SEPARATION OF POWERS — APPOINTMENTS CLAUSE — D.C. CIRCUIT HOLDS APPOINTMENT OF COPYRIGHT ROYALTY JUDGES BY LIBRARIAN OF CONGRESS VIOLATES APPOINTMENTS CLAUSE. — *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, 684 F.3d 1332 (D.C. Cir. 2012), *reh'g and reh'g en banc denied*, No. 11-1083 (D.C. Cir. Aug. 28, 2012).

When attempting to insulate an executive branch officer from presidential control, Congress faces a dilemma. The Constitution's Appointments Clause delineates the required appointment mechanisms for "Officers of the United States."[1] "[P]rincipal" officers must be appointed by the President and confirmed by the Senate, while inferior officers may be appointed by the President alone, courts, or heads of executive departments, as Congress chooses.[2] Additionally, a restriction on an officer's removal signals the officer's "principal" status.[3] Taken together, it is challenging for Congress both to vest appointment of an officer in someone other than the President (making the appointee an inferior officer) and to shield that officer from removability at will (indicating that she may be a principal officer). Recently, in *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*,[4] the D.C. Circuit ruled that Congress had failed to navigate these constitutional shoals successfully. The court held that Copyright Royalty Judges (CRJs) are principal officers, and so their appointment by the Librarian of Congress violated the Appointments Clause.[5] To resolve the constitutional problem, the court struck down the restriction on the CRJs' removal, thereby rendering them inferior officers.[6] The court had freedom in its choice of remedy, and to preserve the CRJs' political insulation, the court should have considered changing their appointment mechanism.

In 2004, Congress created the Copyright Royalty Board.[7] A component of the Library of Congress,[8] the Board consists of three CRJs and their staff.[9] The CRJs are appointed by the Librarian of Congress[10] to six-year terms,[11] are subject to appointment qualifications,

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1 *See* U.S. CONST. art. II, § 2, cls. 1–2.

2 *See id.*

3 *See, e.g.*, Edmond v. United States, 520 U.S. 651, 664 (1997); Morrison v. Olson, 487 U.S. 654, 671 (1988).

4 684 F.3d 1332 (D.C. Cir. 2012), *reh'g and reh'g en banc denied*, No. 11-1083 (D.C. Cir. Aug. 28, 2012).

5 *Id.* at 1341–42.

6 *Id.* at 1342.

7 Final Brief for Appellees at 1 n.1, 4–5, *Intercollegiate Broad. Sys.*, 684 F.3d 1332 (No. 11-1083).

8 37 C.F.R. § 301.1 (2011).

9 *See* 17 U.S.C. § 801(a) (2006); 37 C.F.R. § 301.1.

10 17 U.S.C. § 801(a).

11 *See id.* § 802(c).

and can be removed only for cause.[12] The Librarian of Congress is appointed by the President, confirmed by the Senate,[13] and removable at will by the President.[14]

Holders of copyrights for sound recordings have exclusive rights to performances of their works transmitted to public audiences over the internet.[15] To encourage bargaining between copyright owners and would-be infringers,[16] federal law provides for statutory licenses[17] at "reasonable rates and terms of royalty payments."[18] Those rates and terms should approximate "the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller,"[19] while ensuring a fair return for the parties, and while maximizing the public good and minimizing the impact on industry.[20]

In 2008, the CRJs initiated proceedings to set default webcasting license rates for 2011–2015.[21] After many parties settled, four participated in the Board's formal process.[22] Two parties urged the CRJs to base the statutory licenses on their settlement agreement, a view supported by twenty-four other noncommercial webcasters.[23] Intercollegiate Broadcasting System, Inc., an association of educational webcasters, objected, arguing that the settlement agreement set too high a minimum fee and encouraging the CRJs to create new categories for "small" and "very small" broadcasters.[24] The CRJs rejected these arguments and accepted the settlement terms.[25]

The D.C. Circuit vacated.[26] Writing for a unanimous panel, Senior Judge Williams[27] held that the CRJs were principal officers of the United States, who must be appointed by the President and confirmed by the Senate, and so their appointment by the Librarian of Congress

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[12] *Id.* § 802(a)(1), (i).

[13] 2 U.S.C. § 136 (2006).

[14] *Intercollegiate Broad. Sys.*, 684 F.3d at 1341.

[15] *See* 17 U.S.C. § 106(6). Transmitting such performances is commonly called "webcasting." *Intercollegiate Broad. Sys.*, 684 F.3d at 1334.

