysis of the constitutional issue now plaguing the copyright royalty judges.

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86. See Copyright Royalty and Distribution Reform Act of 2003: Hearing on H.R. 1417 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary, 108th Cong. 53–54, 57, 63, 65, 69, 73–76 (2003) [hereinafter 2003 Hearing] (demonstrating widespread support for Congress’s legislative effort to amend the CARP process and establish a new compulsory license review board, including statements from the National Music Publishers’ Association; the American Federation of Musicians of the United States and Canada; the American Society of Composers, Authors and Publishers and Broadcast Music, Inc.; the National Association of Broadcasters; SESAC, Inc.; the American Federation of Television and Radio Artists; and the Intercollegiate Broadcasting System).

87. See, e.g., id. The hearing record from 2003 is replete with examples of CARP failures, yet displays little recognition of the potential constitutional issues raised later by challengers in Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board and Live365, Inc. v. Copyright Royalty Board. In fact, the legislative history of the 2004 Act includes only a brief justification for vesting the Librarian with the power to appoint copyright royalty judges. See H.R. REP. No. 108-408, at 27 (2004). The only other reference to potential constitutional issues was raised in a letter to the House Committee on the Judiciary, submitted by Intercollegiate Broadcasting, Inc.:

You will recall that Congress attempted to resolve the Appointments Clause problem by making the Librarian a Presidential appointee. As such, he is subject to the President’s constitutional duty to take care that such policies be implemented and to a duty to implement the President’s executive orders. If, consistent with the Librarian’s litigating position, he were considered a Congressional officer in respect of copyright matters, a serious violation of the constitutionally mandated separation of powers would result.

Id. at 75.
2. Congress Departs from the Constitutional Concerns of the Past

Congress's failure to review the Appointments Clause issues thoroughly before passing the 2004 Act may stem from the twenty-seven year gap between the Copyright Royalty Tribunal (Tribunal)'s creation in 1976 and its replacement by the copyright royalty judges in 2004. Unlike the deliberative process leading up to the 2004 Act, Congress devoted significant attention to potential separation-of-powers concerns raised before the Tribunal's creation. Professor Fulton E. Brylawski sounded the initial alarm in a 1975 article criticizing then-pending legislation seeking to authorize the Register of Copyrights to appoint Tribunal members:

One provision of the revision bill would create within the Copyright Office a Copyright Royalty Tribunal that would have the authority to decide disputes with respect to the distribution of royalties and to establish new royalty rates or cable TV and phonograph records, and possibly for performances of sound recordings.

The ratemaking function of the Copyright Royalty Tribunal appears, therefore, to constitute a clearly unconstitutional delegation of legislative power that only compounds the serious constitutional infirmities of the proposed copyright law.

On June 5, 1975, Professor Brylawski testified before the House Judiciary Committee during consideration of the 1976 Copyright Act amendments and recommended that Congress instead establish the Tribunal as an independent executive agency appointed by the President. The ultimate resolution of Professor Brylawski's presentation and the committee's response is reflected in

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88. See supra notes 82–84 and accompanying text.
89. See infra text accompanying notes 92–97.
90. See Brylawski, supra note 16, at 5, 36–40 (asserting that pending legislation vested unconstitutional executive and legislative power in Tribunal members). In a footnote, Brylawski noted that his attack on the constitutional status of the Copyright Office was the first of its kind: "The constitutionality of the present administration of the Copyright Office or its future administration under the revision bill is taken for granted perhaps because no constitutional assault has been mounted." Id. at 37 n.180.
91. Id. at 37–38, 40.
92. Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary, 94th Cong. 465 (1975) (statement of E. Fulton Brylawski). The hearing transcript following Professor Brylawski's presentation suggests that committee members absorbed the weight of his charges. A brief colloquy among committee members, led by subcommittee chairman Representative Danielson, is illustrative: "I just want to say thank you. I had not thought about that constitutional problem at all, for which I can only sit here and blush and say thank you very much." Id. at 466. He was followed by Representative Edward W. Pattison: "I feel the same way. No questions." Id. Representative Danielson then concluded, "I think you may have a point." Id.
both the legislative outcome and the accompanying committee report. The House applied his reasoning and provided direct presidential appointment of Tribunal members. The House also required the Tribunal to be established as an independent authority outside the legislative branch. The committee's respect for the underlying separation-of-powers principles informing the Appointments Clause, in addition to Professor Brylawski's cogent analysis, were subsequently included in the House amendments and later codified as law.

