CONGRESSIONAL RECORD

103RD CONGRESS

EXTENSION OF REMARKS

Bill	Date	Page(s)
H.R. 897	Mar. 30, 1993	E810-13

Remarks:

Remarks by Mr. Rose

TESTIMONY BY THE LIBRARIAN OF CONGRESS

HON. CHARLIE ROSE

OF NORTH CAROLINA

IN THE HOUSE OF REPRESENTATIVES

Tuesday, March 30, 1993

Mr. ROSE. Mr. Speaker, as chairman of the Joint Committee on the Library I am particularly interested in legislation that affects the Library of Congress.

On February 16, 1993, the Copyright Reform Act of 1993 was introduced in both Houses. This legislation contains a number of salutary features but also may have an unforeseen effect on the great and universal collections of the Library of Congress. This would, in turn, affect libraries throughout the Nation, which have come to depend upon the Library of Congress to collect, catalog, and make available the largest collection of materials in the world. The Nation's libraries rely upon the Library of Congress as the library of last resort for the safekeeping of our cultural and literary heritage, which would otherwise be lost to history. The Library has been able to accomplish this monumental task because of the opportunity to select from works deposited for copyright registration for the last 120 years.

James Billington, the Librarian of Congress, testified at a March 4, 1993, hearing before the House Subcommittee on Intellectual Property and Judicial Administration of the Judiciary Committee, and I hope my colleagues will take the time to read his remarks about this very important legislation.

STATEMENT OF JAMES H. BILLINGTON

Mr. Chairman and members of the Subcommittee, I wish to thank you and your staff for the opportunity to testify before this committee on an issue that gravely concerns me as Librarian of Congress and thus as custodian of America's creative and intellectual heritage. The Library contains almost 100 million items—not just books, but maps, manuscripts, pictures, prints, photographs, musical scores, and radio and television programs.

The copyright registration system, created by Congress, has brought free deposit copies of these materials to the Library for us to preserve and for future generations to study and learn from. Since 1870, the system has worked efficiently for the Library and for the nation. Without it, we could never have built up the world's most comprehensive collections in all formats, used by scholars every day and available to all comers.

Now this system, created by Congress, appears to be in jeopardy. On February 16, the Copyright Reform Act of 1993 (H.R. 897; S. 373) was introduced in the House and Senate. There was widespread surprise.

The proposed bill, whatever its intent, effectively eviscerates the copyright registration system and eliminates the statutory incentives that bring the Library free deposit copies. It severs the historically close ties between the Library and the Copyright Office.

These disruptions would gravely harm the unique ability that the Library of Congress has to collect and preserve unpublished works—television programs, musical scores, architectural drawings, photographs—for future generations. The bill's impact on the Library's future acquisition of books and other published materials, while less predictable, would probably involve considerably higher costs to the Library and the taxpayer.

The Library's role is indispensable to the purposes of Copyright legislation—that is, to

promote the growth and exchange of ideas by making the nation's intellectual and creative output available for study.

This legislation endangers the ability of the Library to collect copyright materials as thoroughly, as quickly, or as comprehensively across all information formats as it does today. The result will be a less usable, less comprehensive, and more costly record of the nation's cultural and intellectual heritage. Even if adequate measures are taken to ensure that the Library's collections are not diminished by the proposed changes, the bill, in the long run, is likely to cost the nation much more than its sponsors say it will save.

In these times of already restricted budgets, I fear the bill will drastically deplete the Library's collections by forcing the Library to purchase (or forego) the broad range of materials that could not efficiently be demanded. Moreover, by removing the Librarian's authority over deposit regulations issued by the Copyright Office and over the staff of that Office, the bill seriously undermines the Library's ability to control the flow of works that constitute the nucleus of our specialized collections.

Although I take no position on moving the functions of the Copyright Royalty Tribunal to the Copyright Office, I note that the Congressional Research Service's legal experts advise that it is not a constitutional requirement that the Register of Copyright be a presidential appointee in order to perform the arbitration functions contemplated by the Copyright Reform Act.

