No. 12-928

In the Supreme Court of the United States

INTERCOLLEGIATE BROADCASTING SYSTEM, INC.,
Petitioner,
v.
COPYRIGHT ROYALTY BOARD, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF PROFESSOR JOHN F. DUFFY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

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SUMMARY OF ARGUMENT

In this extraordinary case, the United States Court of Appeals for the District of Columbia Circuit held unconstitutional the appointment structure applicable to the Copyright Royalty Board, but it did so for the wrong reason and granted the wrong remedy. Certiorari is warranted because the administrative structure of the U.S. copyright system is constitutionally incoherent. The position advocated below by the Department of Justice on

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[1] Pursuant to Rule 37.6, counsel for *amicus* certifies that this brief was not authored in whole or in part by counsel for any other party and that no person or entity other than the *amicus* or his counsel has made a monetary contribution to the preparation or submission of this brief. The petitioner and the government received notice of the intention to file this brief ten days prior to its due date. Both intervenor-respondents waived ten-day notice in the matter. All parties have consented in writing to the filing of this brief.

behalf of the Librarian of Congress is directly and completely contrary to the position that the Librarian himself has consistently put forward to Congress in official testimony.

The Librarian of Congress is vested by statute with the power to appoint all officials holding significant power in the U.S. copyright system, including the Copyright Royalty Judges (whose appointments are being challenged here) and the Registrar of Copyrights, who holds rulemaking and other administrative powers. In defending the Librarian's appointment powers before the D.C. Circuit, the government successfully argued that the Librarian of Congress should be viewed as being a "Head[] of Department" for purposes of the Appointments Clause and thus "within the Executive Branch" for constitutional purposes. Gov't C.A. Br. 29.

The Librarian of Congress has himself, however, repeatedly described the Library as an "arm of Congress" and part "of the Legislative Branch of the government"; has confirmed that "the relationship between Congress and its Library has been and remains today fundamentally different from the Congress's relationship with executive agencies"; and has specifically praised Congress's "wise decision" to locate copyright administration in the Library rather than in "the Executive and Judicial Branches."

This case therefore presents the highly unusual situation in which the Department of Justice successfully presented to the Article III courts below a constitutional position that has been clearly contradicted by the head of the relevant agency in official testimony before the Article I legislature.

That split in positions is itself sufficient reason to grant certiorari here. A government agency unequivocally representing itself as in one constitutional branch when it appears before Congress cannot be shifted into a different constitutional branch when it appears before the Article III courts.

In addition to that embarrassing inconsistency, the government's position below suffers from numerous other problems. First, for the Librarian of Congress to head an executive department for constitutional purposes, he must be subject to presidential supervision and control. Yet, the lynchpin of the government's argument below to establish presidential control was that the Librarian of Congress is "removable at [the President's] will." Gov't C.A. Br. 34. That position has no basis in law or in practice. No statute provides the President with any power to remove the Librarian, and the relevant case law demonstrates that an implied presidential power to remove an appointee exists only if the appointee is an *executive* officer. The government's position below is also clearly inconsistent with longstanding practice. Since Congress established the current appointment structure in 1897, no Librarian has ever been removed by a President. The current Librarian has served since 1987—more than a quarter century. As the Library's own website candidly states, "in the twentieth century the precedent seems to have been established that a Librarian of Congress is appointed for life." Library of Congress, *Jefferson's Legacy: A Brief History of the Library of Congress, Librarians of Congress* (Mar. 30, 2006), http://www.loc.gov/loc/legacy/librs.html.