II. APPOINTMENT OF COPYRIGHT ROYALTY JUDGES: A FAILURE TO SATISFY CONSTITUTIONAL REQUIREMENTS

Assuming a court determines that copyright royalty judges are inferior executive officers, the appropriateness of their appointments will turn on whether the Librarian is deemed a "head of a department within the meaning of the Appointments Clause." Supreme Court and lower federal court precedent dictate that the statute providing for the appointment of copyright royalty judges fails the relevant Appointments Clause test.

A. Appointment of Copyright Royalty Judges Fails the Supreme Court's Test

1. According to Freytag and Free Enterprise Fund, the Librarian Is Not a Head of Department and Cannot Appoint Inferior Executive Officers

Although Freytag's majority opinion did not "identify the precise characteristics of 'Cabinet-like' departments," the Court established that cabinet-level officials are limited to appointees that share the President's political accountability to the electorate. This limiting construction reflects

94. Id. ("Due to constitutional concern over the provision of the Senate bill that the Register of Copyrights, an employee of the Legislative Branch, appoint the members of the Tribunal, the Committee adopted an amendment providing for direct appointment of three individuals by the President.").
95. Id.
98. See supra note 11.
the Framers' intent to confine the appointment power to senior executive officials and to place a heavy emphasis on the political accountability shared by the President and his appointees.

The Librarian, like the chief judge of the U.S. Tax Court in Freytag, is not subject to the level of electoral oversight demanded by the Court. The Librarian is not a member of the President's cabinet and is not regularly subject to the same political oversight common of high-ranking executive officers. Nor do the Librarian's responsibilities rise to the level of those normally handled by cabinet members and other department heads. Thus, the Librarian's appointment power falls short of the constitutional standard under Freytag's majority analysis.

A similar result is commanded by Justice Scalia's more expansive analysis articulated in Freytag's concurring opinion, and the clarification offered by Free Enterprise Fund nineteen years later. This assertion undercuts a principal argument relied upon by the federal government in Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board and Live365, Inc. v. Copyright Royalty Board, in addition to the district court's preliminary

102. Id. at 885.
103. See id. at 886 (instructing that heads of departments are subject to the President's political oversight).
104. See BLACK'S LAW DICTIONARY 230 (9th ed. 2009) (defining "cabinet" as "comprising the heads of the 15 executive departments" and listing them). Although other officials, including the United States ambassador to the United Nations and the director of the Office of Management and Budget, are accorded cabinet rank, the Librarian is not among them. Id.
105. Much to the contrary, the current Librarian retains a long-standing appointment dating to 1987, a period of time unheard of for cabinet-level officials, and follows predecessors who served twelve and twenty years, respectively. See Office of the Librarian: About the Librarian of Congress, LIBRARY OF CONGRESS, http://www.loc.gov/about/librarianoffice/about.html (last updated May 1, 2008) ("James Hadley Billington was sworn in as the Librarian of Congress on September 14, 1987. He is the 13th person to hold the position since the Library was established in 1800."); see also Previous Librarians of Congress: Daniel J. Boorstin, LIBRARY OF CONGRESS, http://www.loc.gov/about/librarianoffice/boorstin.html (last updated May 5, 2008) (illustrating that the twelfth Librarian served for twelve years); Previous Librarians of Congress: Lawrence Quincy Mumford, LIBRARY OF CONGRESS, http://www.loc.gov/about/librarianoffice/mumford.html (last updated May 5, 2008) (showing that the eleventh Librarian served for twenty years).
106. See Burnap v. United States, 252 U.S. 512, 515 (1920) (holding that heads of departments are limited to members of the President's cabinet); United States v. Mouat, 124 U.S. 303, 307 (1888) (discussing Germaine's holding with approval); United States v. Germaine, 99 U.S. 508, 511 (1879) (indicating that heads of departments are limited to high-ranking executive officials like the President's cabinet members); infra note 116 (discussing the Librarian's service to Congress).
108. See Supplemental Brief for the Copyright Royalty Board, at 8, Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 571 F.3d 69 (D.C. Cir. 2008) (No. 07-1123) (contending that a "principal agency like the Library" must be held to be a "Department" under the Appointments Clause); see also Memorandum of Points and Authorities 1) in Support of Defendants' Motion to
finding in Live365, and warrants scrutiny beyond Freytag’s majority holding as a result.