Finally, I am convinced that no major change of the Copyright Law should be undertaken without a full study of its projected impact on the Library of Congress.

The answers to these important unresolved questions could only be gained from careful study. The consequences of this measure should be fully known, before implementation, by the Congress and by all interested parties.

These points are discussed more fully below:

INTRODUCTION: THE LIBRARY OF CONGRESS AND THE COPYRIGHT OFFICE

Copyright functions were placed in the Library of Congress by an act of Congress more than one hundred and twenty years ago. Since that time, the copyright deposit and registration system has not only enhanced the collections of the Library but has permitted greater access to timeless literary and artistic treasures.

The flow of copyrighted material to the Library of Congress encompasses both published and unpublished works. The sweeping range of materials that are copyrighted, has made the permanent collections of the Library of Congress unique in this nation, unrivalled by even the greatest scholarly and public libraries. Because of copyright registrations, the library has been able to assemble in one national collection materials that would otherwise escape preservation or study. To take just one example, the Library's collections of self-published local histories and genealogical works have made the Library a focal point for research in the history of American families, cities, and immigrant communities. The collections of the Library testify to the cultural diversity so important to this nation's strength.

The commitment of the Library to transform what would otherwise be a vast warehouse into an organized, accessible panorama of the nation's intellectual and cultural life, makes the Library not just a beneficiary, but a full partner and vigilant supporter of the creative community.

The mission of the Library of Congress underscores the significance of this partnership. The Library's duties are to assemble "universal collections, which document the history and further the creativity of the American people," and 'to acquire, organize, provide access to, maintain, secure, and preserve these collections" in order to "sustain and contribute to the advancement of thought and knowledge throughout the United States and the world." Without the copyright deposits acquired a result of the present statutory incentives to register, the quality and universality of the Library's collections would be severely compromised.

I. CONTRIBUTION OF COPYRIGHT REGISTRATIONS TO LIBRARY OF CONGRESS COLLECTIONS

According to current copyright law, the demand provisions function in collaboration with the registration system. The Library of Congress is entitled to demand for deposit two copies of all published U.S. works in which a copyright is claimed, but there is no legal basis for demanding the deposit of any unpublished materials. Rather, the Library relies on the copyright registration process to acquire unpublished materials. Unpublished works are those works which, by definition, are generally not available for purchase, by this or any other library.

For these reasons, if the Copyright Reform Act of 1993 were to be enacted, the Library would no longer be able to acquire unpublished copyrighted materials at all. Not only would the distinctive nature of the Library's collections by suddenly truncated, but the nation would lose, both for present and future generations, the right of access to the full range of the nation's cultural and intellectual history and its expression.

Since the collections that would be lost are of incalculable value, the impact of this provision of the Copyright Reform Act of 1993 can therefore be demonstrated only by offering examples of what might have been lost to the nation, if incentives for registration did not exist. The Library's collections would be diminished had the following types of materials not been registered: First, broadcast, media, that is, all television and radio programming, which are considered unpublished (and would not be subject to mandatory deposit). Second, rare performances of artists such as Martha Graham captured on videotape. Third, important American photographs of such masters as Richard Avedon and Diane Arbus. Fourth, original music scores of major American artists such as Scott Joplin. And fifth, architectural drawings, which together from an unparalleled record of all aspects of American building design.

II. SUFFICIENCY OF MANDATORY DEPOSIT PROCESS

The proposed legislation would not change current requirements for mandatory deposit of published works. However, the vast majority of materials received now by the Library through Copyright are not obtained by mandatory deposit, but through voluntary registration stimulated by the statutory incentives of recovering statutory damages and attorney's fees. The success of this voluntary registration procedure shows up not only in the high rate of compliance, but in the very low rate of litigation over copyright infringements. In FY 1992, over 85 percent of books received via the Copyright Office were registered.

