Memorandum

November 6, 2007

TO: House Committee on Administration
Attention: Michael Harrison

FROM: T.J. Halstead
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SUBJECT: GPO Authority Over Regional Depository Libraries

Pursuant to your request, this memorandum provides an overview of statutory provisions governing the establishment and operation of Regional Depository Libraries (RDLs), with a focus on the degree to which the Public Printer of the Government Printing Office (GPO) may direct and control their activities.

While congressional information has been distributed to libraries pursuant to federal law since the early 1800's, the modern structure of the federal depository library system was established by the Depository Library Act of 1962.[1] Currently codified at 44 U.S.C. §§1901-1916,[2] the Depository Library Program establishes generally that government publications are to be made available to depository libraries through the facilities of the Superintendent of Documents of the GPO,[3] and that depository libraries must make these publications available for the free use of the general public.[4] While depository libraries had been in existence since the mid-eighteenth century, the 1962 Act expanded upon this dynamic by establishing a structure for the designation of Regional Depository Libraries (RDLs).[5] In particular, the 1962 Act, as codified, provides that there are to be not more than two RDLs in each state and the Commonwealth of Puerto Rico, and that in addition to fulfilling the requirements for depository libraries, each RDL must "retain at least one copy of all Government publications either in printed or microfacsimile form (except those authorized

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[1] Pub. L. 87-579, 76 Stat. 352, 87th Cong., 2d Sess. (1962).

[2] *See, e.g.,* Pub. L. 90-620, 82 Stat. 1286, 90th Cong., 2d Sess. (1968).

[3] 44 U.S.C. § 1902.

[4] 44 U.S.C. § 1911.

[5] 44 U.S.C. § 1912.

to be discarded by the Superintendent of Documents)."[6] RDLs are also required, "within the region served" to "provide interlibrary loan, reference service, and assistance for depository libraries in the disposal of unwanted Government publications." Finally, the 1962 Act establishes that RDLs "may permit depository libraries, within the areas served by them, to dispose of Government publications which they have retained for five years after first offering them to other depository libraries within their area, then to other libraries."[7] The 1962 Act further included a provision stating, as codified, that "[t]he Public Printer, with the approval of the Joint Committee on Printing...may use any measure he considers necessary for the economical and practical implementation of this chapter."[8]

These provisions are of significance in relation to a letter submitted by the GPO to the Joint Committee on Printing (JCP) requesting its approval "to designate the regional Federal depository libraries at the University of Kansas and the University of Nebraska as shared regional depository libraries."[9] The stated rationale for this proposal is that such a designation would allow these RDLs "to consolidate collections and reallocate resources to achieve operational efficiencies, giving the libraries a practical and economical means for providing public access in the areas they serve." As noted in the letter, this proposal marks "the first instance of a request for a formal designation of shared regional depository libraries between two or more States, as opposed to designation of a regional depository library within a State as prescribed by 44 U.S.C. 1912." The GPO letter concludes by requesting the JCP's approval for such a designation, "[p]ursuant to 44 U.S.C. 1914, which permits the Public Printer, with the approval of the Committee, to 'use any measure he considers necessary for the economical and practical implementation of [chapter 19 of Title 44, U.S.C.].'"

At the outset, it should be noted that significant constitutional concerns adhere to the historic role of the JCP in controlling the activities of the Public Printer in light of the Supreme Court's ruling in *INS v. Chadha.*[10] In *Chadha*, the Supreme Court analyzed §244(c)(2) of the Immigration and Nationality Act, which granted to Congress the power to exercise a legislative veto over decisions made by the Attorney General under the Act. Specifically, §244(c)(2) enabled Congress to overrule deportation decisions by the passage of an appropriate resolution by one House of Congress.[11] The Court noted that a legislative veto constituted an exercise of legislative power, as its use has "the purpose and effect of altering the legal rights, duties, and relations of persons...outside the legislative branch."[12] As such, the Court concluded that a legislative veto could only be exercised in comportment with the bicameralism and presentment requirements of Article I.[13] Given that the statute authorized either House of Congress to execute a legislative veto, the Court determined that

[6] 44 U.S.C. § 1912.

[7] 44 U.S.C. § 1912.

[8] 44 U.S.C. § 1914.

[9] Letter from William H. Turri, Acting Public Printer, to the Honorable Robert A. Brady, Chairman, Joint Committee on Printing, Sept. 13, 2007 (copy on file with author).

[10] 462 U.S. 919 (1983).

[11] *Id.* at 923.

[12] *Id.* at 952.

[13] *Id.* at 954-955.

the provision was an unconstitutional violation of the separation of powers doctrine.[14] With its decision in *Chadha*, the Supreme Court established that Congress may exercise its legislative authority only "in accord with a single, finely wrought and exhaustively considered procedure," namely bicameral passage and presentment to the President.[15]

The maxims delineated in *Chadha* would appear to be fully applicable to the activities of the JCP. The JCP is broadly authorized to "use any measures it considers necessary to remedy neglect, delay, duplication, or waste in the public printing and binding and the distribution of Government publications,"[16] and its exercise of this authority extends beyond oversight and veto to affirmative direction and control. With regard to the current inquiry, the Public Printer, as noted above, may only exercise the implementation authority vested in him in § 1914 "with the approval of the Joint Committee on Printing." Such broad directive and veto authority runs contrary to the Court's holding in *Chadha*, and any exercise of such authority by the JCP would be fundamentally constitutionally suspect.[17]

In addition to this potential constitutional issue, the establishment of "shared regional depository libraries" could potentially be viewed as violating the provisions of the Depository Library Act of 1962. As noted above, § 1912 establishes that there are to be not more than two RDLs in "each State,"; that each RDL "shall receive" copies of all new Government publications authorized for distribution to depository libraries; that each RDL, in addition to fulfilling the requirements for depository libraries, must "retain at least one copy" of all Government publications (except those authorized to be discarded by the Superintendent of Documents); and that each RDL, "within the region served," must provide interlibrary loan, reference service, and publication disposal assistance to depository libraries.