Second, the government badly misrepresented the legislative history to the court below. The government argued that "the congressional sponsors of the 1897 legislation certainly believed the Library to be a 'department' under the Constitution" and that "[o]ne member specifically argued: 'This Library of Congress is a department of the Government. It is an executive department and should be under the control of the executive branch. . . .'" Gov't C.A. Br. 35-36 (ellipsis in original government brief) (quoting Rep. Dockery). That passage is highly significant because it is the only part of the legislative history cited by the government in which a member of Congress appears to voice support for the extraordinary position that the Library was an *executive* department *under the control of the President*. The government's use of an ellipsis, however, is significant and revealing. Immediately after that statement, another member of Congress asked Rep. Dockery "where he gets the authority for saying that this is an executive department." 29 Cong. Rec. 318 (1897) (statement of Rep. Quigg). Dockery then *twice* stated that he "did not intend to say that it is an executive department" and he "do[es] not desire to be so understood." *Ibid*. In fact, the legislative history of the 1897 statute shows that, if anything, Congress was concerned with prior executive interference with the Librarian and acted to *reduce* executive control.

Third, in arguing that the Librarian is a head of an executive department, the government also directly contradicts longstanding Executive Branch precedents, which maintain that the duties imposed on the Library cannot constitutionally be imposed on an Executive Branch agency given the President's

power to control the Executive Branch as secured by the vesting clause in U.S. Const. art. II, § 1, cl. 1.

Even if the government's position below were correct, certiorari would still be warranted here. If the Librarian is an executive department head subject to the direction and control of the President, then a ruling of this Court can definitively resolve the legal uncertainty caused by the many years in which the Librarian has consistently told Congress the opposite. Such a ruling would clear the way for *actual* executive control and supervision—something which currently exists only as a matter of speculation in briefs of the Department of Justice.

ARGUMENT

I. The Argument Made by the Department of Justice Below Contradicts the Position Repeatedly Advanced in Testimony to Congress by the Librarian Himself

In deciding whether to grant certiorari, this Court typically looks to whether the lower courts have come into "conflict" with each other on an "important matter." Sup. Ct. R. 10(a); see also Sup. Ct. R. 10(b). In this case, the conflict is even more worthy of resolution than a conflict between divergent inferior courts. The conflict here is between the position argued by the Department of Justice below on behalf of the Librarian of Congress and the position that the Librarian of Congress himself has repeatedly advanced before Congress. This conflict concerns matters of upmost importance—the constitutional status of the Librarian of Congress and, relatedly, the constitutionality of the Librarian's powers to

appoint and to supervise all of the officials who administer the U.S. copyright system (including the Copyright Royalty Judges at issue in this case).

Moreover, the conflict is important not merely because it is constitutionally unseemly—with diametrically opposed positions being presented to Article I and Article III forums—and not merely because, under this Court's precedents, the Librarian's own representations are legally relevant for determining his constitutional position, see, *e.g.*, *Bowsher* v. *Synar*, 478 U.S. 714, 731 (1986) (holding the Comptroller General to be a legislative officer in part because of evidence that "the Comptrollers General have also viewed themselves as part of the Legislative Branch"). Resolution of the conflict is especially important because it undermines the legal certainty that is, as a practical matter, necessary for effective Executive Branch supervision of the administration of the U.S. copyright system.

It is common ground in this case that, for the appointments at issue here to be constitutional, the Librarian of Congress must be the head of an Executive Department. Indeed, the Department of Justice's brief below argued that, in enacting the 1897 statute that established the current appointment structure for the Librarian, Congress made a "purposeful and explicit decision to place the Library within the Executive Branch for Appointments Clause purposes." Gov't C.A. Br. 29. The extreme historical inaccuracy of that statement will be demonstrated later, see Part II(B), *infra*, but for now the important point is just how much the Department of Justice's position diverges from the positions taken by the Librarian himself.