The impact on the quality of the Library's collections of the proposed radical shift in the source and processing of copyright receipts, is bound to be great. But we would have to determine (1) the extent of voluntary compliance which the Library could anticipate from publishers; (2) the timeliness of voluntary compliance; (3) the costs to the Library, including the cost of identifying and demanding publications, and the ability of the staff to identify smaller publishers and their publications; and (4) any increased resistance on the part of publishers to the Library's demands, along with the need for increased judicial enforcement of these demands.

For example, based on the latest available data, there presently exist 14,000 publishers of machine-readable works and 48,500 products. Because the Library has already experienced difficulty in claiming these materials, it would be possible to build a collection of machine-readable materials for the Library and the nation only at greatly increased expense, if all the terms of the proposed legislation were enacted.

Extent of compliance. The very existence of a staff at the Copyright Office now dedicated to placing demands with noncompliant publishers indicates that some noncompliance is, and will be, a factor. A scenario of 100% compliance is unrealistic. Increasing the workload of the current staff handling deposits and demands, to cover the full range of published materials that are now being registered, would increase costs significantly. Additional expenditures should also be anticipated to cover the cost of employing additional bibliographers, subject specialists, and others whose jobs it is to ensure the universality and high quality of the collections. The cost of enforcement would also increase.

Cost to the Library of new procedures. In addition to the actual costs of supporting an expanded operation to secure increased deposits and issue demands, there are other costs associated with unknowns such as extent of compliance and timeliness. To give just one example, the Library has recently instituted group registration for serials, which allows publishers to register many individual issues of a serial for a single $20 fee. In the Law Library, this has resulted in such timely registrations that the Library will be able to cancel its subscriptions to many expensive looseleaf services without compromising service to Congress. If deposits are not received as timely registrations, the costs of acquiring materials needed for immediate service to Congress can only escalate.

Another important area where new costs to the Library can be anticipated is the Library's extensive foreign acquisitions program. The Copyright Law contains provisions which specifically authorize the Library to exchange duplicate materials received via Copyright for other materials needed by the Library. In 1992, the Library sent out approximately 38,000 copies of publications received through Copyright and not needed for the Library's collections, to international exchange partners; in exchange, the Library received foreign publications determined to be needed by the Library, with an estimated value of between $1.3 and $1.9 million. If compliance with mandatory deposits is anything less than current voluntary compliance with registration, the Library's international exchange program would also suffer greatly. A few recent examples of how copyright duplicates have been exchanged for valuable materials for the Library's collections are: First, publications of political opposition parties such as Taiwan's once outlawed Democratic Progressive Party, not available through regular channels; second, documentation of new developments in foreign science and technology, including a complete set of publications of the European Space Agency (NASA receives only a fraction of these); third, opposition publications from the former Soviet bloc; new literary output of the former Soviet Republics and the new republics of Eastern Europe, including hundreds of works from the new republic of Croatia; and other foreign cultural treas-

ures such as 74 videos from the State Theatrical Library in Moscow; and fourth, materials otherwise unavailable for purchase, such as works by the Japanese Imperial Household Agency, and a rare first edition of Dvorak's opera *Armida*.

Legal challenges and resistance to mandatory deposit. The proposed legislation places reliance for copyright acquisitions on mandatory deposit without having examined all possible legal outcomes of doing so. By relying exclusively on the mandatory deposit program, instead of balancing this program with the incentives that exist under the current voluntary registration program, the Library's legal experts anticipated at least some increased resistance to demand deposit, and increased need for judicial enforcement. Should a publisher successfully challenge the constitutionality and the legality of mandatory deposit as the principal means of copyright acquisition, the Library would be left without even the ability to acquire those materials now being registered. This outcome would do great damage not just to the Library, but to the creative community at large, since it is in the overall interest of that community that the Library collect, record, and preserve this national heritage.

III. OTHER PROBLEMS

A decreased ability of the Library to acquire published materials would also cripp programs where the Library redistributes published materials to the National Library of Medicine and the National Agricultural Library.

