



**U.S. Department of Justice**

Office of Legislative Affairs

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Office of the Assistant Attorney General

*Washington, D.C. 20530*

December 22, 2020

The Honorable Russell Vought  
Director  
Office of Management and Budget  
Washington, DC 20503

Dear Mr. Director:

This letter presents the views of the Department of Justice (“Department”) on S. 3989, the “United States Semiquincentennial Commission Amendments Act of 2020,” as enrolled and presented to the President. The Department takes no position on whether the President should sign the bill. If the President does sign the bill, the Department recommends signing statement language to address a number of constitutional concerns raised by the bill:

Today I am pleased to sign into law S. 3989, the “United States Semiquincentennial Commission Amendments Act of 2020,” which would amend the powers of the United States Semiquincentennial Commission, a commission with the responsibility to provide for the observance and commemoration, in 2026, of the 250th anniversary of the founding of the United States. It is altogether fitting and proper that this historic milestone be commemorated. The Act provides that the Commission will include officials who are members of the House and Senate appointed by congressional leaders, private citizens appointed by congressional leaders, and nonvoting ex officio members from the executive branch. I wholeheartedly welcome the participation of Members of Congress and private citizens in the activities of the Commission. In accord with President Reagan’s Signing Statement in 1983 and President Obama’s Signing Statement in 2016 for similar commemorative legislation, I understand, and my Administration has so advised the Congress, that because the Commission includes Members of Congress and congressional appointees, the Commission may provide advice and recommendations, and may participate in ceremonial activities, but may not participate in matters involving the execution of the laws, in light of the separation of powers and the Appointments and Ineligibility Clauses of the Constitution.

This language derives in substantial part from President Obama’s statement on signing the United Semiquincentennial Commission Act of 2016, Pub. L. No. 114-196, 130 Stat. 685 (2016), which established the Commission.

The Department offers the following additional explanation for its constitutional concerns.

The bill would amend certain provisions of the United States Semiquincentennial Commission Act of 2016 (“Semiquincentennial Act”), which created the United States Semiquincentennial Commission (“Commission”). As presently constituted, the Commission includes eight Members of Congress, sixteen private citizens appointed by congressional leaders, and a number of nonvoting ex officio members, including senior executive branch officials. The Commission bears the responsibility to “(1) prepare an overall program for commemorating the 250th anniversary of the founding of the United States and the historic events preceding that anniversary; and (2) plan, encourage, develop, and coordinate observances and activities commemorating the historic events that preceded, and are associated with, the United States Semiquincentennial.” United States Semiquincentennial Commission Act of 2016, Pub. L. No. 114-196, 130 Stat. 685, 686-687, § 5(a) (2016). As part of its duties, the Commission shall, “[n]ot later than 2 years after the date of enactment of this Act,” submit to the President “a comprehensive report that includes the specific recommendations of the Commission for the commemoration of the 250th anniversary and related events.” *Id.* § 5(c)(1). The President would in turn submit the report to Congress, along with any recommendations for legislative or administrative action the President considers appropriate. Semiquincentennial Act § 5(d). To fulfill its responsibilities, the Commission is empowered to “procure supplies, services, and property,” to “make contracts,” and to “take such actions as are necessary to enable the Commission to carry out efficiently and in the public interest the purposes of this Act.” *Id.* §§ 7(e)(1), (2), (4).

We have previously advised that the presence of Members of Congress and congressional appointees on the Commission raises constitutional concerns under the Appointments Clause, the Ineligibility Clause, and the anti-aggrandizement principle, if the Semiquincentennial Act were construed to permit the Commission to exercise operational control over a statutorily prescribed national commemoration. Accordingly, in signing the Semiquincentennial Act into law, President Obama explained that the Executive Branch would construe the Act to permit the Commission to “provide advice and recommendations” and “participate in ceremonial activities,” but not to “participate in matters involving the execution of the laws, in light of the separation of powers and the Appointments and Ineligibility Clauses of the Constitution.” Statement on Signing the United States Semiquincentennial Commission Act of 2016, Daily Comp. Pres. Doc. No. DCPD201600487, at 1 (July 22, 2016).

S. 3989 would alter the Commission’s structure and augment its powers in ways that reprise the same constitutional concerns. First, the bill would grant the Commission “the exclusive right to use, and to allow others to use, the official marks, imprimaturs, and logos of the Commission.” *Id.* § 2(e). Second, the bill would amend the Semiquincentennial Act to permit the Commission to remove a private-citizen member of the Commission “[o]n an affirmative vote of not less than 2/3 of the members of the Commission.” *Id.* § 2(a)(2).

