



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable John Barrasso
Chairman
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

JUL 25 2019

Dear Mr. Chairman:

This letter presents the views of the Department of Justice (Department) on S. 1014, the "Route 66 Centennial Commission Act." Due to constitutional concerns with provisions of this bill, we would recommend that those provisions be amended as described below.

S. 1014 would raise serious constitutional concerns under the Appointments Clause and the anti-aggrandizement principle of the separation of powers. The bill would establish a Route 66 Centennial Commission and direct it to, among other things, "plan, develop a list of, and carry out such activities as the Commission determines to be appropriate to honor Route 66 on the occasion of its centennial anniversary." S. 1014, § 4. The Commission would be comprised of 15 members: 3 appointed by the President on the recommendation of the Secretary of Transportation; 8 appointed by the President on the recommendation of the governors of certain States associated with Route 66; and 4 appointed by, respectively, the Speaker and Minority Leader of the House of Representatives and the Majority and Minority Leaders of the Senate. *Id.* § 5(a). The bill would require the initial appointments to be made within 120 days of the bill's enactment. *Id.* § 5(c).

This bill is similar to one passed by the House of Representatives during the 115th Congress, H.R. 66, that also would have created a Route 66 Centennial Commission. The Department advised last year that H.R. 66 raised constitutional concerns under the anti-aggrandizement principle of the separation of powers because it would have conditioned the President's appointment of several Commission members on the recommendations of congressional leaders. *See* Letter for Sens. John Barrasso & Thomas R. Carper from Prim F. Escalona, Principal Deputy Assistant Attorney General, Office of Legislative Affairs (Aug. 7, 2018). S. 1014 presents even graver constitutional concerns, however. By vesting the Commission with broader authority than the version contemplated by H.R. 66, S. 1014 would make the Commission's members "Officers of the United States" and thus raise several problems under the Constitution's Appointments Clause. In addition, the bill would raise heightened anti-aggrandizement concerns by directly vesting the appointment of certain Commission members in congressional leadership.

1. S. 1014's appointment provisions would raise serious concerns under the Appointments Clause. That Clause requires that all "Officers of the United States" be appointed by the President with the advice and consent of the Senate, except for "inferior Officers," whose appointment Congress may vest "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. The members of the Route 66 Centennial Commission would be "Officers of the United States" within the meaning of the Appointments Clause because they would occupy "'continuing' position[s] established by law" and exercise "significant authority pursuant to the laws of the United States." *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (quoting *United States v. Germaine*, 99 U.S. 508, 511 (1879), and *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)); see also *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 73–74 (2007). The Department reached the same conclusions in assessing the constitutionality of a very similar bill creating the Ronald Reagan Centennial Commission. See *Constitutionality of the Ronald Reagan Centennial Commission Act of 2009*, 33 Op. O.L.C. ___, at *3–4 (Apr. 21, 2009) ("*Reagan Commission*"). As with the Reagan Commission bill, the Route 66 Commission members would be appointed "for the life of the Commission," § 5(d), so their duties would be continuing rather than "occasional and intermittent." *Reagan Commission* at *3–4. And while some of the Commission's functions would be merely advisory or ministerial, see § 4(2)–(4), its responsibility to "plan, develop a list of, and carry out such activities as the Commission determines to be appropriate to honor Route 66," § 4(1), would constitute "significant authority" for constitutional purposes. See *Reagan Commission* at *4 (concluding that the Reagan Commission's authority to "plan, develop, and carry out such activities as the Commission considers fitting and proper to honor Ronald Reagan" would be significant authority). The breadth of this authority distinguishes S. 1014 from H.R. 66, under which the Route 66 Commission's only non-recommendatory function would have been "[t]o plan and host, in cooperation with [federal agency] partners, a conference on the U.S. Numbered Highway System, and assist in the activities of such a conference." H.R. 66, § 4(3).

The Commission members' status as officers of the United States means that the bill's processes for appointing at least 12 of the 15 members would be inconsistent with the Appointments Clause. (The appointment of 3 members by the President on the recommendation of the Secretary of Transportation would be constitutional, assuming these were inferior rather than principal officers, because Congress could vest the appointment of such officers in the Secretary alone.) The provisions for 4 appointments by congressional leaders, § 5(a)(10)–(13), would plainly violate the Appointments Clause. The Clause's text makes clear that "officers of the United States . . . cannot be appointed by Congress, or by congressional officers." *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 249 (1989). And although the remaining 11 appointments would be made by the President, 8 would be conditioned on the recommendations of state governors. § 5(a)(2)–(9). Congress may prescribe reasonable statutory qualifications for the appointment of officers, see *Myers v. United States*, 272 U.S. 52, 128–29 (1926), but these recommendation requirements would not leave sufficient "scope for the judgment and will" of the appointing President, *Constitutionality of Statute Governing Appointment of United States Trade Representative*, 20 Op. O.L.C. 279, 280 (1996) (quoting *Civil Service Commission*, 13 Op. Att'y Gen. 516, 520 (1871)).

In addition, section 5(c) of the bill would raise a distinct Appointments Clause problem by requiring the President to make his appointments within 120 days of the bill's enactment. This also unconstitutionally interferes with the President's appointment authority. *See* Statement on Signing the Help America Vote Act of 2002 (Oct. 29, 2002), 2 *Pub. Papers of Pres. George W. Bush* 1927, 1927 (2002) (120-day deadline "unduly circumscribes the presidential appointment power").

2. Even if the Commission's members were not officers of the United States, S. 1014 would independently raise anti-aggrandizement concerns by granting to congressional leadership authority to appoint certain members. § 5(a)(10)–(13). "While Congress may inform itself of how legislation is being implemented through the ordinary means of legislative oversight and investigation, the anti-aggrandizement principle forbids Congress . . . from intervening in the decision making necessary to execute the law." *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 131 (1996) (footnote omitted). As the Supreme Court has observed, "once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation." *Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986). Congress therefore may not appoint members of entities with executive powers regardless of whether they qualify as officers of the United States subject to the Appointments Clause. *See FEC v. NRA Political Victory Fund*, 6 F.3d 821, 827 (D.C. Cir. 1993). Because the Commission would be such an entity, congressional leaders may not constitutionally appoint any of its members.

* * *

To remedy these constitutional defects, we recommend limiting the Commission's functions to providing advice and recommendations with respect to planning and carrying out activities to honor Route 66. The bill could then assign an executive branch official the responsibility to consider the Commission's advice and then "plan, develop a list of, and carry out" the commemorative activities. The Commission could retain a non-operational role in participating in any ceremonial events. If the Commission's role were limited in this manner, the appointment mechanisms in S. 1014 could remain the same. *See Reagan Commission* at *5–6 (recommending the same approach).

Sincerely,



Prim F. Escalona
Principal Deputy Assistant Attorney General

cc: The Honorable Thomas R. Carper
Ranking Member