Copyright registration records are de facto the U.S. national bibliography, because they are the most complete, unedited entries of the products of American creativity, ingenuity, and artistic expression. Diminished voluntary compliance will severely devalue this catalog and hamper future scholarly research.

IV. IMPACT OF MAKING THE REGISTER OF COPYRIGHTS A PRESIDENTIAL APPOINTEE

The Library's ability to collect copyrighted materials is integrally related to the regulations and legal interpretations of the Copyright Office. Under the present Act, as under the 1909 Act, the Copyright Office is part of the Library of Congress, not an independent agency. As a consequence, the Register of Copyrights is an employee of the Library, appointed by the Librarian, and administers the Office under the Librarian's general direction and supervision. Thus, all regulations established by the Register to administer the Copyright Act are by law subject to the approval of the Librarian.

At this time, those regulations and interpretations are initiated, reviewed, and approved by the Librarian of Congress. For example, the Library, rather than the Copyright Office, presently determines the format in which various genres of published works must be deposited.

The Copyright Reform Act of 1993 would make the Register of Copyrights a Presidential appointee. The amendment would remove the authority of the Librarian to approve regulations established by the office. The Library would still have the authority to "consult" with the Register before he/she issues regulations with respect to the acquisition of transmission programs.

However, in most cases, the Librarian would have no authority over regulations in this most important area of the law which governs the deposit of copies for the Library. This legislation could compromise the commonality of interests between the Copyright Office, the Library, and their constituents, possible to the detriment of all. At a time when publishing and communication are experiencing technological breakthroughs, it is particularly critical that the interests of the Library, the Copyright Office, and their constituents, be treated as mutual and complementary. The Library must be able to work hand in hand with the Copyright Office to ensure the continued collection, preservation, and protection of published and unpublished materials, including the new electronic information media that are making an increasingly important contribution to the nation's intellectual heritage.

The Library has made many reasonable accommodations in response to the needs of the creative community. A good example is the agreement arrived at by the Library in response to problems encountered by professional photographers in registering their photographs individually. Several months ago, the Library and the photographers confirmed that collections of photographs may be registered using a single registration application and fee, with copies provided to the Library in videotaped form.

It is important that the Library continue to participate in accommodations that are reasonable and workable from the perspective of copyright owners, but which would not compromise the Library's unique collections or its ability to fulfill its mission. To assure continuity, the Copyright Office should remain under the authority and supervision of the Librarian of the Congress. We see no constitutional necessity to alter the present statutory scheme of appointment in order to vest the proposed arbitral functions in the Register as proposed in the Copyright Reform Act of 1993. (I have attached a discussion of this particular issue in Appendix A to this statement.)

V. NEED FOR STUDY PRIOR TO MAJOR CHANGES IN COPYRIGHT LAW

The nation's copyright laws have undergone several major revisions in just the last twenty-five years. Each of these revisions has been preceded by thorough study and planning by many parties in anticipation of expected impacts.

The Copyright Reform Act of 1993 recommends a major revision of the Copyright Law, but its assessment of potential impact on the Library of Congress collections (as well as on the Copyright community generally) is largely speculative. Before this legislation is enacted, its possible impact should be examined fully and openly with all affected parties.

In our view, any study of the potential impact of the proposed legislation should examine the following subjects: anticipated loss of deposit of unpublished materials, anticipated loss of deposit of published materials, anticipated levels of compliance with mandatory deposit, anticipated costs of enforcing increased numbers of demands, comparative timeliness of compliance with mandatory deposit and voluntary registration, legal and constitutional soundness of mandatory deposit requirement as the principal means of copyright acquisitions, increased costs to the Library, including staffing, of purchasing additional materials for collections or for use in exchange and of increased staff, analysis of other national legal deposit systems, future of copyright, including electronic registration and/or deposit of published and unpublished materials, impact on the Library's collections of removing the Librarian's authority over the regulations and staff of the Copyright office, and other financial implications: could the Library expect to be reimbursed for the costs of Copyright Office overhead and space, once it lost copyright deposits?