The Librarian has repeatedly described the Library of Congress as

- a "branch of the Legislative branch";[2]
- an "arm of the United States Congress";[3] and
- "a unique part of the Legislative Branch of the government."[4]

These are not isolated statements but instead represent a consistently held position. Not surprisingly, the characterization of the Library as part of the Legislative Branch is also repeatedly found in the statements of members of Congress, who routinely group the Library with other indisputably legislative entities. See, *e.g.*, 155 Cong. Rec. S7052 (daily ed. June 25, 2009) (statement of Sen. Nelson) ("The legislative branch is home to not only all of us here in the Senate and the House, but the Capitol Police, the Library of Congress, the Architect of the Capitol, the Government Accountability Office."); 152 Cong. Rec. E844 (daily

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[2] *Legislative Branch Appropriations for 1992 Part 2: FY91 Supplemental Request and FY92 Legislative Branch Appropriation Request Before the Subcomm. on Legislative Appropriations of the H. Comm. on Appropriations*, 102d Cong. 571-572 (1991) (statement of James Billington).

[3] James H. Billington, Librarian of Congress, Library of Congress, Testimony before the Subcomm. on the Legislative Branch, Comm. on Appropriations, U. S. House of Representatives, FY 2008 Budget Request (Mar. 22, 2007), *available at* http://www.loc.gov/about/Librarianoffice/speeches/032207.html.

[4] *Legislative Branch Appropriations for 1996 Part 2 Before the Subcomm. on Legislative Appropriations of the H. Comm. on Appropriations*, 104th Cong. 499 (1995) (statement of James Billington).

ed. May 16, 2006) (statement of Ms. Millender-McDonald) (noting that "service in the Library, a Legislative-branch agency, does not confer competitive status" under the federal civil service laws); 142 Cong. Rec. S9068 (daily ed. July 29, 1996) (statement of Sen. Domenici) (stating the bill under consideration provides "outlays for the Congress and other legislative branch agencies, including the Library of Congress, the General Accounting Office, and the Government Printing Office, among others").

Nor is the characterization of the Library of Congress as legislative merely semantic. The Librarian has described "the relationship between Congress and its Library" as being "fundamentally different" from the Congress's relationship with executive agencies. *Legislative Reorganization Act of 1994: Hearing on S. 1824 Before the Subcomm. on Rules & Admin.*, 103d Cong. 309 (1994) (statement of James Billington). As the Librarian has elaborated, this "fundamentally different" relationship involves "maintain[ing] a close working relationship, often on a daily basis, with both the Senate Rules Committee and the Joint Committee on the Library" and ensuring that the Library "is first and foremost the Congress's library." *Ibid.*

The Librarian has also specifically testified about Congress's "wise decision" to remove the administration of U.S. copyrights from the Executive and Judicial Branches, stating that "[b]ecause Congress made the wise decision to place the Copyright Office in the Library (after it had been in both the Executive and Judicial Branches), it is

Congress that deserves the praise for preserving what its citizenry creates."[5]

Again, the Librarian's characterization of the Copyright Office as not being in the Executive Branch seems to be universally accepted in Congress—even among those who consider it bad policy. Thus, for example, when Senator Hatch in 1996 introduced legislation to centralize intellectual property policy in one Executive Branch agency, he too accepted as indisputable that the Library of Congress was part of the Legislative Branch. Thus, he stated "not only are there two government entities that deal with intellectual property—the Patent and Trademark Office [PTO] and the Copyright Office—but they are in different branches. The PTO is in the Executive Branch, while the Copyright Office is in the legislative branch of the Government." 142 Cong. Rec. S7898 (daily ed. July 16, 1996) (statement of Sen. Hatch). Senator Hatch sought "the elimination of the bifurcation of intellectual property policy between the legislative and the executive branches" and argued that the location of copyright administration in the legislative branch was hindering the Executive Branch's ability to coordinate intellectual property policy and to address the many international aspects of copyright policy. *Ibid.* Moreover, "whenever the Copyright Office is tasked with an executive-type function, the constitutional question arises." *Ibid.*

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[5] James H. Billington, Librarian of Congress, Library of Congress, Testimony before the Subcomm. on the Legislative Branch, H. Comm. on Appropriations, U.S. House of Representatives (Mar. 20, 2007), *available at* http://www.loc.gov/about/librarianoffice/speeches/032007.html).