In his concurrence, Justice Scalia concluded that heads of departments include officers outside the President’s cabinet. Justice Scalia rested his conclusion on the administrative reality that many important executive departments—the Central Intelligence Agency (CIA), Environmental Protection Agency (EPA), and Security and Exchange Commission (SEC), for example—are not headed by cabinet members. However, to strip those heads of the ability to appoint inferior officers would create substantial inefficiencies because they would have to rely on the President or his cabinet to staff their departments. As Free Enterprise Fund makes clear, however, the head of an executive department may not wield such extraordinary power without clear executive independence free from subservience to the legislative branch.

Consequently, the Court’s analysis in Free Enterprise Fund precludes the Librarian from appointing inferior executive officers by virtue of being a head of department. Rather than filling a major policy-making role in the President’s cabinet or in an independent executive agency, the Librarian’s foremost mission is to serve Congress and the legislative branch.

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109. See Live365, Inc., 698 F. Supp. 2d at 40-43 (determining that the plaintiffs could not prove that there was a substantial likelihood, for purposes of obtaining a preliminary injunction, that their inferior officer challenge under the Appointments Clause would succeed on the merits at trial). A preliminary injunction is “an extraordinary remedy,” and a plaintiff must meet a high burden to be granted one. Id. at 34–35. The court must consider whether “there is a particularly strong likelihood of success on the merits.” Id. The burden of proof is higher than at a trial following discovery, and it requires the plaintiff to make “a clear showing” to carry the burden of persuasion. Id. at 34.


111. Id (reasoning that expanding “Departments” to include independent executive agencies “is the only construction that makes sense of Article II, § 2’s sharp distinction between principal officers and inferior officers”); see also Free Enter. Fund, 130 S. Ct. at 3163–64 (holding that multimember boards may be heads of departments).

112. Freytag, 501 U.S. at 918–19 (Scalia, J., concurring).

113. Free Enter. Fund, 130 S. Ct. at 3162–64 (describing the importance of executive control over department heads).

114. See id. at 3162–64; Freytag, 501 U.S. at 918–20 (Scalia, J., concurring).


116. See About the Library, LIBRARY OF CONGRESS, http://www.loc.gov/about/ (last updated Oct. 6, 2009) (“The Library’s mission is to make its resources available and useful to the
appointees such as the Register of Copyrights\textsuperscript{117} and copyright royalty judges\textsuperscript{118} perform duties typical of executive agencies, the executive duties performed by those inferior officers cannot transform the Librarian into the head of an executive department.\textsuperscript{119}

This distinction is missing from \textit{Live365, Inc.}, a case in which the court determined that the Librarian appeared to be "a Head of Department with executive authority to appoint inferior officers" "even though the Library . . . is a free standing entity that operates independently of the Executive branch."\textsuperscript{120} \textit{Free Enterprise Fund} requires the opposite conclusion, however, and conclusively holds a head of department may only reside in the executive branch, and may not "be subordinate to or contained within any other component of the government."\textsuperscript{121} Consequently, courts cannot rely on \textit{Live365, Inc.} as controlling precedent, and the Librarian should be prohibited from appointing inferior officers.

