U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

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The Honorable Richard Shelby
Chairman
Committee on Rules and Administration
United States Senate
Washington, DC 20510

The Honorable Amy Klobuchar
Ranking Member
Committee on Rules and Administration
United States Senate
Washington, DC 20510

Dear Chairman Shelby and Ranking Member Klobuchar:

We write to provide our views on S. 1010, the "Register of Copyrights Selection and Accountability Act of 2017." The Department wishes to notify Congress that this bill if enacted would be unconstitutional in two respects.

First, the bill would violate the Appointments Clause by requiring the President to appoint the Register of Copyrights from a list of individuals generated by a seven-member panel. S. 1010, sec. 2(a)(5), § 701(a)(6). It would limit the President to appointing an individual from the names on the list, *id.* sec. 2(a)(1)(C), § 701(a)(1), which could be as few as three, *id.* sec. 2(a)(5), § 701(a)(6). "Whatever the possible role of Congress in setting reasonable qualifications for office, *see Myers v. United States*, 272 U.S. 52, 128–29 (1926), a restriction ruling out a large portion of those persons best qualified by experience and knowledge to fill a particular office invades the constitutional power of the President and Senate to install the principal officers of the United States." *Constitutionality of Statute Governing Appointment of United States Trade Representative*, 20 Op. O.L.C. 279, 280 (1996). "Any power in the Congress to set qualifications 'is limited by the necessity of leaving scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment.'" *Id.* (quoting *Civil-Service Commission*, 13 Op. Att'y Gen. 516, 520–21 (1871)). "Congress may not dictate qualifications 'unattainable by a sufficient number to afford ample room for choice.'" *Id.* (quoting *Civil-Service Commission*, 13 Op. Att'y Gen. at 525).

The presence of six Members of Congress on the seven-member panel generating the list exacerbates this Appointments Clause concern. Giving Members of Congress an ongoing, post-enactment role in defining the qualifications of office violates the anti-aggrandizement principle

of the separation of powers. "Congressional participation in [] appointments is limited by the Appointments Clause of the Constitution to the Senate's provision of advice and consent with respect to Presidential nominees." *Statement on Signing the Vision 100—Century of Aviation Reauthorization Act* (Dec. 12, 2003), 2 Pub. Papers of Pres. George W. Bush 1716, 1716 (2003); *see Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 487 (1989) (Kennedy, J., concurring in the judgment). Nor may Congress authorize its Members or agents to exercise executive functions. *See Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265–77 (1991); *Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986). By refusing to recommend names, the Members of Congress on the panel could prevent the President from nominating, and the Senate from confirming, anybody as Register of Copyrights. *Cf. INS v. Chadha*, 462 U.S. 919 (1982) (striking down section of Immigration and Nationality Act authorizing a single house of Congress, by simple resolution, to negate a decision of the Attorney General to allow a deportable alien to remain in the United States).

Second, S. 1010 would operate as an unconstitutional de facto removal of the Register of Copyrights, if the Librarian of Congress were to exercise her current authority to appoint a Register between now and enactment of the bill. (Currently an Acting Register serves.) S. 1010 provides explicitly:

> The amendments made by subsection (a) shall apply with respect to any vacancy for the Register of Copyrights after January 1, 2017. If a Register of Copyrights is appointed during the period beginning on January 1, 2017 and ending on the day before the date of the enactment of this Act, that Register shall meet the requirements of the amendments made by this Act *or shall be replaced* in accordance with such amendments.

Id. sec. 2(b) (emphasis added). The "amendments made by this Act" include appointment of the Register by the President, with the advice and consent of the Senate, from the list of nominees, as well as new statutory qualifications for the office of Register. *Id.* sec. 2(a)(1)(C), § 701(a)(1). S. 1010 would require "replac[ing]" the incumbent Register unless he had been appointed through a mechanism other than the one required by law at the time of his appointment and unless he possessed qualifications not required at the time of his appointment. No incumbent Register would have been presidentially appointed and Senate-confirmed; under current law, the Register can only have been appointed by the Librarian of Congress. Thus, any incumbent Register would have to be "replaced." S. 1010 would also retroactively change the tenure of the incumbent Register from an indefinite term to one of ten years, usurping part of the Executive's power to remove an executive appointee by allowing Congress to dictate when the appointment must end.

"Congress has the general authority to legislate in ways that in fact terminate an executive branch officer's or employee's tenure," such as by eliminating or defunding a position altogether. *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 170 (1996). But Congress cannot force removal of an incumbent officeholder while continuing the office, as it would be doing in S. 1010. *See id.* (citing *Myers v. United States*, 272 U.S. 52, 161 (1926)). For this reason, the Executive Branch has long resisted legislation applying new statutory qualifications to an incumbent, 111 Cong. Rec. 17597–98 (1965) (statement of Assistant Attorney General Schlei); legislation cutting off the salary of an

incumbent officer, *United States v. Lovett*, 382 U.S. 303 (1946); "ripper" legislation simultaneously abolishing and recreating an office, *Status of the Director of Central Intelligence Under the National Security Intelligence Reform Act of 2004*, 29 Op. O.L.C. 28, 34 (2005); and legislation requiring renomination and reconfirmation of executive branch officers upon the expiration of a presidential term, *Constitutionality of Proposed Legislation Requiring Renomination and Reconfirmation of Executive Branch Officers Upon the Expiration of a Presidential Term*, 11 Op. O.L.C. 25 (1987). By retroactively changing the terms of an earlier appointment, section 2(b) of S. 1010 would be another impermissible attempt to remove an incumbent officeholder by operation of statute.

We therefore urge the Senate to amend S. 1010 as follows: (1) delete section 2(b); (2) strike all of 17 U.S.C. § 701(a)(6) (as added by section 2(a)(5)); and (3) strike "from the individuals recommended under paragraph (6)" in 17 U.S.C. § 701(a)(1) (as amended by section 2(a)(1)(C)). The Office of Management and Budget has advised us that, from the standpoint of the Administration's program, there is no objection to the submission of this letter.

Sincerely,

Samuel R. Ramer
Acting Assistant Attorney General

cc: The Honorable Charles E. Grassley
The Honorable Dianne Feinstein
The Honorable Orrin G. Hatch
The Honorable Patrick J. Leahy