Even if the Department of Justice's position were correct and the position taken by the Librarian, Senator Hatch and numerous other members of Congress were legally wrong, the clear divergence in constitutional understandings between two of the three branches of government would still warrant this Court's attention. The President cannot, as a practical matter, exercise executive supervision over an agency where no statute gives him any supervisory powers and all indicia of congressional intent, contemporary practice and longstanding tradition characterize the agency as legislative. As shown below, however, the government's position is not correct.

II. The Librarian of Congress Is Not a Head of an Executive Department

The government's characterization of the Librarian as a head of an Executive Department is wrong because (i) the President lacks any effective means to supervise the Librarian; (ii) the legislative history of the 1897 legislation does not provide support for the government's position; and (iii) the Library has been vested with legislative duties that cannot constitutionally be conferred on an Executive Department.

A. The President Lacks Power to Supervise the Librarian

The government has not disputed—nor could it dispute—that the Librarian of Congress cannot be considered a Head of an Executive Department for constitutional purposes unless the President has power not merely to appoint but also to oversee and control the Librarian. As this Court confirmed in

Free Enterprise Fund v. *Public Co. Accounting Oversight Board*, 130 S. Ct. 3138, 3151-3153 (2010), such presidential supervision is constitutionally required for *all* agencies that execute the laws, even those agencies that are considered "independent" in some sense.

With respect to presidential oversight and control, the Librarian of Congress is an extreme outlier. Executive branch agencies are generally subject to White House supervision under longstanding Executive Orders, such as Executive Order 12,866. Under such Executive Orders, at least some supervisory control is exercised over any "agency" as defined in 44 U.S.C. § 3502(1), including independent agencies. See, *e.g.*, Exec. Order 12,866 § 4, 3 C.F.R. § 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2006) (establishing a regulatory planning mechanism applicable even to independent agencies). Long ago, however, the General Accounting Office (now the Government Accountability Office)—itself a legislative entity—concluded that 44 U.S.C. § 3502(1) does not cover "legislative branch agencies such as the Congressional Budget Office, Office of Technology Assessment or the Library of Congress." GAO Op. B-192766, 1978 WL 11028 (Comp. Gen. Nov. 14, 1978). Thus, the normal institution for Presidential control familiar to any administrative law practitioner—policy review by the White House Office of Management and Budget—is inapplicable to the Library.

The Librarian is also an extreme outlier in another respect. Unlike any Executive Department, over which a sitting President would routinely

exercise control through appointment, removal, or both, the Library has not had any Presidential appointments in over a quarter century, and no Librarian has *ever* been removed since the current appointment structure was created in 1897.

Despite there being no visible means by which Presidents have controlled or could control the Librarian, the government below argued that the President does have power to supervise and control through an atextual power to remove the Librarian. Two theories were advanced below—one based on implied Presidential power, the other based on legislative history. Both are wrong.

First, because statutory law is concededly silent on the issue of the Librarian's removal, the government argued that an "incident of the President's appointment power is that there are no limitations on the President's power to remove the Librarian." Gov't C.A. Br. 30. It is true that, for statutes governing Presidential appointees in the Executive Branch (which are often silent on the issue of removal), the normal presumption is that statutory silence implies that the President has an unlimited ability to remove an executive appointee. That presumption is, however, based on the President's control over *executive power* and it applies only to *executive* officers. As this Court has explained, the traditional presumption comes from the notion that "the executive power include[s] a power to oversee executive officers through removal" and, where "that traditional executive power [has] not [been] 'expressly taken away, it remain[s] with the President.'" *Free Enter. Fund*, 130 S. Ct. at 3152. Thus, the government's argument that statutory

silence equals a Presidential removal power merely begs the question whether the Librarian is within the Executive Branch.

