Copyright's Constitutional Chameleon

BY DANIEL SOLOVE · MAY 17, 2013

by John Duffy, Peter Strauss and Michael Herz

Earlier this year, more than 100,000 citizens petitioned the White House to overturn a copyright rule issued by the Librarian of Congress that made unlocking a cell phone a crime. The White House responded by promising to seek legislation to overturn the Librarian's rule. That was the most the President would or could do because "[t]he law gives the Librarian the authority," and the Administration would "respect that process," even though the Librarian acted contrary to the Administration's views. See here. As the *New York Times* reported, "because the Library of Congress, and therefore the copyright office, are part of the legislative branch, the White House cannot simply

overturn the current ruling." See here.

There's only one problem with all of this: The Department of Justice has been vigorously arguing precisely the contrary constitutional position in the federal courts.

According to the Administration's filings in litigation that has now reached the Supreme Court, the Library of Congress is "an executive Department," and the Librarian himself is "subject to plenary oversight by the President." Justice Department lawyers have explained that Congress made a "purposeful decision to place the Library under the President's direct control and supervision"; that the Librarian of Congress is the "Head" of this "executive Department"; that the President may remove the Librarian "at will" just as he may remove other heads of executive departments; and that this removal power creates the Librarian's "here-and-now subservience" to the President. (See pages 16 & 17 of the Government's Brief in Opposition filed at the Supreme Court, available here and pages 23, 29 & 37 the Government's Brief for Appellees filed in the Court of Appeals, available here.

In light of that clear legal position, an obvious question arises: If the Librarian is really a head of an executive Department subject to "plenary oversight by the President," why hasn't the President either taken responsibility for criminalizing cell phone unlocking or ordered the Librarian to reverse his decision?

The answer is that no one in the political arena actually believes for one minute that the Librarian is the head of an executive department. The current Librarian has repeatedly testified to Congress that the Library is "arm of the United States Congress," "a "branch of the Legislative branch," and "a unique part of the Legislative Branch of the government." Members of Congress also understand this to be true. To take but one prominent example, Senator Orrin Hatch has noted not only that "the Copyright Office is in the legislative branch of the Government" but also that this arrangement presents difficulty because "whenever the Copyright Office is tasked with an executive-type function, [a] constitutional question arises."

The President's supposed powers of "plenary oversight" and at-will removal are utter fiction, as the controversy about cell phone unlocking shows. Indeed, although the legal force of the assertion is doubtful, the Library's own website states that the precedent has been "established that a Librarian of Congress is appointed for life." Bold though it seems, that statement is accurate: Since the current administrative structure for the Library was established in 1897, no President has ever removed a Librarian of Congress, and the Librarians' average tenure exceeds in duration that enjoyed by Chief Justices of the United States. The current Librarian is 83 years old and was appointed by President Reagan.

Why then are the Administration's lawyers arguing that the Librarian is a presidential underling? The answer is easy. The Librarian has been vested with the power to appoint all of the officers who execute the copyright laws—including the Registrar of Copyrights and the judges of the Copyright Royalty Board—but the "Appointments Clause" of the Constitution makes clear that such power can be lodged in the Librarian only if he is the head of an Executive Department. Indeed, as the Supreme Court has made clear, the Framers of the Constitution wanted to ensure that such important powers would be wielded only by those high officials who were "accountable to political force and the will of the people."

The Librarian of Congress has thus become a constitutional chameleon. When testifying before Congress, he calls himself a legislative officer who is part of the Legislative Branch of government. When the Librarian's constitutional authority is challenged in court, he morphs into an Executive Branch department head subject to the President's "plenary oversight." And yet when he makes a controversial decision with which the President disagrees, he changes back again to a legislative officer whom the President cannot control except by recommending new legislation.

The importance of this constitutional issue is vividly highlighted by the current controversy over cell phone unlocking. The Librarian of Congress has made an immensely controversial executive decision that the White House has publicly disavowed. To whom do the people complain? Well, more than 100,000 complained to the President, but the President has avoided accountability by blaming the Librarian, who is assumed by everyone (including the *New York Times*) to be a legislative officer. Indeed, this President can hardly be held responsible for Librarian's decision because the Librarian was appointed a President first elected when the current President was a sophomore in college.