These proposed changes raise constitutional concerns under the Appointments Clause, the Ineligibility Clause, and the anti-aggrandizement principle of the separation of powers.

1. *Appointments Clause.* The Appointments 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 voting members of the 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) (“*Officers of the United States*”). The Commissioners would exercise significant authority, namely, the power to “bind[] the Government or third parties for the benefit of the public.” *Officers of the United States*, 31 Op. O.L.C. at 77. While we have previously construed the Commission’s organic statute to confer only limited powers to provide advice and recommendations and participate in ceremonial activities, we do not see a possible saving construction for S. 3989’s grant to the Commission of “exclusive right to use, and allow others to use, the official marks, imprimaturs, and logos of the Commission.” The power to “exclu[de]” some from using the Commission’s marks and to “allow others to use” them paradigmatically involves binding third parties for the public benefit. *Officers of the United States*, 31 Op. O.L.C. at 89. The Commissioners also occupy continuing positions established by law. Like the commissioners of the similarly structured Ronald Reagan Centennial Commission, whom we have held are “Officers” within the meaning of the Appointments Clause, *Constitutionality of the Ronald Reagan Centennial Commission Act of 2009*, 33 Op. O.L.C. \_\_\_, at \*3–4 (Apr. 21, 2009) (“*Reagan Commission*”), the Commission’s members are appointed “for the life of the Commission,” Semiquincentennial Act § 4(c). Their duties are thus continuing rather than “occasional and intermittent.” *Reagan Commission* at \*3–4. Accordingly, the Commissioners are “Officers” under the Appointments Clause.

Here, all twenty-four voting members of the Commission would be congressionally appointed. Semiquincentennial Act § 4(b)(1)–(3). These provisions plainly violate the Appointments Clause, since 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).

2. *Ineligibility Clause.* Because eight members of the Commission are themselves members of Congress, Semiquincentennial Act § 4(b)(1)–(2), the Commission would raise concerns under the Ineligibility Clause as well. The Ineligibility Clause states that “[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time.” U.S. Const. art. I, § 6, cl. 2. We have previously noted that “legislation that creates a commission or other entity and simultaneously requires that certain of its members be Representatives or Senators” violates the Ineligibility Clause “[u]nless the congressional members participate only in advisory or ceremonial roles, or the commission itself is advisory or ceremonial”—though, as noted below, even such participation may raise other constitutional concerns. *Reagan Commission* at \*5 (quoting *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 160 (1996) (“*Constitutional Separation of Powers*”). We thus concluded that the Reagan Centennial Commission would violate the Ineligibility Clause because its membership was composed in part of members of Congress “responsible for planning, developing, and carrying out such events as part of a national commemoration.” *Id.* The Commission established by the Semiquincentennial Act, as a product of this bill’s amendments, raises serious constitutional concerns for the same reason.

3. *Anti-Aggrandizement—Congressional Appointment.* Regardless of whether the Commissioners qualify as officers of the United States subject to the Appointments Clause, the bill’s grant of executive power—to “allow some” to use the Commission’s intellectual property and to

deny that right to others—to a body appointed entirely by Congress would unconstitutionally aggrandize congressional power. “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.” *Constitutional Separation of Powers*, 20 Op. O.L.C. at 131 (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). Thus, Congress may not appoint members of entities with executive powers. See *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 827 (D.C. Cir. 1993). Because the Commission is such an entity, congressional leaders may not constitutionally appoint any of its members—including its nonvoting, ex officio members, S. 3989 § 2(a)(1); Semiquincentennial Act § 4(b)(4).

4. *Anti-Aggrandizement—Commission Removal Power.* Just as Congress may not appoint members of entities with executive powers, Congress may not remove them. As noted above, the Commission is composed of twenty-four voting members, eight Members of Congress and sixteen private citizens appointed by congressional leadership. The bill would provide that “[o]n an affirmative vote of not less than 2/3 of the members of the Commission, the Commission may remove” a private-citizen member of the Commission. S. 3989 § 2(a)(2). This would empower a body of congressional agents—most obviously, the eight Members of Congress who would serve on the Commission—to remove an officer performing executive functions. But “Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment.” *Bowsher*, 478 U.S. at 726; see also *Morrison v. Olson*, 487 U.S. 654, 686 (1988) (“[T]he essence of the decision in *Myers* was the judgment that the Constitution prevents Congress from ‘draw[ing] to itself . . . the power to remove.’” (quoting *Myers v. United States*, 272 U.S. 52, 161 (1926))).

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Thank you for the opportunity to present our views. We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,



Mary Blanche Hankey  
Acting Assistant Attorney General