2. The Library of Congress Is Not an Executive Agency

Justice Scalia's interpretation of heads of departments and the \textit{Free Enterprise Fund} decision provides a common thread with the second element of \textit{Freytag}'s majority test. After all, the Librarian, although appointed by the President,\textsuperscript{122} is a statutory agent of Congress first and provides services specifically for Congress.\textsuperscript{123} The Congressional Research Service (CRS), a subdivision of the Library solely devoted to aiding Congress in fulfilling its mission,\textsuperscript{124} is illustrative. CRS represents the Library's single largest budget item outside salaries and expenses,\textsuperscript{125} and it is directed by a chief officer...
appointed by the Librarian after consultation with the Joint Committee of Congress on the Library, an entity entirely comprised by members of Congress that exercises oversight over the Library’s budget and operation.\textsuperscript{127} The Librarian’s relationship to Congress is therefore inextricably linked to the legislative branch and its purpose, and cannot at the same time be considered executive.\textsuperscript{128} A contrary finding would directly offend the Supreme Court’s proposition that Congress, under the Appointments Clause, enjoys no right to vest in legislative officers the power to appoint officers that perform executive functions.\textsuperscript{129}

\textbf{B. Lower Courts Indicate that the Librarian Is Prohibited from Appointing Inferior Executive Officers}

\textit{Bowsher} suggested that if the Librarian (1) is found to be an officer independent of the executive departments, (2) is viewed by Congress as an officer of the legislative branch, and (3) views himself as a member of the legislative branch, he should be determined a legislative officer subservient to Congress who cannot appoint inferior executive officers.\textsuperscript{130} This concept is supported by applying \textit{Bowsher}'s analytic framework to other court decisions, including \textit{Harry Fox Agency, Inc. v. Mills Music, Inc.}, \textit{Ethnic Employees of the Library of Congress v. Boorstein}, and \textit{Keeffe v. Library of Congress}. Together, they illustrate that the Librarian is a legislative officer under \textit{Bowsher} and cast a shadow over copyright royalty judges’ constitutional status in the process.\textsuperscript{131}

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\begin{itemize}
\item \textsuperscript{126} FISCAL 2009 BUDGET JUSTIFICATION 1, 9 (2009), available at http://www.loc.gov/about/reports/budget/fy2009.pdf.
\item \textsuperscript{127} 2 U.S.C. § 166(c)(1).
\item \textsuperscript{128} See supra note 59.
\item \textsuperscript{129} But see Supplemental Brief for the Copyright Royalty Board, supra note 108, at 9 (asserting that the Library’s legislative codification is merely a statutory label). In making this argument, the government relied on \textit{Lebron v. National Railroad Passenger Corp.} for the proposition that the Constitution, and not Congress, dictates an agency’s status within the federal government. \textit{Id.} at 12; see \textit{Lebron v. Nat’l R.R. Passenger Corp.}, 513 U.S. 374, 392–94 (1995). This reliance is both misplaced and potentially counterproductive to the government’s argument. In \textit{Lebron}, the Court rejected Amtrak’s attempt to escape First Amendment liability by relying on the organization’s originating statute establishing Amtrak as a non-government entity not subject to the First Amendment. \textit{Lebron}, 513 U.S. at 392–94. The First Amendment rights of American citizens are not at issue in a challenge of the Board’s constitutional status, so reliance upon \textit{Lebron} should not control.
\item \textsuperscript{129} See \textit{Bowsher v. Synar}, 478 U.S. 714, 726 (1986).
\item \textsuperscript{130} See supra text accompanying notes 31–33.
\item \textsuperscript{131} See supra text accompanying notes 57–67. Although this body of case law, standing alone, provides strong evidence of the Librarian’s status, when applied to \textit{Bowsher}'s reasoning, each holding provides a seamless link to the Supreme Court’s Appointments Clause teachings.
\end{itemize}
Harry Fox Agency, Inc. illustrated the Library's status as an independent legislative agency outside of the executive branch. The court found that the Library is "part of the legislative branch itself" and relied on the Library's enabling statute for support. Citation to the Library's enabling statute is critical, not coincidental, because the statutory framework provides members of Congress with direct control over the Library's budget beyond mere appropriations. Retaining budget authority over the management of an agency indicates control beyond the appropriations process to which every federal agency is subject. A contrary interpretation of the Library's status within the legislative branch would therefore violate the separation of powers.

Further, federal decisions derived from Ethnic Employees of the Library of Congress v. Boorstein reflect Congress's long-standing view that the Library is a legislative institution. Congress's opinion is manifest in light of the Administrative Procedure Act, Rehabilitative Act, and Hatch Act, each of which, by its terms, does not apply to members of the legislative branch.