[16] *See* 17 U.S.C. § 114(e), (f)(3) (2006 & Supp. V 2011); *see also* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960) (observing that, ignoring transaction costs, markets become efficient regardless of the "initial legal delimitation of rights").

[17] 17 U.S.C. §§ 112(e)(1), 114(d)(2).

[18] *Id.* § 114(f)(1)(A).

[19] *Id.* § 114(f)(2)(B).

[20] *See id.* § 801(b)(1)(A)–(D).

[21] *Intercollegiate Broad. Sys.*, 684 F.3d at 1335; *see also* Digital Performance Right in Sound Recordings and Ephemeral Recordings, 76 Fed. Reg. 13,026, 13,026 (Mar. 9, 2011).

[22] Final Brief for Appellees, *supra* note 7, at 8–9.

[23] *Id.* at 9–10.

[24] *See* Digital Performance Right, 76 Fed. Reg. at 13,039–41.

[25] *See id.* at 13,042; *see also Intercollegiate Broad. Sys.*, 684 F.3d at 1335.

[26] *Intercollegiate Broad. Sys.*, 684 F.3d at 1342.

[27] Senior Judge Williams was joined by Judges Garland and Griffith.

violated the Appointments Clause.[28] Intercollegiate Broadcasting pressed two alternative constitutional challenges[29]: either the CRJs were principal officers,[30] or they were inferior officers, who had to be appointed by a "Head of Department," which the Librarian of Congress is not.[31] The D.C. Circuit found that the "major differentiating feature" between principal and inferior officers is "the extent to which the officers are 'directed and supervised' by persons 'appointed by Presidential nomination with the advice and consent of the Senate.'"[32] The court looked to three factors that influenced the Supreme Court's decision in *Edmond v. United States*,[33] which held that judges of the Coast Guard Court of Criminal Appeals are inferior officers[34]: (1) the extent to which the judges were "subject to . . . substantial supervision and oversight," (2) removability, and (3) whether the judges' substantive decisions could be reversed.[35]

The court held that CRJs were not sufficiently directed by a principal officer to count as inferior officers. First, the court reasoned that CRJs retained broad discretion unsupervised by a principal officer.[36] In picking rates and terms, the CRJs were required to make a "reasonable" decision, but the factors guiding their discretion "pull[ed] in opposite directions,"[37] leaving a potentially vast "zone of reasonableness."[38] To be sure, the significant discretion held by the CRJs was constrained by the Librarian of Congress's power (via the Register of Copyrights) to issue binding opinions of law and to correct legal errors, as well as the Librarian's power to approve the Board's procedural regulations, issue ethical rules, and exercise some logistical control over the Board's operations.[39] But the Librarian's supervision of issues orthogonal to the CRJs' substantive decisions "still [fell] short" of the direction required to make the CRJs inferior officers.[40]

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[28] *Intercollegiate Broad. Sys.*, 684 F.3d at 1342.

[29] Intercollegiate Broadcasting offered two further arguments regarding the statute's judicial review provision, *id.* at 1335–36, and the regulation's merits, *id.* at 1342. The court did not reach either issue. *Id.* at 1336, 1342.

[30] *Id.* at 1336; *see also* Soundexchange, Inc. v. Librarian of Cong., 571 F.3d 1220, 1226 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (flagging this "serious constitutional issue").

[31] *Intercollegiate Broad. Sys.*, 684 F.3d. at 1341.

[32] *Id.* at 1337 (quoting Edmond v. United States, 520 U.S. 651, 663 (1997)). The government conceded that the CRJs are officers of the United States for purposes of the Appointments Clause. *Id.*

[33] 520 U.S. 651.

[34] *Id.* at 666.

[35] *Intercollegiate Broad. Sys.*, 684 F.3d at 1338.

[36] *Id.* at 1338–39.

[37] *Id.* at 1339 (quoting Recording Indus. Ass'n of Am. v. Copyright Royalty Tribunal, 662 F.2d 1, 9 (D.C. Cir. 1981)) (internal quotation mark omitted).

[38] *Id.* (quoting Fed. Power Comm'n v. Conway Corp., 426 U.S. 271, 278 (1976)).

[39] *Id.* at 1338–39.

[40] *Id.* at 1339.

