

STEPHEN MILLER INVITES JOHN ROBERTS TO BE THE INSTRUMENT OF HIS OWN DESTRUCTION

I meant to write this post last week; I meant to argue that a Stephen Miller-related effort to FOIA the US Courts could be more significant development than Trump's refusal to tell Kristen Welker he would adhere to the Constitution because he will instead do what "the lawyers" – probably including non-lawyer Stephen Miller among them – tell him to do.

KRISTEN WELKER:

But even given those numbers that you're talking about, don't you need to uphold the Constitution of the United States as president?

PRES. DONALD TRUMP:

I don't know. I have to respond by saying, again, I have brilliant lawyers that work for me, and they are going to obviously follow what the Supreme Court said. What you said is not what I heard the Supreme Court said. They have a different interpretation.

It didn't happen. I didn't write the post.

But the delay proved useful, because the firings of the Librarian of Congress and the Register of Copyrights reflect yet another step in the same process that – I suspect – the lawsuit could one day join.

For all the chaos of the Trump term, after some initial missteps, Trump has preceded relentlessly to use presidential firings to remap government agencies over which the

Executive is supposed to have limited or no influence. There has been a certain logical progression. Trump started with agencies entirely within the Executive (like USAID), then proceeded to boards and agencies designed to be independent (starting with the Special Counsel and Merit Systems Protection Board, effectively stripping federal employees of key protections, then moving onto the Federal Elections Commission, the Consumer Financial Protection Board, and the Federal Trade Commission, and more recently the Consumer Product Safety Commission). DOGE then started swallowing up independent agencies, like the US African Development Foundation and the Institute for Peace, before moving onto Radio Free Europe and the Postal Service.

Those efforts are all stuck in various stages of legal challenges. Their takeover may not succeed.

But after moving through independent agencies, Trump has turned to an agency of Congress, the Library of Congress, all without even telling Republicans he was coming.

Trump's firing of the librarian, in particular, was so sudden that the move caught several of his Republican allies on Capitol Hill off guard, according to the two sources, with some GOP lawmakers who help conduct oversight of the Library of Congress unaware that the White House was going to do it; they learned about the firings in the media and elsewhere.

We're just days into the latest escalation and thus far at least, Congress has prevented replacement staffers from taking over the Copyright Office.

Two men claiming to be newly appointed Trump administration officials tried to enter the US Copyright Office in Washington, DC on Monday, but left

before gaining access to the building, sources tell WIRED. Their appearance comes days after the White House fired the director of the copyright office, Shira Perlmutter, who had held the job since 2020. Perlmutter was removed from her post on Saturday, one day after the agency released a report that raised concerns about the legality in certain cases of using copyrighted materials to train artificial intelligence.

[snip]

The US Copyright Office is a government agency within the Library of Congress that administers the nation's copyright laws. It processes applications to copyright creative works and maintains a searchable database of existing registrations. Last week, the Trump administration also fired the Librarian of Congress, Carla Hayden, who was the first woman and the first Black person to hold the position.

The document the two men cited also stated that deputy attorney general Todd Blanche, who previously served as a personal defense lawyer for Trump, was now the acting Librarian of Congress. The Department of Justice announced Monday that Blanche would be replacing Hayden, who had been in the job for nearly a decade. White House press secretary Karoline Leavitt told reporters that Hayden's firing stemmed from "quite concerning things she had done at the Library of Congress in pursuit of DEI."

Ranking House Committee on Administration Member Joe Morelle has asked the Inspector General to investigate whether this breached Congress' independence. Politico claims Republicans might object to this – but that's based off a feckless comment from John Thune (and none from Mike

Johnson).

Senate Majority Leader John Thune said in a brief interview that congressional leaders “want to make sure we’re following precedent and procedure” in naming a replacement for Carla Hayden, the Librarian of Congress whom Trump dismissed Thursday.

Thus far, no one has sued, but it often takes a few days to do so.

We’re still just at Day One on Trump’s attempt to take over two entities of Congress, with still more entities – like the Congressional Budget Office or Government Accountability Office, the latter of which is two months into a review of DOGE – Trump might want to undercut next.