Finally, and perhaps most strikingly, the Librarian's own actions consistently illustrate his identity as a legislative officer. Keeffe supports this notion by first concluding that "the Library of Congress is a congressional..."
agency" exempt from the Hatch Act.142 Second, the decision upholds the Librarian's self-imposed restrictions modeled on the Hatch Act because Hatch Act restrictions apply only to executive employees.143 The Librarian "recognized that the Hatch Act did not cover Library employees,"144 and on two occasions issued general orders aligning the Hatch Act's prescripts specifically to cover legislative employees otherwise exempt from the Act.145 When combined with the Librarian's own mission statement asserting his subservience to Congress,146 the Librarian views himself as a member of the legislative branch.

C. Eltra Cannot Withstand Scrutiny Under Supreme Court Reasoning in Freytag or Bowsher

Federal case law evaluating the Library's status provides compelling evidence illustrating Congress's control of the Library in the face of Bowsher's analytical framework. Regardless, a successful challenge to the copyright royalty judges' appointments must still overcome the Fourth Circuit's holding in Eltra. This decision affirmed the Librarian's ability to appoint the Register of Copyrights and remains the only federal holding to address the Librarian's appointment power.147

Reliance on Eltra is nevertheless a dubious proposition for three reasons. First, the 1978 decision failed to analyze the Register's appointment under the bright-line rule established in 1991 by Freytag and previously articulated in the case law following Germaine.148 This could be overlooked because Eltra was decided thirteen years before Freytag.149 However, the Eltra court quoted a long passage from Buckley that cited directly to Germaine, and the court even referred to Germaine in the text of its opinion without analyzing the Court's treatment of the constitutional issue.150 The case law influencing Freytag's holding151 was squarely before the Eltra court in 1978. That Eltra failed to

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142. Keeffe, 777 F.2d at 1574, 1578.
143. See id. at 1578, 1583.
144. Id. at 1578.
145. See LIBRARY OF CONG., OFFICE OF THE LIBRARIAN, GEN. ORDER NO. 1371 (June 29, 1948); LIBRARIAN OF CONG., OFFICE OF THE LIBRARIAN, GEN. ORDER NO. 1164 (Nov. 6, 1942).
146. See About the Library, The Mission of the Library of Congress, LIBRARY OF CONGRESS, http://www.loc.gov/about/mission.html (last updated May 1, 2008) (stating that the "Library's mission is to make its resources available and useful to the Congress").
147. See supra notes 68–81 and accompanying text.
148. See supra notes 41–44.
150. Eltra, 579 F.2d at 300 (quoting Buckley v. Valeo, 424 U.S. 1, 125–26 (1976) (per curiam)).
151. See Freytag, 501 U.S. at 886 (relying on Germaine and holding that "department" refers only to cabinet-level officers); see also Burnap v. United States, 252 U.S. 512, 515 (1920) (relying on Germaine and determining that the "term head of a Department means . . . the
account for Germaine, given its importance and positive treatment by subsequent Supreme Court cases, renders Eltra’s holding questionable at best.

Putting this issue aside, the Eltra court’s analysis appears shallow on its own. The Fourth Circuit relied on an inferential leap from three Supreme Court decisions interpreting the Register’s application of the Copyright Act of 1909. In holding that the Register was validly appointed under Appointments Clause requirements, the court reasoned:


[[It seems incredible that, if there were a constitutional infirmity in the 1909 Act, it would have so long escaped notice by either the Supreme Court or the bar or that the Supreme Court would have given implicit authorization in the three decisions... for the exercise by the Register of the power to issue rules and regulations, as provided in the Act.]

This inferential chain requires that an Appointments Clause challenge be read into the three Supreme Court decisions where the Register’s appointment simply was not at issue. According to this logic, Supreme Court deference must then require consideration of a constitutional challenge not before the bench.

But this logical inference is simply incorrect. Although courts sometimes offer commentary concerning important issues not before the bench, they rarely consider an issue not raised by a party on appeal. In fact, the Supreme Court’s own rule provides that the Court will not entertain an issue not “fairly comprised” in the petition for certiorari. Eltra’s holding assumes that the Supreme Court would violate basic tenants of judicial restraint and should therefore be considered suspect.

