



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

September 17, 2009

**MEMORANDUM FOR GREGORY B. CRAIG
COUNSEL TO THE PRESIDENT**

Re: Application of 5 U.S.C. § 3110 to Two Proposed Appointments by the President to Advisory Committees

You have asked for our opinion whether section 3110 of title 5, United States Code, which prohibits a public official from appointing or employing a relative “in or to a civilian position in the agency . . . over which [the official] exercises jurisdiction or control,” bars the President from appointing two of his relatives to advisory committees within the Executive Branch. Specifically, you have asked whether the President may appoint his brother-in-law to the President’s Council on Physical Fitness and Sports (“Fitness Council” or “Council”) and his half-sister to the President’s Commission on White House Fellowships (“Fellowships Commission” or “Commission”). We conclude that section 3110 prohibits both proposed appointments.

I

The Fitness Council is an advisory committee established by executive order and charged with advising, and making recommendations to, the Secretary of Health and Human Services and the President regarding measures to enhance participation in physical activity and sports. *See* Exec. Order No. 13265, 67 Fed. Reg. 39,841 (June 6, 2002).¹ The Council lacks any authority to undertake operational activities, and its functions are purely advisory. *See* Memorandum for Richard Hauser, Deputy Counsel to the President, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: President’s Council on Physical Fitness and Sports* at 5 (Feb. 17, 1984) (“Fitness Council Memo”). Specifically, the Council provides advice and recommendations through the Secretary to the President regarding the Secretary’s progress in establishing “a national program to enhance physical activity and sports participation.” Exec. Order No. 13265, § 1; *see id.* § 3(a). It also advises the Secretary in her own capacity regarding “ways to enhance opportunities for participation in physical fitness and sports” and the need for “enhancement” of the Council’s “programs and educational and promotional materials.” *Id.* § 3(b), (d). In advising the Secretary, the Council also serves as her “liaison to relevant State, local, and private entities.” *Id.* § 3(c).

The Council is composed of twenty presidentially appointed members, with a Chair or Vice Chair designated by the President and an Executive Director appointed by the Secretary. *Id.* §§ 2(b), 4(d). Members of the Council serve without compensation, but may receive certain

¹ In accordance with subsection 14(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. app. § 14(a)(2) (2006), the Council was scheduled to terminate on June 6, 2004, but that date has repeatedly been extended by executive order. The Council’s current termination date is September 30, 2009. *See* Exec. Order No. 13446, § 1(m), 72 Fed. Reg. 56,175 (Sept. 28, 2007).

travel expenses. *Id.* § 4(b). The Secretary is responsible for the Council’s administrative requirements, “furnish[ing] the Council with necessary staff, supplies, facilities, and other administrative services” and paying its expenses “from funds available to the Secretary.” *Id.* § 4(c).

The Fellowships Commission, which was also established by executive order, is a presidential advisory committee charged with “prescrib[ing] such standards and procedures as may be necessary to enable it to recommend annually a group of outstanding young persons from among whom the President may select White House Fellows.” Exec. Order No. 11183, § 2(a), 29 Fed. Reg. 13,633 (Oct. 3, 1964), *as amended by* Exec. Order No. 11648, 37 Fed. Reg. 3,623 (Feb. 16, 1972). “[T]he basic function of the Commission is to provide [these] recommendations” to the President. Letter for the Honorable Dudley Mecum, II, Assistant Director for Management Organization and Analysis, Office of Management and Budget, from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel at 2 (Apr. 23, 1973) (“Fellowships Commission Letter”).² Once the Commission’s “standards and procedures” have been published, it may accept applications and nominations “for consideration in its recommendations.” Exec. Order No. 11183, § 2(a). The Commission is composed of “such outstanding citizens . . . of private endeavor, and the Government service, as the President may from time to time appoint,” with “[o]ne of the members appointed from private life . . . designated by the President to serve as Chairman of the Commission.” *Id.* § 1(a). Members “serve at the pleasure of the President,” and receive no compensation for their service. *Id.* § 1(b). The Office of Personnel Management (“OPM”) (the successor to the Civil Service Commission) is responsible for “provid[ing] the Commission with administrative services, staff support, and travel expenses.” *Id.* § 4(b).