The government's error is made clear by examining this Court's reasoning in *Wiener* v. *United States*, 357 U.S. 349 (1958). In *Wiener*, Congress by law had provided that members of the War Claims Commission be appointed by the President with the advice and consent of the Senate. There, as here, statutory law was silent as to the President's ability to remove the appointees. *Id.* at 352. Nevertheless, contrary to the government's position below in this case, this Court held that the Presidential power to appoint, coupled with statutory silence, did *not* mean that there were no limits on the President's power to remove the appointees. *Id.* at 356.

> Rather, this Court held that its earlier precedents
>
> drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body "to exercise its judgment without the leave or hindrance of any other official or any department of the government," as to whom a power of removal exists only if Congress may fairly be said to have conferred it.

Wiener, 357 U.S. at 353 (quoting *Humphrey's Ex'r* v. *United States*, 295 U.S. 602, 625-626 (1935)). As this Court explained, "[t]his sharp differentiation derives from the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference." *Ibid.*

The Court in *Wiener* instructed that instead of presuming unfettered removal power where a statute is silent, "the most reliable factor for drawing an inference regarding the President's power of removal in our case is the nature of the function that Congress vested in the [relevant body]." 357 U.S. at 353. Thus, the presumption of removal relied on by the government does not apply here, where the Librarian has been vested with legislative functions, see Part II(C), *infra*, and both the Librarian and the Congress believe the Library to reside within the Legislative, not the Executive, Branch.

As an alternative to its implied-presidential-removal theory, the government also argued below that a presidential removal power could be inferred from the legislative history of the 1897 Act, Act of Feb. 19, 1897, 29 Stat. 538, 544, that established the current appointment structure for the Librarian. Again, this is wrong.

The 1896-97 congressional debates leading up to the enactment of the 1897 Act were set against a historical backdrop in which the President exercised sole power to appoint the Librarian, with no Senate confirmation. That system of appointment existed from 1802 to 1897. During those 95 years and 21 different Presidential Administrations, only six individuals held the position—an average tenure of 15 years. Nevertheless, as the government emphasized below, two of those Librarians had been removed by Presidents and replaced with those Presidents' political supporters. See Gov't C.A. Br. 31.

One key issue in the 1896-97 congressional debates on the Librarian was whether Congress

would eliminate the President's preexisting exclusive control over the Librarian's appointment and switch to an appointment system requiring Senate consent. The Congressional Record quotations relied on by the government below came from the *losers* in this debate—the members of Congress who tried and failed to maintain the preexisting system.

Thus, for example, in arguing that "[i]t has long been recognized that the Librarian is removable by the President at will," Gov't C.A. Br. 30, the government below invoked Representative Bingham's statement that "President Cleveland to[]day can by a mere stroke of his pen change or remove the Librarian of Congress for any cause or reason good to himself, or for a more efficient administration of the Library." 29 Cong. Rec. 378 (1896). Yet the two sentences directly preceding the sentence quoted by the government demonstrate that Representative Bingham was speaking about the legislative alternative that would have maintained the *pre-existing* system of exclusive Presidential control over the Librarian's appointment:

> We in no wise in the paragraph [in the proposed bill] change existing law. Existing law, made in 1802, declares that the Librarian shall be appointed solely by the President for the Library of Congress.

Ibid. Bingham also went on to emphasize that, under the existing system, "[t]he Librarians of Congress up to the present time have occupied virtually a life position," *ibid.,* so it is highly questionable whether he should be counted as supporting a vigorous Presidential removal power.

The appointment scheme competing with Bingham's status quo proposal was put forward by Representative Quigg. Representative Quigg proposed to make the Librarian's appointment subject to Senate confirmation, 29 Cong. Rec. 378 (1896), a proposal that was part of Quigg's package of reforms designed to give Congress *more*, not less, control over the Library. Thus, Representative Quigg emphasized that under his proposal "control [was] being retained in Congress," and that the Senate confirmation requirement was being added "so that the qualifications of the Librarian would be thoroughly discussed." *Id.* at 381 (statement of Rep. Quigg). Since the most recently removed Librarian (30 years in the past) had been removed to make way for an appointee of the same party as the President, see Gov't C.A. Br. 31, the switch from appointment by the President alone to a Senate confirmation system—a switch designed to increase legislative scrutiny of "qualifications"—would decrease the temptation to use the Librarian's position for Presidential patronage to unqualified favorites.

