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SIDEBAR

In One Flaw, Questions on Validity of 46 Judges

By Adam Liptak
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Law professors are sometimes influential, but in a general way. Their insights can help shape the law, over time and at the margins.

But John F. Duffy, who teaches at the George Washington University Law School, is a different kind of law professor. He has discovered a constitutional flaw in the appointment process over the last eight years for judges who decide patent appeals and disputes, and his short paper documenting the problem seems poised to undo thousands of patent decisions concerning claims worth billions of dollars.

His basic point does not appear to be in dispute. Since 2000, patent judges have been appointed by a government official without the constitutional power to do so.

"I actually ran it by a number of colleagues who teach administrative law and constitutional law," Professor Duffy said, recalling his own surprise at finding such a fundamental and important flaw. He thought he must have been missing something.

"No one thought it was a close question," Professor Duffy said.

Charles Miller, a spokesman for the Justice Department, said the government had no comment. "There is really nothing we can say at this time," he said.

But the Justice Department has already all but conceded that Professor Duffy is right. Given the opportunity to dispute him in a December appeals court filing, government lawyers said only that they were at work on a legislative solution.

They did warn that the impact of Professor Duffy's discovery could be cataclysmic for the patent world, casting "a cloud over many thousands of board decisions" and "unsettling the expectations of patent holders and licensees across the nation." But they did not say Professor Duffy was wrong.

If it was a legislative mistake, it may turn out to be a big one. The patent court hears appeals from people and companies whose patent applications were turned down by patent examiners, and it decides disputes over who invented something first. There is often a lot of money involved.

The problem Professor Duffy identified at least arguably invalidates every decision of the patent court decided by a three-judge panel that included at least one judge appointed after March 2000.

The appeals court, the United States Court of Appeals for the Federal Circuit, ducked the question in January, which was easy to do because the company on the losing side raised it only after the court had already issued its decision. The company, Translogic Technology, was frank in explaining the delay: it had not known of the issue until Professor Duffy published his article.

John F. Duffy
Stan Barouh/George Washington University Law School

Last month, Translogic asked the Supreme Court to consider the question.

Some provisions of the Constitution are open to interpretation, but some are clear. The Constitution says, for instance, that some government officials may be appointed only by the president, the courts or "heads of departments" like the attorney general or the secretary of commerce.

But a 1999 law changed the way administrative patent judges are appointed, substituting the director of the Patent and Trademark Office for the secretary of commerce. Jennifer Rankin Byrne, a spokeswoman for the office, said 46 of the 74 judges on the patent court, the Board of Patent Appeals and Interferences, were appointed under the new law.

"That method of appointment is almost certainly unconstitutional," Professor Duffy wrote in his paper, first published last summer on an influential patent law blog.

There are two possible contrary arguments. One is that the patent judges are not the sort of "inferior officers" to whom the Constitution's appointments clause applies, but instead mere employees (and thus inferior to inferior officers). But the Supreme Court has already ruled, in Freytag v. Commissioner in 1991, that special trial judges of the tax court are inferior officers, and the patent judges have more power and discretion than they do.

The other possible argument is that the director of the patent office is entitled to appoint the judges because he is the head of a department. The Freytag decision "pretty clearly forecloses" that argument, Professor Duffy wrote. Freytag said the departments referred to in the Constitution are "executive departments like the cabinet-level departments." But the patent office is part of the Commerce Department, and its director is an under secretary of the department not its head.

The question of who gets to appoint "inferior officers" may seem a trivial one. But the Constitution's framers cared about it.

The "manipulation of official appointments" was "one of the American revolutionary generation's greatest grievances against executive power," Justice Harry A. Blackmun explained in Freytag. The framers understood, he continued, "that by limiting the appointment power they could ensure that those who wielded it were accountable to political force and the will of the people."

The Office of Legal Counsel at the Justice Department, which is supposed to catch constitutional problems in pending legislation, only last year published a 41-page memorandum on the importance and limits of the appointments clause. People who wield the delegated sovereign powers of the federal government are officers subject to the appointments clause, the memorandum said, and judges certainly wield such power.

"Appointments clause issues were our bread and butter," said John O. McGinnis, a law professor at Northwestern who was deputy assistant attorney general in the Office of Legal Counsel from 1987 to 1991. Professor McGinnis said Professor Duffy's analysis appeared correct.

"You have to understand that O.L.C. looks at just an enormous number of bills," he added. "A line attorney might just miss it."

The Supreme Court will soon decide whether to take up the question, in the case involving Translogic, one with $86 million at stake.

"An improperly constituted tribunal should not be deciding the case," said a lawyer for Translogic, Robert A. Long of Covington & Burling in Washington. "You have to go back and have the decision made by a properly constituted panel."