The Federal Advisory Committee Act (“FACA”) applies to the Fitness Council and the Fellowships Commission, both of which “were established . . . by the President . . . in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government,” and both of which have members who are not full-time or permanent part-time federal employees or officers. 5 U.S.C. app. § 3(2) (2006); *see also* Fellowships Commission Letter at 2-3; Fitness Council Memo at 2. You have informed us that the President’s brother-in-law and half-sister would, like other members of these sorts of advisory committees, be appointed to their positions as “special government employees,” who exercise their duties on a part-time, temporary basis. *See* 18 U.S.C. § 202 (2006); *see also* Fitness Council Memo at 8 n.9 (“[i]n light of their limited service, it is likely that most, if not all, of the Council members from private life are ‘special government employees’”).

² The Fellowships Commission’s current termination date is September 30, 2009. *See* Exec. Order No. 13446, § 1(f).

II

The operative portion of section 3110 is subsection (b), which provides that “[a] public official may not appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative of the public official.” 5 U.S.C. § 3110(b) (2006). The statute provides expressly that the President is a “public official” and that a public official’s brother-in-law and half-sister are his “relative[s]” for purposes of the prohibition. *See id.* § 3110(a)(2), (3). We also have little doubt that the President has “jurisdiction or control” over the Fitness Council and the Fellowships Commission. *See, e.g., Inspector General Legislation*, 1 Op. O.L.C. 16, 17 (1977) (“The President’s power of control extends to the entire executive branch. . .”). Accordingly, the permissibility of each of the President’s contemplated appointments turns on whether it constitutes an appointment “to a civilian position in [an] agency.”

Our inquiry into this question is guided by the substantial precedent from this Office addressing the scope of the section 3110 prohibition as applied to presidential appointments. In a November 14, 1972 memorandum, we advised that section 3110 would bar the President from appointing a relative “to permanent or temporary employment as a member of the White House staff.” Memorandum for the Honorable John W. Dean, III, Counsel to the President, from Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel, *Re: Applicability to President of Restriction on Employment of Relatives* at 1 (“Cramton Memo”). In a February 18, 1977 memorandum, we advised that section 3110 would also bar the President from appointing the First Lady to serve, with or without compensation, as Chairperson of the President’s Commission on Mental Health (“Mental Health Commission”). *See* Memorandum for Douglas B. Huron, Associate Counsel to the President, from John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Possible Appointment of Mrs. Carter as Chairman of the Commission on Mental Health* (“Mental Health Commission Memo”) (referencing attached Memorandum for John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel, from Edwin S. Kneedler, Attorney-Adviser, Office of Legal Counsel, *Re: Legality of the President’s appointing Mrs. Carter as Chairman of the Commission on Mental Health* (Feb. 17, 1977) (“2/17/77 Kneedler Memo”). That memorandum further advised that the First Lady could serve in an “honorary position related to the Commission,” as long as she “remained sufficiently removed from the Commission’s official functions.” *Id.* at 1.

Later in 1977, the White House again asked us to advise on the application of section 3110 to a contemplated presidential appointment, this time of the President’s son to serve as an unpaid assistant to a regular member of the White House staff. *See* Memorandum for the Attorney General, from John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Employment of Relatives Who Will Serve without Compensation* (Mar. 23, 1977) (“3/23/77 Harmon Memo”) (referencing Memorandum for John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel, from Edwin S. Kneedler, Office of Legal Counsel, *Re: Appointment of President’s Son to Position in the White House Office* (Mar. 15, 1977) (“3/15/77 Kneedler Memo”). We “re-examin[ed]” the issues raised by the proposed appointment in light of arguments advanced by the Civil Service Commission (now OPM) for construing section 3110 not to prohibit the President and Vice President from appointing relatives to their personal staffs. *Id.* at 1. We deemed the Commission’s arguments

unpersuasive, however, reaffirming the reasoning of the Mental Health Commission Memo and concluding that section 3110 barred the proposed appointment. *See* 3/23/77 Harmon Memo at 1 (noting that 3/15/77 Kneedler Memo, which concluded “that [section 3110] does apply to positions on the President’s staff,” and to the proposed appointment in particular, was conveyed to the Counsel to the President); *see also id.* at 2 (stating that Mr. Harmon had “re-examined the specific issue of whether the statute applies to uncompensated positions,” and concluded that it does).