Second, the court reasoned that the CRJs, unlike the judges in *Edmond*, were removable only for good cause, insulating them from direction by a principal officer.[41] Third, determinations made by the CRJs were final within the executive branch.[42] Indeed, although the CRJs may consult with the Register of Copyrights, they are statutorily prohibited from consulting with the Register on questions of fact.[43] The court also noted that, if the significance of the CRJs' authority is relevant to the principal-inferior distinction, their ratemaking authority "can obviously mean life or death for firms and even industries."[44]

Taking these four factors together, the court held that the CRJs were principal officers whose appointment therefore violated the Constitution.[45] In crafting a remedy, the court looked to the Supreme Court's decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[46] In that case, the Court found that several provisions of the Sarbanes-Oxley Act of 2002[47] relevant to the newly created Public Company Accounting Oversight Board combined to form a constitutional defect in the Board's structure. The Court then struck down only the Board's for-cause removal provision rather than the Act as a whole or one of the Act's collateral provisions.[48] Similarly here, the D.C. Circuit invalidated the statute's for-cause removal provision. The court expressed "confiden[ce] that" the Librarian of Congress could use "unfettered removal power" to supervise the CRJs and provide substantive input, which would make them inferior officers.[49] Since the CRJs were invalidly appointed when making the determination under review, the court vacated it and remanded for reconsideration in light of the CRJs' new status.[50] Intercollegiate Broadcasting moved for rehearing en banc, arguing that the defect remained and that the court should have left the remedy to Congress,[51] but the court denied the motion.[52]

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[41] *Id.* at 1339–40; *see also* 17 U.S.C. § 802(i) (2006).

[42] *See Intercollegiate Broad. Sys.*, 684 F.3d at 1340.

[43] *See id.* (citing 17 U.S.C. § 802(f)(1)(A)(i)).

[44] *Id.* at 1338.

[45] *Id.* at 1340.

[46] 130 S. Ct. 3138 (2010); *Intercollegiate Broad. Sys.*, 684 F.3d at 1340 (citing *Free Enter. Fund*, 130 S. Ct. at 3151–54, 3161).

[47] Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of the U.S. Code).

[48] *Free Enter. Fund*, 130 S. Ct. at 3161–62.

[49] *Intercollegiate Broad. Sys.*, 684 F.3d at 1341.

[50] *Id.* at 1342. The D.C. Circuit also rejected Intercollegiate Broadcasting's argument that the Librarian of Congress could not be a head of department able to appoint inferior officers under Article II because the Library of Congress is not an executive department. *Id.*

[51] Appellant's Corrected Petition for Rehearing and Rehearing en banc at 8, 13, *Intercollegiate Broad. Sys.*, 684 F.3d 1332 (No. 11-1083).

[52] *Intercollegiate Broad. Sys.*, 684 F.3d at 1332.

The D.C. Circuit based its decision to strike down the CRJs' for-cause removal provision on *Free Enterprise Fund*'s reasoning. Yet lower courts have freedom to remedy Appointments Clause defects in several ways, so long as the solution minimally disrupts Congress's policy choices. In this case, Congress created the constitutional defect by attempting to insulate the CRJs from presidential control ex ante, through a nonpresidential appointment mechanism, and ex post, through a removal restriction. The court might have hewed more closely to Congress's intent to preserve the CRJs' political insulation by changing the appointment mechanism rather than eliminating the removal restriction.

The D.C. Circuit's remedy is an extension, not an application, of the Supreme Court's decision in *Free Enterprise Fund*. In *Free Enterprise Fund*, the Court found Congress's removal restriction on officers of the Public Company Accounting Oversight Board constitutionally defective.[53] Rather than striking down the Board entirely, the Court invalidated the problematic restriction and severed it from the rest of the Act.[54] And having made the Board members removable at will, the Court declared that they were now inferior officers whose appointment was constitutional.[55] The teaching of *Free Enterprise Fund*, then, is not that Appointments Clause defects *ought* to be cured by eliminating removal restrictions. Rather, it is that eliminating removal restrictions *might*, in some cases, cure Appointments Clause defects.[56] Eliminating a removal restriction is not necessarily the correct remedy in the absence of a predicate defect inherent in the removal restriction.

When altering statutes to cure constitutional defects, courts should minimally disrupt the legislature's policy choices. "[T]he touchstone for any decision about remedy is legislative intent . . . ."[57] A "ruling of unconstitutionality frustrates the intent of the elected representatives of the people,"[58] and courts lack the "constitutional mandate and institutional competence" to rewrite statutes and choose among provisions — actions that are "quintessentially legislative work."[59] As a consequence, when resolving a constitutional problem, a court should be guided by the legislature's choices. The *Free Enterprise*

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[53] *Free Enter. Fund*, 130 S. Ct. at 3157.

[54] *Id.* at 3161–62.

[55] *Id.* at 3162.

[56] *Id.* (stating that, "[g]iven that the Commission is properly viewed . . . as possessing the power to remove Board members at will," the Court had "no hesitation" in finding the Board members inferior officers).