In the past such an approach has succeeded in persuading even sympathetic judges that the President can use such firings to remake government. And the assault on Congressional entities matches the model used before: the White House fires someone appointed by the President (in this case, Congressional Librarian Carla Hayden), and then proceeds to claim authority to totally remap the agency, in significant part *because* it acts like an agency and courts, including SCOTUS, have said the President has unitary authority over agencies.

If that logic were to continue, it would be unsurprising to see Trump attempt a similar method with the Administrative Office of the US Courts. Indeed, DOGE has already probed the limits of Article III authority by including the Courts in the weekly DOGE email, the firing of GSA staffers who maintain Phoenix’s courthouse, and the attempted exclusion of law firms from federal properties, which would include courts.

TPM’s Josh Kovensky, who first reported this aspect of the lawsuit [docket], included some of these examples to demonstrate what he describes (with justification) as an escalating campaign

to erode the independence of the judiciary.

The executive branch has tried to encroach on the power of the judiciary in other ways too, prompting a degree of consternation and alarm unusual for the normally-staid Administrative Office of U.S. Courts. As TPM has documented, DOGE has already caused disorder at the courts and sent out mass emails to judges and other judiciary employees demanding a list of their recent accomplishments. Per one recent report in the New York Times, federal judges have expressed concern that Trump could direct the U.S. Marshals Service – an executive branch agency tasked with protecting judges and carrying out court orders – to withdraw protection.

These are all facets of an escalating campaign to erode the independence of the judiciary, experts told TPM. The lawsuit demonstrates another prong of it: close allies of the president are effectively asking the courts to rule that they should be managed by the White House.

It's on the basis that experts Kovensky quotes dismiss the seriousness of this challenge, again, with good justification.

"It's like using an invalid legal claim to taunt the judiciary," Anne Joseph O'Connell, a professor at Stanford University Law School, told TPM.

"To the extent this lawsuit has any value other than clickbait, maybe the underlying message is, we will let our imaginations run wild," Peter M. Shane, a constitutional law scholar at NYU Law School, told TPM. "The Trump administration and the MAGA community will let our imaginations run wild in

our attempts to figure out ways to make the life of the judiciary miserable, to the extent you push back against Trump.”

But against the background of the relentless assault on agencies of government, independent or not, the argument looks very familiar. America First Legal Foundation – Stephen Miller’s NGO, his affiliation with which unserious people sometimes mistake Miller for a lawyer – situates its argument in Sheldon Whitehouse’s efforts to crack down on Clarence Thomas and Sammy Alito’s open corruption. Because the Judicial Conference and Administrative Office of the Courts responded to oversight requests from Whitehouse, along with Hank Johnson, AFLF argues, it makes them Executive Agencies.

5. The Judicial Conference and the Administrative Office are central levers for Senator Whitehouse and Representative Johnson’s lawfare enterprise. The Conference and the Administrative Office have actively accommodated oversight requests from these congressmen concerning their allegations against Justices Thomas and Alito. Under our constitutional tradition, accommodations with Congress are the province of the executive branch. The Judicial Conference and the Administrative Office are therefore executive agencies. Such agencies must be overseen by the President, not the courts. Judicial relief here not only preserves the separation of powers but also keeps the courts out of politics.

The Judicial Conference is doing agency stuff, and therefore must be supervised by the Executive Branch, the lawsuit contends.

7. The federal judiciary is the system of courts. These courts are made up of judges who preside over cases and

controversies. The executive branch, on the other hand, is responsible for taking care that the laws are faithfully executed and ensuring the proper functioning of the government. Federal courts rely on the executive branch for facility management and security. Federal judges, as officers of the courts, need resources to fulfill their constitutional obligations.

8. Courts definitively do not create agencies to exercise functions beyond resolving cases or controversies or administratively supporting those functions. But the Administrative Office of the U.S. Courts does exactly that. The Administrative Office is controlled by the Judicial Conference, headed by the Chief Justice of the United States Supreme Court, John Roberts. The Administrative Office is run by an officer appointed by—and subject to removal by—Chief Justice Roberts. 28 U.S.C. § 601.