Quigg also rejected both the notion that the Library was an Executive Department, see Part II(B), *infra*, and the idea that the new appointment structure would lead to the Librarian serving only four years, the duration of one presidential administration. Responding to a claim that a system of presidential appointment with Senate confirmation would lead to a mere "four years' tenure" for future Librarians, Representative Quigg emphatically stated that "[t]here is nothing in my amendment which provides a term of that sort." 29 Cong. Rec. 381 (1896). Indeed, when another member criticized Quigg's proposal as "to a certain

extent cloth[ing] the Senate with political supervision," *id.* at 389 (statement of Rep. Stone), a supporter cried out: "How about the appointment of judges—Supreme Court judges?" *Ibid.* (statement of Rep. Willis).

It is true that Representative Quigg ultimately did not get all that he wanted. Quigg also supported giving power to a joint congressional committee to hire Library employees. But such unenacted aspects of his proposal merely demonstrate that, in supporting Senate confirmation of the Librarian, Quigg certainly was not trying to create an inference that the Librarian is fully subject to Executive control. See also 29 Cong. Rec. 315 (1896) (statement of Rep. Quigg) ("[A]s to the control of Congress over the whole question, I do not think there can be any doubt.").

In fact, the 1897 switch to Senate confirmation succeeded in further insulating the Librarian from Executive control. In the 115 years since the switch, no Librarian has been removed by a President; the average tenure has *increased* to more than 16 years (115 years with only seven Librarians); and there have been fewer Librarians than Chief Justices of the United States. See Library of Congress, *Jefferson's Legacy: A Brief History of the Library of Congress, Librarians of Congress*, *available at* http://www.loc.gov/loc/legacy/librs.html.

B. Contrary to the Government's Position, the Legislative History of the 1897 Act Does Not Show That Congress Intended to Make the Library an Executive Department

In the court below, the government asserted that the debates of Congress leading up to the 1897 Act show that Congress was making the Library of Congress into an executive department. Yet the government's brief mentions only "[o]ne member"—Representative Dockery—who voiced support for the view that the Library of Congress "is an executive department and should be under the control of the executive branch. . . ." Gov't C.A. Br. 35-36 (quoting 29 Cong. Rec. 318 (1896)) (ellipsis in original government brief).

The government used an ellipsis to cover up what happened immediately after Representative Dockery made that statement. That ellipsis is convenient for the government, because just two sentences after Dockery's assertion, the following colloquy occurs:

> MR. QUIGG: Will the gentleman inform the committee where he gets the authority for saying that this is an executive department?
>
> MR. DOCKERY: I did not intend to say that it is an executive department. It is, however, a department of the Government.
>
> MR. QUIGG: I understood the gentleman to say it is an executive department.
>
> MR. DOCKERY: I do not desire to be so understood.

29 Cong. Rec. 318 (1896). The government below never hinted that this type of exchange was hidden

behind the ellipsis in its brief. Yet, to put it mildly, Dockery's responses undermine the government's reliance on him to demonstrate that the Library of Congress is an executive department—which is the crucial constitutional question for purposes of the Appointments Clause. Indeed, the colloquy between Dockery and Quigg confirms that the proponents of adding Senate confirmation (such as Quigg) were hardly trying to create an executive department.

Many other members of Congress also stated that the Library of Congress was part of the legislative branch. At least one was quite emphatic in his belief that the Library was wholly an organ of Congress: "No other branch of the Government has any control over this Library. * * * The law distinctly provides for a Congressional Library under the sole management and control of Congress." 28 Cong. Rec. 5497 (1896) (statement of Sen. Chandler). Others agreed: "[N]o constitutional lawyer will dare to say that [the Library] was not under the exclusive control of Congress," *id.* at 5500-5501 (statement of Sen. Cockrell); "So the whole theory of the law, it seems to me, is that the Congress of the United States is the sole controller of the Library of Congress," *id.* at 5505 (statement of Sen. Cullom).