In short, this legislation, from the Library's point of view, gravely threatens a system which over 120 years has admirably served the Library, the Congress, the creative community, and the public interest. At the very least, serious study of its potential impact is required so that the public and the Congress may be fully aware of the probable costs. We look forward to working with the committee in any problems in copyright registration that the bill attempts to address. Thank you.

APPENDIX A—NON-NECESSITY OF RE-ESTABLISHING THE OFFICE OF THE REGISTER OF COPYRIGHTS AS A PRESIDENTIAL APPOINTEE IN ORDER TO VEST IT WITH ARBITRAL FUNCTIONS

In remarks accompanying the introduction of H.R. 897, the Copyright Reform Act of 1993, 139 Cong. Rec. E237 (daily ed. Feb. 16, 1993), Rep. William J. Hughes indicated that in order constitutionally to accomplish one of the proposal's chief purposes, abolition of the Copyright Royalty Commission, and have its present functions be performed by *ad hoc* arbitration panels convened by the Register of Copyrights, it is necessary that the Register be appointed by the President with advice and consent of the Senate in order to avoid conflict with the principles established by the Supreme Court in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). At present, the Register is appointed by the Librarian of Congress who is in turn appointed by the president with Senate advice and consent.

We conclude that the proposed change in the current appointive scheme is not constitutionally required. *Buckley* simply requires that any person exercising substantial executive functions pursuant to the laws of the United States must be an "Officer of the United States." While direct appointment by the President would certainly qualify the Register to perform the contemplated arbitral duties, the Present appointment scheme is also legally sufficient. A brief summary of the legal basis for this conclusion follows.

The Copyright Act, 17 U.S.C. 1, *et seq.* (1976), contains various compulsory licensing provisions which permit the use of copyrighted works without copyright owners' permission upon the payment of a fee. The compulsory fees were originally set by statute in 1976, 17 U.S.C. 11, but subsequently have been adjusted by the Copyright Royalty Tribunal (CRT). 17 U.S.C. 115-116, 801(b). The CRT also determines the formula for distribution of royalty fees paid under the compulsory licenses. 17 U.S.C. 118.

The CRT is an independent agency in the legislative branch composed of three members appointed by the President with the advice and consent of the Senate for seven year terms. 17 U.S.C. 801(a), 802. The CRT is provided with certain support functions by the Library of Congress, 17 U.S.C. 806, and performs functions which dovetail with those of the Copyright Office, *see* e.g., 17 U.S.C. 111(d)(2) and (3), 119(b). The Library of Congress and the Copyright Office, which is a constituent part of the Library, 17 U.S.C. 701(a), are also in the legislative branch. The Librarian of Congress is appointed by the President with Senate concurrence, 2 U.S.C. 136, and the Librarian in turn appoints the Register of Copyrights, the head of the Copyright Office. 17 U.S.C. 701(a).

In 1988, Congress created a new compulsory license for secondary transmission of copyrighted works by satellite. 17 U.S.C. 119. The initial royalty fee is established by the statute. 17 U.S.C. 119(b)(1)(B). Thereafter, adjustments are to be made by voluntary negotiation or, on failure to agree, through binding arbitration by panels convened by the CRT. Panel decisions must be made "on the basis of a fully documented written record" and in conformity with factors set forth in the statute. 17 U.S.C. 4(c)(3)(C) and (D).

The panel's report may be adopted or rejected by the CRT. If rejected, the CRT sets

the rate. The CRT's decision is subject to limited review by the Court of Appeals for the District of Columbia, *i.e.*, the appeals court may modify or vacate the decision of the panel or the CRT only if it finds that either acted in an "arbitrary manner." 17 U.S.C. 119(c)(4).

