

## Copyright's Constitutional Chameleon

—John F. 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 <https://petitions.whitehouse.gov/petition/make-unlocking-cell-phones-legal/1g9KhZG7>. 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." <http://www.nytimes.com/2013/03/05/technology/fcc-urges-a-right-to-unlock-cellphones.html>.

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 at <http://www.justice.gov/osg/briefs/2012/0responses/2012-0928.resp.pdf>; and pages 23, 29 & 37 the Government's Brief for Appellees filed in the Court of Appeals, available at <http://tinyurl.com/Librarian-Govt-Appellees-Brief>).

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 observed, 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 the Librarian's decision because the Librarian was appointed by 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 at <http://www.scotusblog.com/case-files/cases/intercollegiate-broadcasting-system-inc-v-copyright-royalty-board/>. SCOTUSblog highlighted the petition for certiorari in the case as the “petition of the day” for May 16, 2013 (see <http://www.scotusblog.com/?p=163730>).

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