9. Congress cannot constitutionally delegate to an officer improperly appointed pursuant to Article II powers exceeding those that are informative and investigative in nature. *Buckley v. Valeo*, 424 U.S. 1, 137–39 (1976).

10. The Judicial Conference's duties are executive functions and must be supervised by executive officers who are appointed and accountable to other executive officers. *United States v. Arthrex, Inc.*, 594 U.S. 1, 6 (2021) (Officers who engage in executive functions and are not nominated by the President "must be directed and supervised by an officer who has been.").

11. Thus, the Judicial Conference and Administrative Office exercise executive functions and are accordingly subject to

FOIA. Accordingly, their refusal to comply with AFL's FOIA request is unlawful.

This is packaged up as a FOIA lawsuit. The entire argument – which should be that the Judicial Conference is an agency and therefore must respond to a FOIA – is presented in reverse, so that the outrageous claims about Article III are the primary argument. But it also lays out precisely the kind of argument we've seen used to rationalize the takeover of agencies Congress set up to be independent.

As of right now, Trevor McFadden, the Trumpiest DC District Judge (in my experience McFadden also *fiercely* guards judicial prerogatives), has been assigned the case. On Friday he invited calls from the parties to ask for his recusal.

[T]he undersigned is a member of the Judicial Conference's Committee on Court Administration and Case Management (CACM). Any party wishing to submit a recusal motion on that basis must do so on or before the due date for Defendants' Answer.

Like virtually all other legal challenges, it will take some time to see where this will go.

I'm not saying this lawsuit – a naked attempt to get a judge to say that judges' own infrastructure must be relegated to the Executive Branch, susceptible to takeover just like the Institute of Peace or Radio Free Europe – will succeed.

I'm saying that it adopts the very same pattern that has been used to subsume independent agencies, the same pattern used in recent days in an assault on Congress' prerogatives.

It's possible the lawsuit, which named John Roberts as a defendant, will clue SCOTUS in to the use to which Stephen Miller's minions plan to put Supreme Court precedent, including

Roberts' own fondness for the unitary executive. Notably, Roberts' comments on the import of judicial independence came after this lawsuit was filed, after former subordinates of Trump's top advisor argued that the Executive must takeover Article III's bastions of independence.

Roberts, speaking at a public event in Buffalo, New York, said an independent judiciary is a key feature of the U.S. constitutional system that had not existed in other countries when it was founded.

"In our Constitution ... the judiciary is a co-equal branch of government, separate from the others, with the authority to interpret the Constitution as law and strike down, obviously, acts of Congress or acts of the president," he said.

"And that innovation doesn't work if ... the judiciary is not independent," he added. "Its job is to, obviously, decide cases but, in the course of that, check the excesses of Congress or the executive, and that does require a degree of independence."

Roberts repeated his concern about the courts yesterday.

So maybe this purported FOIA challenge was a strategically stupid move by Miller's crowd, showing their hands prematurely to the guy most able to swap cards. Or maybe they took it as a deniable first probe into whether they could use with the courts the same tactic used to dismantle the independence of much of the rest of federal government.

None of us know how this will work out. It might just happen that, by alerting Roberts that *he's next*, after Trump finishes off the Institute of Peace and the Library of Congress, Roberts will look more critically at Trump's arguments in

those legal fights, knowing full well that rubber stamping Executive authority may rubber stamp the takeover of the courts, or at least the courthouses, the same way he *might* look differently at the commission firings knowing that Jerome Powell might be next.

But this is, in my opinion, more than just a troll, more than just an attempt to bully judges. This certainly looks like a test to see whether Miller's minions can extend their thus far successful takeover plan to encompass the judiciary itself.

Update: In a piece on the Library of Congress firing, Daniel Schuman concludes,

Trump likely can fire the Librarian of Congress. Trump likely cannot appoint an interim replacement. Trump cannot hire or fire subordinates. Congress must provide Robert Newlen support as he protects the independence of the Library of Congress and its ability to serve all members of Congress.

In his own post on it, Chris Geidner reviews some of the precedents.