Finally, in a February 28, 1983 memorandum, we advised on whether the President could appoint a relative to the Presidential Advisory Committee on Private Sector Initiatives (“CPSI”). *See* Memorandum for David B. Waller, Senior Associate Counsel to the President, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Appointment of Member of President’s Family to Presidential Advisory Committee on Private Sector Initiatives* (“CPSI Memo”). After summarizing the Office’s precedents on the application of section 3110, we cautioned that “time constraints have not permitted us to reexamine the legal analysis and conclusions reached in these memoranda.” *Id.* at 1. We nonetheless observed that the CPSI and the Mental Health Commission “are not sufficiently different to provide a basis for distinguishing between them with respect to the applicability of section 3110,” and stated that in light of our inability to conduct a proper reexamination, “we must adhere to the conclusion . . . that the President cannot, consistently with section 3110, appoint a relative as an active member of such a Commission, even if the relative serves without compensation.” *Id.* at 1-2.

Thus, these precedents demonstrate this Office’s consistent position that a presidential appointment is not exempt from the bar imposed by section 3110 just because it is to an uncompensated position or to a position on an advisory committee. Absent clear evidence that the analysis in these prior memoranda was in error, that there have been material intervening changes in the governing law, or that the appointments presently contemplated are somehow distinguishable from those we have addressed previously, we are disinclined to deviate from our longstanding position.

III

The first issue we address is whether members of the Fitness Council and the Fellowships Commission, who receive no compensation and exercise duties that are strictly advisory in nature, occupy “civilian positions” within the meaning of section 3110. We conclude that they do.

Lack of compensation. As discussed above, the Office has repeatedly advised that section 3110 applies to presidential appointments to uncompensated positions.³ In a 1993

³ *See* 3/23/77 Harmon Memo at 2; Mental Health Commission Memo; *see also* Memorandum for D. Lowell Jensen, Acting Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Application of 5 U.S.C. § 3110 to Mrs. Meese’s Service on Attorney General’s Task Force on Family Violence* at 2 (Feb. 14, 1984) (relying on 3/23/77 Harmon Memo in concluding that section 3110 applies to the uncompensated service of the wife of Attorney General Edwin Meese III on the Attorney General’s Task Force on Family Violence) (“Family Violence Task Force Memo”); Memorandum for Michael E. Shaheen, Jr., Counsel, Office of Professional Responsibility, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Use of Department of Justice Vehicles by Attorney General’s Spouse* at 9 (Jan. 23, 1984) (concluding

decision, however, the U.S. Court of Appeals for the District of Columbia Circuit observed in *dicta* that “[t]he anti-nepotism statute . . . may well bar appointment only to paid positions in government.” *Ass’n of Am. Physicians and Surgeons, Inc. v. Clinton*, 997 F.2d 898, 905 (D.C. Cir.) (“AAPS”). The only support the court offered for this view was a citation to subsection (c) of the statute, which provides that “[a]n individual appointed, employed, promoted, or advanced in violation of [section 3110] is not entitled to pay, and money may not be paid from the Treasury as pay to an individual so appointed, employed, promoted, or advanced.” 5 U.S.C. § 3110(c). The 2/17/77 Kneedler Memo that was attached to and referenced in the Mental Health Commission Memo addressed the import of subsection (c). In concluding that section 3110 applies to uncompensated appointments, the Kneedler Memo acknowledged the argument “that because the statutory remedy for a violation is to deny the appointee pay,” the ban applies only to appointments to compensated positions, 2/17/77 Kneedler Memo at 2. But the Kneedler Memo deemed this argument unpersuasive in light of section 3110’s text and legislative history and the evident congressional purposes underlying its enactment. *See id.* at 2-4; *see also id.* at 4 (observing that Civil Service Commission concurred in the Memo’s view that the prohibition applies to uncompensated positions). We agree with this conclusion.