H.R. 897 would abolish the CRT and, adopting the arbitration mechanism of the 1988 amendment for resolution of all contested fee and distribution questions, place supervisory and review authority in the Register, who would be an advice and consent presidential appointee. The arbitral functions are executive duties that may be performed by an officer of the United States. *See, e.g., Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940); *Todd & Co.* v. *SEC*, 557 F.2d 1008 (3d Cir. 1977); *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 1168 (1990); *Cospito* v. *Heckler*, 742 F.2d 72 (3d Cir. 1984), *cert. denied*, 471 U.S. 1131 (1985). The only question, then, is whether the Register of Copyrights can remain as he is now, an appointee of the Librarian of Congress, and be constitutionally capable of exercising the review and other executive functions that would be vested in that office by H.R. 897. It appears apparent that no alteration in the status quo is necessary to effect such a change in function.

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the Supreme Court held that any person "exercising significant authority pursuant to the laws of the United States" must be appointed in accordance with article II, sec. 2, clause 2 of the Constitution, the Appointments Clause. 424 U.S. at 126. *See* also *Bowsher* v. *Synar*, 478 U.S. 714, 721–27 (1986). That is, Congress may vest the appointment of officers in the President, with the advice and consent of the Senate, or, alternatively, it may vest the appointment of inferior officers in the President alone, in the heads of departments, or in the courts of law. *See Freytag* v. *Commissioner*, 111 S.Ct. 2631 (1991).

Congress has provided that the Librarian of Congress must "be appointed by the President, by and with the advice and consent of the Senate." Act of February 19, 1897, ch. 265, sec. 1, 29 Stat. 544, 546, *codified* at 2 U.S.C. 136 (1988). The law makes no provision with respect to the tenure of the Librarian and as to whether and by whom he might be removed from office. The legislature's silence in this regard, however, raises no serious legal question as to where the power to remove the Librarian resides. The long established rule is that in the face of statutory silence, the power of removal is presumptively incident to the power of appointment. *Myers v. United States*, 272 U.S. 52, 161 (1926); *Shurtleff v. United States*, 189 U.S. 311, 318 (1903); *Regan v. United States*, 182 U.S. 419, 426–27 (1901); *In re Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839). This presumption, coupled with the legislative history of the 1897 amendment, which indicates a congressional awareness of the executive nature of the Librarian's functions, establishes beyond peradventure that the present appointment process was enacted with the understanding that presidential appointment, and the concomitant power of at-will removal, was constitutionally compelled. *See, e.g.*, 29 *Cong. Rec.* 316 (1896) (statement of Rep. Quigg) ("Once appointed, he will remain, as now, until removed by the President"); *Id.* at 318–19 (statement of Rep. Dockery) ("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 . . . It is a great national Library . . . and is an executive bureau, and as such should be presided over by some executive officer with authority to appoint and remove its employees"); *Id.* at 386 (statement of Rep. Cannon) ("This library is practically a great department, embracing not only the National Library, but covering the copyright business and the care of that great building . . . [A]s a general proposition, appointments must, under the Constitution, be made by the President, by the courts, or by the heads of Departments . . . I do not think that Congress has any right to devolve this duty upon the House and the Senate; and I think that when our fathers adopted such a provision as a part of the Constitution they acted wisely, because it is not best—it never has been found best in the history of governments—to invest in the legislative power the administrative function. Hence any such mingling of authority has been expressly prohibited by the Constitution"). As a consequence, anyone the Librarian appoints similarly has the constitutional capacity under *Buckley* to exercise executive duties.