To be sure, some members of Congress did raise Appointments Clause arguments in a manner that supports the government's position. But such statements merely demonstrate the need for certiorari here. The constitutional status of the Library has been debated for more than a century. The result—just as in 1897—has been an uneasy compromise. The Librarian is appointed by the President, with the advice and consent of the Senate,

and that appointment process seems acceptable to both sides in the debate because it is an appointment process that can be used for officers not in the Executive Branch, such as judges. But despite that appointment structure, the President is neither given a removal power nor expected by Congress to conduct any supervision of the Librarian. Rather, the end result of the 1896-97 debates is still very much true today: The ultimate statute containing the new appointment process for the Librarian was contained in an act making appropriations for "the legislative, executive, and judicial expenses of the Government." Act of Feb. 19, 1897, ch. 265, 29 Stat. 538. All of the provisions concerning the Library are contained in the "Legislative" portion of the statute, *id.* at 538, 544-546, just before the "Executive" portion of the statute, *id.* at 546.

C. The Librarian of Congress's Legal Responsibilities Demonstrate That He Cannot be the Head of an Executive Department

The Congressional Research Service ("CRS") is a central component of the Library of Congress. The Librarian appoints the CRS Director, "[a]fter consultation with the Joint Committee on the Library," and also appoints other CRS supervisory personnel. 2 U.S.C. § 166(c), (e). The Librarian supervises the CRS to ensure, among other things, that the CRS "render[s] to Congress the most effective and efficient service" and "discharge[es] its responsibilities to Congress." *Id.* § 166(a)(1). CRS's statutory responsibilities include providing advice and research assistance to congressional members and committees, including providing advice about

"the advisability of enacting" legislative recommendations "submitted to Congress, by the President or any executive agency." *Id.* § 166(d)(1).

In every appropriations bill since 1952,[6] Congress has forbidden CRS from engaging any "publication" of CRS materials without congressional committee authorization, and CRS has interpreted the concept of "publication" "broadly" so as to preclude any unapproved distribution to "non-congressional requesters." See Memorandum from Daniel P. Mulhollan, Dir., Cong. Research Serv., to All Cong. Research Serv. Staff 5 (Apr. 18, 2007), *available at* http://www.fas.org/sgp/crs/crs041807.pdf. CRS's policy of confidentiality is supported by, inter alia, a senate resolution declaring CRS materials to be an "integral part of the legislative process and privileged under the Speech or Debate Clause of the Constitution." *Id.* at 3 (quoting 126 Cong. Rec. S3162 (daily ed. Mar. 27, 1980)). Thus, CRS's confidentiality policy precludes any distribution to "Executive Branch * * * offices and employees" unless such distribution is "deemed to enhance CRS service to the Congress." *Id.* at 5.

In the court below, the government argued that an Executive Department "does not lose [its Executive Branch] status even when it is assigned functions that come much closer to the 'legislative powers' of Congress under Article I." Gov't C.A. Br. 42. This is wrong under the Department of Justice's own precedents.

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[6] For the most recent version, see Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, 125 Stat. 786, 1130 (2012).

The Office of Legal Counsel ("OLC")—the Department of Justice component charged with rendering constitutional advice—has long maintained that it would be "entirely inconsistent" with "separation of powers principles" for Congress to impose on any component of the Executive Branch a statutory obligation to submit "legislative comments directly to Congress prior to any approval or even review by the [executive agency's] superiors, including the [head of the agency's Executive Department] and the President." Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress, 6 Op. O.L.C. 632, 639 (1982); see also Constitutionality of Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007, 2008 WL 4753234 at *1 (2008) (noting that "the Executive Branch has consistently objected to direct reporting requirements similar to the one at issue here on the ground that such requirements infringe upon the President's constitutional supervisory authority over Executive Branch subordinates and information").