[57] Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 330 (2006).

[58] *Id.* at 329 (quoting Regan v. Time, Inc., 468 U.S. 641, 652 (1984)) (internal quotation mark omitted).

[59] *Id.*

Fund Court followed this approach: the Court excised the removal restriction, rather than choose an alternative that Congress would have opposed (for example, eliminating the entire statute) or one that would have required legislative judgment (modifying one of "a number of statutory provisions that, working together, produce a constitutional violation").[60] The D.C. Circuit tacitly applied this analysis, noting that it tried to "minimize[] any collateral damage."[61]

The evidence of Congress's intent suggests that the removal clause was a key component of its legislative scheme. One of Congress's objectives was to insulate the CRJs from sources of potential political pressure and allow the CRJs to make determinations on the basis of their expertise. Congress named the officials "Judges" and gave them relatively long terms.[62] Congress made their salaries contingent on congressional appropriations, rather than on royalties collected pursuant to licenses.[63] Congress required that persons appointed as CRJs have industry expertise.[64] Though the CRJs are reliant on the Librarian of Congress for administrative resources, Congress explicitly exempted the CRJs from statutory performance reviews.[65] Expressing concern about potential bias,[66] Congress provided that the CRJs be "separate and independent" from parts of the Library that might influence them improperly[67] and limited the Librarian's ability to remove them.[68] To be sure, the fact that Congress vested the appointment power in the Librarian means that Congress intended the CRJs to be inferior officers, but it also evinces a desire to insulate them ex ante from presidential control. Functional insulation, rather than formal inferiority, drove congressional choices.

Despite this demonstrable congressional interest in assuring the CRJs' independence, the court's remedy reduces the CRJs' political insulation by enhancing presidential control over them.[69] Absent the removal restriction, the President may threaten the CRJs with removal by exerting influence over the Librarian of Congress, increasing the President's influence over the CRJs' policy choices and thereby reduc-

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[60] *Free Enter. Fund*, 130 S. Ct. at 3162.

[61] *Intercollegiate Broad. Sys.*, 684 F.3d at 1340; *see also* Transcript of Oral Argument at 45, *Intercollegiate Broad. Sys.*, 684 F.3d 1332 (No. 11-1083).

[62] 17 U.S.C. § 802(c) (2006).

[63] H.R. REP. NO. 108-408, at 21 (2004).

[64] 17 U.S.C. § 802(a)(1).

[65] *Id.* § 802(f)(2)(A).

[66] H.R. REP. NO. 108-408, at 22.

[67] *Id.* at 24. In particular, Congress was concerned about the undue influence of the Copyright Office, which leads federal copyright policy. *See id.* at 26.

[68] 17 U.S.C. § 802(i).

[69] *Cf.* Bowsher v. Synar, 478 U.S. 714, 734 (1986) (observing that invalidating removal protections "would . . . alter the balance that Congress had in mind"). As noted above, the CRJs retained broad discretion notwithstanding the Librarian's ability to influence them indirectly.

ing the role of expertise in their exercise of discretion.[70] Given the amount of money at stake in Board proceedings,[71] the President might be pressured to become involved in contentious copyright disputes. Even if the President is politically constrained from using her ability to remove the Librarian to control the CRJs,[72] in the court's own view, the mere threat of removal will constrain the CRJs' independence.[73] As the D.C. Circuit stated, the court's remedy will afford the Librarian the "direct ability to 'direct,' 'supervise,' and exert some 'control' over the CRJs' decisions."[74] And as the Librarian is removable at will by the President,[75] the President will be able to substantively affect the CRJs' decisions. In short, the court's chosen remedy may enable the President to guide the CRJs' decisions, even absent an explicit threat of removal, through the President's other formal and informal means of influence.[76]

The court had an alternative to eliminating the CRJs' removal provision: it could have mandated that the CRJs be nominated by the President and confirmed by the Senate.[77] Once appointed, the CRJs would have had the same degree of discretion as they did before, subject to the same checks.

Vesting the appointment power in the President, rather than the Librarian, would not substantially increase the President's influence over the CRJs. First, it comes with a built-in check — Senate confir-

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[70] *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3174 (2010) (Breyer, J., dissenting) ("[T]his Court has recognized the constitutional legitimacy of a justification that rests agency independence upon the need for technical expertise."); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 696–97 (2000) (noting the continuing importance of bureaucratic expertise notwithstanding the political dimension of administrative decisionmaking).