The Supreme Court has before it a petition to hear a case in which it could consider the constitutionality of an unaccountable legislative officer running the nation's copyright system. The case presents the opportunity to correct a glaring constitutional defect—either by confirming the President's "plenary oversight" power or by striking down the current arrangement. It is an opportunity the Court should take.

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The briefs filed at the Supreme Court in this case can be found here. SCOTUSblog highlighted the petition for certiorari in this case as the "petition of the day" for May 16, 2013 (see here).

A pdf version of this post is available here.

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Sean Croston · May 17, 2013 at 3:51 pm

The Appointments Clause, Art. II, sec. 2, cl. 2, refers to appointments by "the Heads of Departments." One clause before that, the Opinions Clause, Art. II, sec. 2, cl. 1, authorizes the President to request opinions from "the principal Officer in each of the executive Departments." Likewise, sec. 4 of the 25th Amendment explicitly refers to "principal officers of the executive departments."

What's the significance, if any, of the fact that, unlike the Opinions Clause and the 25th Amendment, the text of Appointments Clause doesn't actually include the key modifier "executive," as suggested in the post? The framers clearly knew how to add that modifier when they wanted to — they did it twice over time. Could the Librarian of Congress perhaps still be considered the Head of a (Legislative or Independent) Department? I agree it's pretty odd, but I'm just wondering…

Brett Bellmore · May 17, 2013 at 9:23 pm

Haven't you noticed that this administration's motto is, "The buck never gets within sight of us."

Marty Lederman · May 18, 2013 at 1:43 am

Whoa — slow down a minute here. The White House response to the petition does *not* say that the Librarian is a legislative officer; that the Librarian has for-cause removal protection; or even that the President lacks the authority to

direct the Librarian on which position to adopt respecting phone unlocking.

Moreover, on that latter question, although I haven't looked closely at the particular statute at issue, I assume Peter is of the view — and perhaps John and/or Michael are, as well — that the President does *not* in fact have the authority to countermand the Librarian's decision, or to direct the Librarian to adopt a particular view on the cellphone unlocking question: The only coercive power the President has is the power to remove. Thus, even though the White House *could have* gone further and said that the President lacks the authority to tell the Librarian what to do, it did not even offer that as a ground for absolving itself of responsibility; instead, it said only that it "respects" Congress's decision to give the decision-making authority to the Librarian. Hardly such a radical notion — no more so than, say, the White House deferring to an investigatory decision of the FBI Director (an executive officer!), or to a prosecution decision of the Attorney General (same), both of which happen every day.

More to the point, the White House said nothing at all inconsistent with DOJ's argument that the Librarian is the head of an executive department, and thus constitutionally empowered to appoint inferior officers if a statute so prescribes. Indeed, that would be true even if the Librarian were de jure "independent," i.e., even if he did have for-cause removal protection (which he does not).

So what's the fuss about?

P.S. Since Congress — unlike the President — has neither the power to appoint nor to remove the Librarian, the idea that the Librarian is a legislative officer for constitutional purposes is a stretch, to say the least.

John Duffy May 18, 2013 at 9:00 am

(Response to Marty Lederman from one of the authors)

Our post does not claim that the White House said the Librarian is a legislative officer. The New York Times said that, as our post states.

If, however, the Librarian is truly an executive officer who is subject to the "plenary supervision" of President, then the President should bear some responsibility for his Librarian's continuous and repeated testimony to Congress that the Library is a "branch of the Legislative branch," an "arm of the United States Congress," and "a unique part of the Legislative Branch of the government." In addition to the current Librarian's congressional testimony, statements such as these are currently maintained on the Librarian's own website; so too is the assertion that he is "appointed for life." I don't think that the Attorney General or the director of the FBI have been making similar statements about their constitutional position, in congressional testimony or otherwise.

If DOJ's briefs are correct, the Librarian's statements are highly misleading and, more importantly, have in fact misled the nation's newspaper of record — and, one might think, a significant portion of the public — in a way that undermines accountability for an unpopular decision. The Librarian's statements (or perhaps something else) have also been very successful in misleading Congress, as the Congressional Record includes numerous statements by current members of Congress that the Library is a legislative entity.