Finally, no subsequent federal decision positively cites to the conclusion reached in Eltra, with the exception of the court’s flawed analysis in Live365, Inc., yet one district court in the Third Circuit explicitly rejected it in United

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Secretary in charge of a great division of the executive branch of the Government, like the State, Treasury, and War, who is a member of the Cabinet); United States v. Mouat, 124 U.S. 303, 307 (1888) (approving of Germaine and finding that heads of departments are cabinet members).

152. See supra notes 69–71 and accompanying text.

153. Eltra, 579 F.2d at 299–300.

154. See supra note 69.


156. See, e.g., Berkemer v. McCarthy, 468 U.S. 420, 443 (1984) (“[W]hen reviewing a judgment of a federal court, we have jurisdiction to consider an issue not raised below, but we are generally reluctant to do so.”); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970) (“Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.”); Lawn v. United States, 355 U.S. 339, 362 n.16 (1958) (referencing the Court’s rule prohibiting the Court from reviewing issues not in the petition for certiorari).

According to Brooks, "the Library of Congress is clearly a part of Congress, and therefore part of the legislative branch of government." Brooks appropriately questioned Eltra's methodology that equated performance of executive duties with membership in the executive branch. As the court held in Brooks, "[a]cting similarly to an executive agency is not the same as being part of the executive branch." Actual affiliation with the executive branch is crucial for Appointments Clause analysis.

In light of the Brooks rebuke, the dubious reasoning applied by Eltra and the Fourth Circuit's failure to apply long-standing Supreme Court precedent for analyzing the Register's appointment, Eltra cannot be relied on as valid law supporting the Librarian's status as an executive officer. Eltra's holding, in turn, cannot be relied on to support the copyright royalty judges' constitutional status.

III. SOLUTION TO THE COPYRIGHT CRISIS: PRESIDENTIAL APPOINTMENT AND INDEPENDENCE FROM THE LEGISLATIVE BRANCH

Significant consequences may impact both copyright holders and users if a court holds that copyright royalty judges are impermissibly appointed. The Librarian not only appoints copyright royalty judges, he also appoints the Register of Copyrights who supervises administration of U.S. copyright law. Thus, a successful challenge could "call into question the status of every registered American copyright" in addition to invalidating the copyright royalty judges' determinations.

Either consequence needlessly threatens stakeholder industries reliant on stable copyright law. However, Congress can avoid unwelcome judicial intervention by curing the constitutional infirmities in the Board's current appointment structure. Congress should amend the Copyright Act to (1) provide the President direct authority to appoint copyright royalty judges and remove the Board from the legislative branch, and (2) retroactively affirm decisions under the current process via the "de facto officer" doctrine.


160. See id.

161. Id. at 834.

162. See Freytag v. Comm'r, 501 U.S. 868, 885–86 (1991) (holding that a head of department must be in the executive branch); Brooks, 945 F. Supp. at 834 ("The mere fact the Copyright Office is required to perform 'administrative functions and duties' under the Copyright Act is not enough to make the Copyright Office a component of the executive branch." (citation omitted)).


A. Avoiding Confrontation with the Appointments Clause: The Importance of Presidential Appointment

Most importantly, this proposal eliminates confrontation with the Appointments Clause by providing copyright royalty judges direct presidential appointment. The Appointments Clause expressly vests authority in the President to appoint inferior officers.\(^{165}\) Thus, if appointed by the President, copyright royalty judges would unambiguously be subservient to the President as the Constitution demands. The cloud of constitutional uncertainty currently surrounding every Board decision would dissipate, and the Board’s venerated service would continue free of unnecessary litigation.\(^{166}\)

This proposal is far from revolutionary. Instead the legislative recommendation revives the appointment structure of the tribunal as conceived by the House of Representatives during consideration of the Copyright Law Amendments of 1976.\(^{167}\) In this way, the recommendation adheres to the scholarship and constitutional consideration first applied by Congress more than thirty years ago.\(^{168}\)

Little deliberation of the constitutionality of the copyright royalty judges’ appointments occurred leading up to the Copyright Royalty and Distribution Reform Act of 2004.\(^{169}\) This lack of consideration is at least partially responsible for the challenge to the Board’s appointment structure in *Intercollegiate Broadcasting System, Inc.* and *Live365, Inc.*\(^{170}\) Nevertheless, Congress has an opportunity to correct its drafting error before a federal court ultimately intervenes. Failure to do so may lead to repercussions that are not in the interest of copyright owners and users.