[71] *See* Reply Brief for Appellant at 4, *Intercollegiate Broad. Sys.*, 684 F.3d 1332 (No. 11-1083) (arguing that "[b]illions of dollars" are at stake in decisions of the Board); Ben Sisario, *First Royalty Rates Set for Digital Music*, N.Y. TIMES, Oct. 3, 2008, at C8 (describing involvement of major lobbying groups in Board proceeding).

[72] *Cf. Free Enter. Fund*, 130 S. Ct. at 3170 (Breyer, J., dissenting) (noting that "more purely political factors" are strong determinants of the President's authority over officials).

[73] *See Intercollegiate Broad. Sys.*, 684 F.3d at 1341.

[74] *Id.* (quoting Edmond v. United States, 520 U.S. 651, 662–64 (1997)).

[75] *Id.*

[76] *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2290–99 (2001) (describing the power of directives to compel reluctant agencies to obey presidential decisions as "more than persuasion . . . [even if] less than command," *id.* at 2298).

[77] It is not obvious that eliminating the CRJs' statutory appointment mechanism would have empowered the President to appoint them directly without congressional action. But courts have exercised broad authority to develop creative remedies for constitutional defects. *See, e.g.*, Ryder v. United States, 515 U.S. 177, 188 (1995) (remanding for consideration by a "properly appointed panel"); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1982) (declining to apply remedy retroactively and staying judgment to give Congress time to act); Civil Serv. Comm'n — Chief Exam'r, 18 Op. Att'y Gen. 409, 409–11 (1886) (suggesting appointment by the President and confirmation by the Senate where statute is silent).

mation.[78] Second, any increased presidential influence would be only marginal. The President already could influence the appointment of CRJs through the Librarian, an appointee of the President removable at will[79] and constrained "to a significant degree by" the President.[80]

The court may have been reluctant to require Senate confirmation of CRJs, since the Senate may be slow to confirm nominees,[81] disrupting the Board's operation. Under this view, Congress declined to give itself a role in the appointment process to prevent the delays associated with Senate confirmation.[82] Yet the disruption is likely to be minimal. Only one CRJ needs to be confirmed each Congress.[83] The Board typically sets rates in five-year increments,[84] while low-level executive branch nominees are typically confirmed within three months.[85] And if need be, the President can make a temporary appointment.[86] A substantial interruption of the Board's operations is unlikely, and the associated risk is outweighed by Congress's clear goal of insulation.

Future courts will face cases in which Congress has failed to avoid the constitutional appointment-and-removal dilemma, and those courts are free to craft a remedy that best furthers congressional objectives. In *Intercollegiate Broadcasting*, the D.C. Circuit eliminated the constitutional conflict between the Copyright Royalty Board's appointment and removal provisions by eliminating the CRJs' for-cause removal clause. Yet preserving the CRJs' removal protection and vesting their appointment in the President may have better served Congress's interest in insulating the CRJs from the President. The court should have considered this path out of the dilemma.

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[78] *See* THE FEDERALIST NO. 76, at 455–57 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (arguing that Senate confirmation constrains the President's choice of principal officers).

[79] *Cf.* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3153–54 (2010) (observing that, if the Securities and Exchange Commissioners can remove Public Company Accounting Oversight Board members at will, the President can control the Board by "hold[ing] the Commission to account for its supervision of the Board," *id.* at 3154).

[80] *Intercollegiate Broad. Sys.*, 684 F.3d at 1341.

[81] The 112th Congress slowed the confirmation of large numbers of nominees. *See* Jonathan Weisman, *Appointments Challenge Senate Role, Experts Say*, N.Y. TIMES, Jan. 8, 2012, at A19.

[82] *Cf.* H.R. REP. NO. 108-408, at 22 (2004) (identifying "stability" as a goal of the CRJ appointment process).

[83] Fear of disruption might weigh more heavily on a court facing a challenge to a large number of officials. *See, e.g.*, *Free Enter. Fund*, 130 S. Ct. at 3180–81 (Breyer, J., dissenting) (suggesting the danger of opening the decisions of a large set of officers to constitutional challenge).

[84] Transcript of Oral Argument at 27, *Intercollegiate Broad. Sys.*, 684 F.3d 1332 (No. 11-1083).

[85] *See* Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 967 tbl.6 (2009).

[86] *See, e.g.*, Diana Gribbon Motz, Essay, *The Constitutionality and Advisability of Recess Appointments of Article III Judges*, 97 VA. L. REV. 1665, 1666 (2011) (describing the parameters of the Recess Appointments Clause); O'Connell, *supra* note 85, at 934 (describing the Federal Vacancies Reform Act).