It is also true that one part of the Library of Congress — its Congressional Research Service — has statutory duties that, under current precedent of the DOJ's own Office of Legal Counsel (OLC), are unconstitutional if the CRS is just a component within the executive branch. Major administrative scholars such as Paul Verkuil, currently head of the Administrative Conference of the United States, view the CRS as an institution on the "congressional side." Paul R. Verkuil, A Proposal to Resolve Interbranch Disputes on the Practice Field, 40 Cath. U.L. Rev. 839, 847 (1991). Indeed, Verkuil cites CRS and OLC as good examples of institutions "that are by inclination and organization meant to have single branch loyalties." Id. at 848.

Somehow all of these sophisticated actors — the New York Times, Members of Congress, the current head of ACUS and even the Librarian himself — are repeatedly and consistently getting this this separation-of-powers point wrong (if DOJ's litigating position is right). Perhaps DOJ will be proven correct in viewing the Library as executive, but it is nonetheless true that, currently, there is currently a significant conflict of views on the matter, including a conflict between what DOJ is saying to the Article III courts and what DOJ's client has consistently been telling Congress.

That's what the fuss is about, and that sort of fuss — that sort of conflict about a fundamental constitutional issue — is more than enough to justify one spot on Supreme Court's docket.

John Duffy · May 18, 2013 at 10:54 am

(Response to Sean Croston from one of the authors)

Sean Croston's textual point about the Appointments Clause is a good one, and one that I have spent some time considering in writing about this case.

DOJ has not raised this argument in defending the current appointment structure, and there are two reasons why it didn't.

First, in interpreting the word "Department" in the Appointments Clause, the Supreme Court "for more than a century has held that the term 'Departmen[t]' refers only to 'a part or division of the executive government.'" Freytag v. Commissioner, 501 US 868, 886 (1991).

Now to a true textualist, such an answer is not so satisfying because the Supreme Court's statements could just be wrong. It does provide part of the explanation as to why DOJ didn't defend the Librarian on the ground that he is the head of a legislative Department: DOJ did not want to have to overturn a century of Supreme Court precedent in order to win its case.

There is, however, a second reason. Everyone agrees that the relevant officers whose appointments are being challenged here — Copyright Royalty Judges — are exercising executive functions. If the Librarian were the head of a Legislative Department vested with the power to appoint Copyright Royalty Judges, the Copyright Royalty Judges would need to be supervised by some other principal executive branch officer or else the judges either would not be "inferior" officers within the meaning of the Appointments Clause, see, e.g., Edmond v. United States, 520 U.S. 651, 663 (1997), or would be inferior legislative officers whose execution of the copyright laws would be unconstitutional even under the separation-of-powers principles articulated in Morrison v. Olson, Morrison v. Olson, 487 US 654, 695-96 (1988).

The need for executive branch supervision was in fact raised and thoroughly litigated in the lower courts, so DOJ needed to have some executive branch officer who was supposedly the judges' executive branch supervisor.

In fact, one of the great ironies of the result below is that the DOJ lost on the supervision issue. The D.C. Circuit held unconstitutional the statutory tenure protection that Congress had afforded these judges. Under the D.C. Circuit's ruling, these judges now serve at the pleasure of the Librarian of Congress. That is a result that literally no one wants. The Congress never wanted these judges to be removable at will by a self-described part of the legislative branch of government. The DOJ lawyers argued against that result below. And the private parties challenging this arrangement never sought this result either. Indeed, for the private parties, the result below is about a hollow a "victory" as one can imagine. If the D.C. Circuit's constitutional holding stands, the private parties will be in the unenviable position of being remanded back to the Copyright Royalty Board and seeking a more favorable result from judges whose tenure protection these parties have just destroyed! Good luck with that!

Peter Strauss · May 18, 2013 at 12:03 pm

(Another author's reply)

Marty seems to think I must agree with him, but I do not. My view is similar to Justice Stevens' in Bowsher — GAO, the Library of Congress, and other lesser bodies attached to Congress are so strongly legislative agencies (as the "independent regulatory commissions" are not) as to fail as harbors for unmistakably executive functions. "Appoint one of these three" is fine for the head of GAO, because of this; ditto for the President's ostensible appointment authority over the ceremonial post of being Librarian of Congress. But these bodies are and unmistakably have been in the legislative branch since their creation — The Library, the GPO, and the National Botanic Garden since early in the 19th Century; GAO since its creation as an intended congressional balance to the Bureau of the Budget when the latter was established ca. 1922.