One issue adhering to the current proposal is whether the 1962 Act may be construed as allowing RDLs to serve geographic areas outside of the State in which they are located. Regarding the traditional establishment of RDLs, § 1912 states that "[d]esignation of regional depository libraries may be made by a Senator...within the areas served by them." This phrase is not entirely clear, and the 1962 Act does not further define or explain what geographic areas may be served by RDLs. Thus, this phrase could be interpreted as simply

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[14] *Id.* at 954-955. Shortly after its decision in *Chadha*, the Court without opinion and with one dissent summarily affirmed lower court opinions that had struck down a two-House legislative veto provision of the Federal Trade Commission Improvements Act, 15 U.S.C. § 57a-1. *See United States Senate* v. *Federal Trade Commission*, 463 U.S. 1216 (1983); *United States House of Representatives* v. *Federal Trade Commission*, 463 U.S. 1216 (1983).

[15] *Id.* at 951.

[16] 44 U.S.C. § 103.

[17] It should further be noted that it is possible that the JCP's historical role in controlling government printing could be seen as so integral to accomplishing Congress' intentions with respect to executive branch printing that a court might find the JCP's control authorities to be unseverable from the legislative scheme as a whole. *See, e.g., Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 685 (1987)(stating severability standard); *EEOC v. CBS, Inc.*, 743 F.2d 969, 971 (2d Cir. 1984)(finding that "Congress would have been unwilling to delegate to the President such extensive authority to reorganize the executive branch" without the check of the legislative veto); *City of New Haven v. U.S.*, 809 F.2d 900 (D.C. Cir. 1987)(holding that in view of strong evidence that Congress would not have enacted the deferral provision of the Impoundment Act, the veto and the President's broad deferral authority under that provision must both fall).

empowering a Senator to designate an RDL in the state in which he or she serves, without specific limitation on the geographic area that may in turn be served by the RDL. Conversely, it could be argued that this phrase, viewed in conjunction with the overall structure of § 1912 in authorizing the establishment of up to two RDLs in each state, contemplates that such RDLs will serve a state specific service function. This latter interpretation finds support in the Senate Report accompanying the 1962 Act. In particular, the Senate Report states that "[w]hile it is believed that most States could be adequately served by one regional depository...two would be permitted if required."[18] The Senate Report additionally explains that one of the main purposes of the RDLs would be to make complete document collections accessible to "all the regular depositories within the State."[19] While these statements seem to indicate that RDLs were intended to serve depository libraries in their respective states, this interpretation has not been followed in actual practice, as the University of Maine has apparently operated as a an RDL serving Vermont and New Hampshire since 1966 without objection.

Even assuming that RDLs may serve interstate geographic areas, § 1912 specifically requires that RDLs have a distinct and encompassing presence in a state, as evidenced by the requirement that there not be more than two RDLs in "each State," that each RDL receive copies of all Government publications authorized for distribution, and that each RDL "retain at least one copy" of all such publications (except those that are authorized to be discarded). To the extent that the current proposal could operate in contravention of these requirements, its validity may be questioned. In particular, the GPO's statement that the requested designation would allow the RDLs in question to "consolidate collections" would appear to run afoul of the explicit requirements that each RDL in a particular state receive and retain copies of all relevant Government publications. The aforementioned provisions of § 1912 establish that this receipt and retention responsibility is an immutable characteristic of an RDL, and § 1912 further makes it clear that an RDL must exist in a state. Accordingly, any proposal that purports to allow an RDL to avoid these obligations would appear to be violative of the statutory scheme laid out by Congress.[20]

This conclusion adheres irrespective of the authority vested in the Public Printer to "use any measures he considers necessary for the economical and practical implementation" of the depository library program.[21] Apart from the well settled maxim that a generalized statutory provision may not supplant "a matter specifically dealt with in another part of the same enactment,"[22] the legislative history of the 1962 Act clearly indicates that this authority was not intended to be so expansive as to enable the Public Printer to effect fundamental changes to the depository library system created by Congress. Instead, this provision was

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[18] S. Rep. No. 1587, 87th Cong., 2d Sess. (1962), available at 1962 U.S.C.C.A.N. (87 Stat.) 2112.

[19] *Id.* at 2120.

[20] It may be argued that the proposal could be given legal effect by virtue of the authority of the Superintendent of Documents to allow RDLs to discard documents, in that the Superintendent could give permission to one RDL or the other to "discard" parts of its collection that would in turn be retained by the other RDL, effectively accomplishing a consolidation of collections. However, it seems clear from the structure of the 1962 Act that this authority was intended to allow for the discarding of obsolete or unneeded material and should not be utilized as a mechanism to avoid the application of the plain terms of the Act.

[21] 44 U.S.C. § 1914.

[22] *Fourco Glass Co. v. Transmirra Products Corp.,* 353 U.S. 222, 228 (1957)(citations omitted).

intended to allow the Public Printer a degree of discretion in responding to the logistical and fiscal difficulties that were expected to arise from such a rapid expansion of the depository library program by enabling the Public Printer to exempt publications that were "produced in small numbers for specialized use" or that "could not justify the wide dissemination and high cost of maintenance."[23] As such, to the extent that the current proposal would allow RDLs to avoid the explicit receipt and retention functions imposed upon them in § 1912, its provisions would appear to run contrary to the requirements of the depository library program.

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[23] 108 Cong. Rec. 13984, 87th Cong., 2d Sess. (July 18, 1962) (statement of Rep. Hays).