This line of OLC precedents plainly undermines the government's argument below that "the role of CRS vis-a-vis Congress is akin to the role of the U.S. Marshals Service vis-a-vis the federal courts." Gov't C.A. Br. 42. No separation of powers principle prevents the Executive Branch from providing security for Article III (or Article I) officials and institutions. But advice and information are different, and Executive Branch entities cannot be tasked with the responsibility to provide information and advice directly to Congress. CRS is so tasked,

however, and thus cannot be within the Executive Branch.

Further proof that the Library of Congress is not and cannot be an Executive Department comes from the reality that the written opinions of the Library's CRS often directly contradict, criticize and undermine Executive Branch opinions. A CRS report on the contours of executive privilege concludes, for example, that the scope of the privilege is narrower than the position adopted by the Executive Branch in an OLC opinion. Morton Rosenberg, *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments*, Cong. Research Serv., RL 30319, 34-35 (2008). This report even suggests that OLC's legal position would be unlikely to be upheld on appellate review. *Id*. at 35. Similarly, OLC has conceded that CRS's interpretation of the Lloyd-LaFollette Act directly contradicts its own interpretation. Letter from Jack Goldsmith III, Assistant Attorney General, Office of Legal Counsel, Authority of Agency Officials to Prohibit Employees from Providing Information to Congress (May 21, 2004) *available at* http://www.justice.gov/olc/crsmemoresponsese.htm ("The longstanding Executive Branch position is decidedly contrary to the CRS view."). Were the Librarian of Congress the head of an executive department, his recommendations would presumably not undermine those of other departments within the Executive Branch. Indeed, the conflicts between OLC and CRS are considered paradigmatic examples of *interbranch* disagreement. See Paul R. Verkuil, *A Proposal to Resolve Interbranch Disputes on the Practice Field*, 40 Cath. U.L. Rev. 839, 847 (1991).

Finally, the congressional history of the CRS also contradicts the idea that the Library of Congress is executive. The CRS was first created in 1914, under the name the Legislative Reference Division ("LRD") by the legislative section of the Legislative, Executive, and Judicial Appropriations Act of 1914, Pub. L. No. 63-127, 38 Stat. 454, 463. Congress located this entity within the Library with the understanding that the "Library of Congress is, as its name implies, an institution which belongs to Congress." 51 Cong. Rec. 11,208 (1914) (statement of Rep. Murdock). Similarly, the House Report on the 1970 Act creating the CRS referred to both the Library of Congress generally and the CRS specifically as "legislative branch institutions," H.R. Rep. No. 91-1215, at 27 (1970), and it cited the Library of Congress as one example of a "legislative agenc[y]." *Id*. at 116. These consistent statements demonstrate Congress's intention that CRS and, indeed, the Library of Congress as a whole be treated as legislative agencies directly under the control of Congress itself.

* * *

The Librarian of Congress is the head of a constitutionally impossible department. He supervises clearly executive powers under the copyright statutes and exercises a quintessentially legislative function in providing confidential advice to Congress. He repeatedly affirms his legislative status in testimony before Congress while the Department of Justice represents him to be executive in Article III courts. And for more than a century, the Librarians have enjoyed tenure exceeding in duration even that enjoyed by Chief Justices of the

United States. The constitutional paradox posed by the Librarian has been debated in Congress for more than a century, but the problem has only grown as Congress has added legislative research and advice functions to the Library while also increasing the executive powers (such as adjudication and rulemaking) that the Library exercises under the copyright laws.

This constitutional issue is important. As Senator Hatch stated in 1996, the constitutional question arises "whenever the Copyright Office is tasked with an executive-type function," 142 Cong. Rec. S7898 (daily ed. July 16, 1996). Resolving the question merits the attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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