While no case has directly dealt with the question of the removal power of the president with respect to the Librarian, the views of the farmers of the 1897 legislation that the Library performs executive functions and thus must be headed by an "officer of the United States" appointed in conformity with requirements of the Appointments Clause, was forcefully supported and confirmed by the Fourth Circuit's 1978 decision in *Eltra Corporation v. Ringer*, 579 F.2d 294 (4th Cir. 1978). There the appeals court affirmed a lower ruling dismissing a mandamus action brought to compel the Register of Copyrights to register a proposed copyright as a "work of art." Among the contentions of the appellant was the claim that the Register of Copyrights is a legislative office and cannot perform executive functions since it is part of the Library of Congress which, through the Congressional Research Service (CRS), performs exclusively legislative functions as a support agency for the Congress. As a consequence of this activity, it was urged, the Library as a whole must be deemed legislative in character and its copyright functions cannot be lawfully exercised, citing the Supreme Court's then recent decision in *Buckley v. Valeo*, *supra*, as controlling authority. The appeals court unequivocally rejected the argument in an opinion in which it delineated the executive character of the Library despite the unique presence of CRS, the constitutional necessity of presidential appointment of the Librarian, and the appropriateness of the appointment of the Register by the Librarian.

The registration of copyrights cannot be likened to the gathering of information "relevant to the legislative process" nor does the Register perform a function "which Congress might delegate to one of its own committees." The operations of the Office of the Register are administrative and the Register must accordingly owe his appointment, as he does, to appointment by one who is in turn appointed by the President in accordance with the Appointments Clause. It is irrelevant that the Office of the Librarian of Congress is codified under the legislative branch or that it receives its appropriation as a part of the legislative appropriation. The Librarian performs certain functions which may be regarded as legislative (*i.e.*, Congressional Research Service) and other functions (such as the Copyright Office) which are executive or administrative. Because of its hybrid character, it could have been grouped codewise under either the legislative or executive department. But such code-grouping cannot determine whether a given function is executive or legislative. After all, the Federal Election Campaign Act of 1971, under which the Federal Election Commission reviewed in *Buckley* was appointed, is codified under the legislative heading and its appropriations were made under that heading . . . Neither the Supreme Court nor the parties in *Buckley* regarded that fact as determinative of the character of the Commission, whether legislative or executive. It is no more permissible to argue, as the appellant did in the article in the *George Washington Law Review* . . . that the mere codification of the Library of Congress and the Copyright Office under the legislative branch placed the Copyright Office "within the constitutional confines of a legislative agency" than it would be to contend that the Federal Election Commission, despite the 1974 amendment of the Act with reference to the appointment of its members, is a legislative agency unconstitutionally exercising executive administrative authority.

The Supreme Court has properly assumed over the decades since 1909 that the Copyright Office is an executive office, operating under the direction of an Officer of the United States and as such is operating in conformity with the Appointments Clause. The challenge of the appellant to the constitutionality of the 1909 Act and to the Register's power thereunder, would, if properly before us, be without merit.

579 F.2d at 301 (footnotes omitted).

In sum, then, there can be no legal doubt that in placing the appointment power of the Librarian in the President, Congress was legislating with knowledge and understanding that the method of appointment was constitutionally mandated and that it was because the Librarian was to exercise executive functions that the power of removal resided in the President. Further, there is no evidence in the legislative history or structure of the act establishing the presidential appointing authority that would supply the necessary clear and express rebutting indicia of a congressional intent to override the presumption of removability. Thus there can be little doubt that a reviewing court would find that the supervisory role contemplated for the Register in the proposed arbitral scheme would pass constitutional muster. As the *Ringer* court makes clear, "[t]he operations of the Office of Register are administrative and the Register must accordingly owe his appointment, as he does, to appointment by one who is turn appointed by the President in accordance with the Appointments Clause," 579 F.2d at 301. The Librarian clearly is a "head [] of department []" under the clause capable of appointing "inferior officers" such as the Register. See *Silver v. U.S. Postal Service*, 951 F.2d 1033, 1037–40 (9th Cir. 1991) (Postal Service is a "department" capable of receiving appointment authority, the nine governors of the Postal Service are the head of the department, and the Postmaster General and his deputy are "inferior officers" appointed by the Governors). As a consequence, the Register in turn may exercise the supervisory and review functions contemplated by the proposed arbitral mechanism. Thus there is no constitutional necessity to alter the present statutory scheme of appointment in order to validly vest the proposed arbitral functions in the Register.