Congressional preemption of Appointments Clause litigation is not without precedent. Most recently, Congress eliminated a similar constitutional challenge from impacting the patent-law structure by amending the

\(^{165}\) U.S. CONST. art. II, § 2, cl. 2.

\(^{166}\) See 2003 *Hearing*, supra note 86, at 2 (statement of Rep. Lamar Smith) (describing the benefits of a government-supervised copyright royalty panel, which “distributes billions of dollars among the participants in a fair and even-handed manner” and “helps copyright content owners and users in the digital age”).


\(^{168}\) See supra Part I.D.2.

\(^{169}\) See supra note 87.

appointment process for administrative patent judges (APJs) in 2008.\textsuperscript{171} The action prevented considerable uncertainty in the patent-holder and user communities,\textsuperscript{172} and ultimately presents a model Congress can and should follow with respect to the Copyright Royalty Board.

Prior to 1999, the Department of Commerce appointed APJs to review adverse decisions of patent examiners as part of the Board of Patent Appeals and Interference (BPAI).\textsuperscript{173} Congress amended this structure in 1999 by providing the Director of the Patent and Trademark Office (PTO) authority to appoint APJs.\textsuperscript{174}

The constitutional validity of this decision remained unchallenged until 2007,\textsuperscript{175} when Professor John F. Duffy published an article asserting that APJs were “almost certainly” appointed in violation of the Appointments Clause.\textsuperscript{176} Much like in 1975, when Professor Brylawski raised similar criticism regarding copyright tribunal members’ potential appointment,\textsuperscript{177} Professor Duffy’s article prompted questions in the patent-bar community, and litigation soon followed.\textsuperscript{178}

Congress noticed as well and quickly took matters into its own hands before federal courts could resolve the constitutional issue.\textsuperscript{179} In less than three weeks, and with little committee consideration, Congress passed and the President signed amendments providing the Secretary of Commerce authority to appoint APJs.\textsuperscript{180}


\textsuperscript{172} See Adam Liptak, In One Flaw, Questions on Validity of 46 Judges, N.Y. TIMES, May 6, 2008, at A18 (discussing the impact of the flaw on the patent court’s decisions).


\textsuperscript{175} See Gatto et al., supra note 173, at 22.


\textsuperscript{177} See supra text accompanying notes 90–92.

\textsuperscript{178} See, e.g., In re DBC, 545 F.3d 1373, 1377–80 (Fed. Cir. 2008) (refusing to entertain the appellant’s argument based on Professor Duffy’s work because the party failed to raise the issue at the administrative level); see also Petition for a Writ of Certiorari, Translogic Tech. v. Dudas, No. 07-1303 (U.S. Apr. 16, 2008) (petitioning the Supreme Court to hear arguments on the company’s Appointments Clause claim).


Yet the amendments did not stop there. Recognizing the threat that potential litigation might pose to the BPAI decisions between 1999 and 2008, the legislation also conferred retroactive validity upon the PTO director's prior appointments under the "de facto officer" doctrine. That doctrine allows Congress to confer retroactive validity upon administrative decisions rendered by officers previously appointed in an inappropriate manner. Thus, with one swift legislative stroke, Congress eliminated a constitutional threat to the patent appeals system by affirming both the prior appointments and the acts of the appointees.

Congress's decision to engage the constitutional issue following Professor Duffy's publication, but before potential court intervention, provides a successful model to be applied toward copyright royalty judges. By intervening in 2008, Congress created a legislative solution to a problem of its own making in 1999. Further, Congress provided a fallback provision via the de facto officer doctrine in the event that previous APJ appointments would be deemed improper.