ACUS has recently created an interesting and quite comprehensive guide to "The Federal Executive Establishment." Here its only two passages concerning the Library:

While executive branch agencies are responsible for carrying out most federal laws, employees in the legislative and

judicial branches also do so. For example, the legislative branch includes what in common language would be called agencies as well, such as the Government Accountability Office (GAO), the Congressional Budget Office, and the Library of Congress, in addition to legislators, their staffs, and other officers of the legislature. Congress created most but not all of these agencies to serve the legislature as staff agencies.18 For example, the GAO's self-described mission is to serve Congress by investigating how the U.S. government spends federal revenues.19 The judicial branch includes the Administrative Office of the United States Courts, the Federal Judicial Center, and the United States Sentencing Commission, in addition to the courts and their judges and officers.20 These units provide administrative support for the federal courts, offer the basic management support for the court system, and supply education and research about the court system and sentencing principles and guidelines. On the other hand, some administrative units provide support for all three branches of government. The Government Printing Office is responsible for publishing official information for and about all three branches. The U.S. Botanic Garden, another instrumentality of the legislative branch, is a national botanic garden that "informs visitors about the importance, and often irreplaceable value, of plants to the well-being of humans and to earth's fragile ecosystems."21 Neither agency self-evidently needs to be located in the legislative branch

…

The first Congress created the first executive departments, Treasury, State, and War, in 1789.88

88. Harold Seidman, A Typology of Government Agencies, in Federal Reorganization: What Have We Learned?, 34 (Peter Szanton ed., 1981) [hereinafter Seidman, A Typology]. It is interesting to note that Congress considered, but ultimately rejected, a proposal to create a fourth axecutive department—a home department. Instead, they took the programs and responsibilities that would have resided in the home department, and placed them in the other departments.

89. There were a few exceptions to this early pattern. Specifically, Congress created four agencies outside the executive departments prior to the Civil War—the Library of Congress, Botanic Garden, Smithsonian, and Government Printing Office. Id. at 35. Three of these are located in the legislative branch.

These passages reflect universal understandings. The President does NOT have the complex web of relationships he enjoys with "The Federal Executive Establishment," which (as the AGUS publication accurately reflects) includes ALL the independent regulatory commissions. No-one in the Congressional Research Service thinks she is an executive branch employee; Congress would be outraged (and properly so) if a presidential directive to the Librarian to instruct the CRS that its employees must henceforth provide research to and only to executive departments, or that it must submit budget requests to OMB. He could not, via GSA, relocate it to Rockville, Md. The risk that in my judgment arrangements like the copyright royalty tribunal present is teaching Congress how to create institutions with unmistakably executive function that lie outside that web.

mls □ May 19, 2013 at 12:15 am

It is clear that the Library of Congress is understood, at least by Congress, to be part of the legislative branch. Historically, this is not something that the executive branch has questioned (I am not sure that it would have occurred to the executive branch in the 19th century that this was something that it could question). Perhaps it does now—that depends on exactly what it means to be part of the legislative branch and how it relates to the various legal assertions that DOJ has made in court.

Assuming that the LOC is constitutionally prohibited from performing executive functions, the question remains to what extent the administration of copyright laws constitutes an executive function. No doubt the DC Circuit's observation that " the powers in the Library and the Board to promulgate copyright regulations, to apply the statute to affected parties, and to set rates and terms case by case are ones generally associated in modern times with executive agencies rather than legislators" is correct, but what about the fact that Congress, long before "modern times," has placed responsibility for administering the copyright laws in non-executive agencies? It seems that this historical practice might have some relevance to the separation of powers analysis.

Looking at things from another angle, the Framers might well have looked askance at a "copyright rule issued by the Librarian of Congress that made unlocking a cell phone a crime," but I doubt it would have been because they thought that such a rule should be issued by an executive agency.

Some of the points made by the original post seem to have at most a tangential relevance to these difficult constitutional

questions. As Marty suggests, who cares whether the WH distances itself from actions by the LOC, something it might do with respect to any independent agency (or, in the case of the IRS, close enough to independent for government work)? Likewise, the fact that the Librarian believes the LOC to be part of the legislative branch doesn't seem all that important- the question is whether this belief is correct and, if so, what it means.

This strikes me as a very important case. I wonder whether Congress has considered how its institutional interests may be affected and whether it wants DOJ to represent them.

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