The de facto officer doctrine's Anglo-American heritage spans more than 500 years and is a constitutionally valid tool for conferring validity on past actions. Court precedent approves of the doctrine's limited use for an inappropriately appointed officer who was "in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper." The doctrine is intended to avoid the inevitable chaos sure to ensue if actions taken by policymakers deemed inappropriately

182. See BLACK’S LAW DICTIONARY 1194 (9th ed. 2009) (defining a de facto officer as "[a]n officer who exercises the duties of an office under color of an appointment or election, but who has failed to qualify for office for any one of various reasons, as by being under the required age, having failed to take the oath, having not furnished a required bond, or having taken office under a statute later declared unconstitutional").
183. See Buckley v. Valeo, 424 U.S. 1, 142 (1976) (per curiam) (deeming the de facto officer doctrine an appropriate remedy to confer retroactive validity upon administrative decisions of the Federal Election Commission); see also Ryder v. United States, 515 U.S. 177, 180 (1995) (recognizing the de facto officer doctrine as a constitutionally valid legislative device to confer "validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient").
184. Duffy, supra note 181, at 921.
185. In yet another parallel between the APJs and copyright royalty judges, the current constitutional crisis surrounding the Board is the product of Congress's action in 2004 establishing the Board inside the Library, and authorizing the Librarian to appoint the judges.
186. See supra text accompanying notes 182–83.
188. Waite v. Santa Cruz, 184 U.S. 302, 323 (1902).
appointed “could later be invalidated by exposing defects in the officials’ titles.”

There is some doubt, however, that the de facto officer doctrine is an appropriate cure for the Board’s constitutional malady. The Supreme Court has instructed that reviewing courts should not reflexively employ the de facto officer doctrine, and cannot apply it “when the statute creating the office in question is unconstitutional.” As the Court held in *Norton v. Shelby County*, “[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.” Some therefore suggest that the doctrine represents an inappropriate tool for conferring validity upon prior decisions made by copyright royalty judges.

Yet modern Supreme Court precedent suggests that the doctrine is appropriate for just such occasions. In *Buckley*, for example, the Court invoked the doctrine after declaring a statute providing appointment for FEC members unconstitutional. Rather than strike all decisions promulgated by dubiously appointed commissioners, the Court emphasized that inappropriate appointment “should not affect the validity of the Commission’s administrative actions and determinations.” Furthermore, no precedent exists for rejecting legislative application of the doctrine to cure perceived constitutional defects. Congress thus retains authority to confer validity on determinations adjudicated by previously appointed copyright royalty judges and can look to its 2008 modification of the administrative patent-adjudication system as a roadmap for success.

Although the appointment structure for copyright royalty judges and the previous appointment for APJs are not completely parallel, they are similar.

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190.  See Lawson & Seidman, supra note 187, at 596 (citing *Norton v. Shelby County*, 118 U.S. 425, 440–42 (1886)).
192.  See Duffy, supra note 181, at 920 (doubting whether courts will permit reliance upon the de facto officer doctrine to confer validity upon decisions rendered by administrative patent judges).
196.  Prior to congressional intervention, administrative patent judges owed their appointments to the Director of the PTO, who is appointed by the Secretary of Commerce. *See supra* text accompanying notes 173–74. Copyright royalty judges are instead appointed by the Librarian, who owes his appointment to the President. 2 U.S.C. § 136 (2006); 17 U.S.C. § 801 (2006). The extra layer between the President and the PTO Director is thus absent in the Librarian’s appointment.
enough to warrant the same protection. And given the constitutional shield erected by Congress's amendment in 2008, it makes sense to apply a similar anecdote to the constitutional crisis surrounding the Board.

IV. CONCLUSION

The Appointments Clause represents the separation-of-powers principles that permeate the Constitution and prevents one branch of the government from aggrandizing political power at the expense of the other two. The constitutional restrictions represent the Framers' fear that appointment power, if too diffuse, might upset the balance of power that they considered paramount. Congress has violated these principles by vesting a legislative officer with the power to appoint inferior executive officers. Legislation vesting the Librarian of Congress with the power to appoint inferior copyright royalty judges is one such instance. The Copyright Royalty Board, over which the judges preside, stands subject to constitutional attack as a result.

Without swift legislative action by Congress, a federal court may hold that copyright royalty judges are appointed in violation of constitutional principles. Congress should therefore prevent judicial intervention by providing the President direct authority to appoint copyright royalty judges independent from the legislative branch. By taking action, Congress will provide the Board immunity from constitutional scrutiny and will bring stability to the copyright system that is currently shrouded in doubt.