We turn first to the text of section 3110. As the 2/17/77 Kneedler Memo observed, the “substantive prohibition in [section 3110(b)] is written in broad terms which on their face attach no significance to the matter of compensation.” 2/17/77 Kneedler Memo at 2. In particular, to say that a public official may not “appoint” someone does not suggest that the appointment must be compensated. This is demonstrated by the very executive orders establishing the Fitness Council and the Fellowships Commission, both of which use the term “appoint” to refer to positions that are uncompensated. *See* Exec. Order No. 11183, § 1(b) (“Members appointed to the Commission from private life shall serve without compensation.”); Exec. Order No. 13265, § 2(b) (“The Council shall be composed of up to 20 members appointed by the President.”). It is true that subsection (b) uses “appoint” in conjunction with “employ” and that the appointment must be to a civilian “position”—a term that in context might well mean an “employment,” Webster’s New International Dictionary 1925 (2d ed. 1958). But although it may be fair to say that employments usually come with a salary, that is not necessarily the case. *See* Memorandum for the Honorable Fred F. Fielding, Counsel to the President, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Private Sector Survey on Cost Control in the Federal Government* at 4 (Mar. 17, 1982) (“[P]ersons who do not receive a federal salary may nonetheless be deemed to be government employees by virtue of the tasks that they perform or the positions in which they serve.”) (“Cost Control Survey Memo”). Since the members of the Council and the Commission serve in their positions as uncompensated “special government employees,” 18 U.S.C. § 202 (emphasis added), the proposed appointments at issue here again demonstrate the point. Accordingly, we believe that the text of section 3110 strongly supports the conclusion that Congress intended the prohibition to encompass appointments to both paid and unpaid positions.

In addition, as the 2/17/77 Kneedler Memo observed, the legislative history of section 3110 provides no clear indication that Congress intended uncompensated appointments to be exempt from the prohibition. *See* 2/17/77 Kneedler Memo at 2; *cf.* Mental Health Commission

that “[s]ection 3110 would prohibit the Attorney General from appointing his spouse to, or recommending her for, even an uncompensated official position within the Department of Justice”).

Memo (“[T]he legislative history of the statute shows that the prohibition in 5 U.S.C. § 3110(b) applies whether or not the appointee will receive compensation.”). To be sure, there are isolated floor and hearing statements indicating that certain members of Congress were particularly concerned about appointments to paid positions. See 113 Cong. Rec. 28,659 (Oct. 11, 1967) (statement of Rep. Smith); 113 Cong. Rec. 37,316 (Dec. 15, 1967) (statement of Rep. Udall); Federal Pay Legislation: Hearings Before the S. Comm. on Post Office and Civil Service, 90th Cong. 360, 366 (1967) (“Section 3110 Hearings”). But there is no evidence that members were concerned exclusively with such appointments, or that they were unconcerned about appointments to unpaid positions. In fact, Congress might well have concluded that eliminating “family patronage” from “Federal job appointments,” 113 Cong. Rec. 37,316—among the stated purposes of section 3110—would necessarily require applying the prohibition to unpaid government positions as such positions are often highly sought after for their substantial non-pecuniary benefits. Moreover, as the 2/17/77 Kneedler Memo also noted, the legislative history demonstrates that section 3110 was motivated in significant part by Congress’s belief that appointments of unqualified relatives were sapping the morale of government workers and hindering government efficiency. See 2/17/77 Kneedler Memo at 4 (citing 113 Cong. Rec. 28,659 (statement of Rep. Smith); Section 3110 Hearings at 359, 365-68, 372). Such detrimental effects can result from appointments to unpaid as well as paid positions.

Subsection (c)’s provision that relatives appointed in violation of the statutory prohibition are “not entitled to compensation” does not undermine this reading. Admittedly, were this loss of compensation the only statutorily required penalty for violations of section 3110, it might cast some doubt on whether the prohibition extends to uncompensated positions. In our view, however, the better reading of section 3110, including its legislative history and structure, is that Congress intended for relatives appointed in violation of the prohibition to be removed—a penalty that applies regardless whether the position is compensated. Three considerations support this conclusion. First, section 3110 does not describe loss of compensation as the exclusive statutory penalty for appointments in violation of the prohibition, nor do we believe that loss of compensation is inconsistent with an implied statutory penalty of removal. See *Chauffeur’s Training Sch., Inc. v. Spellings*, 478 F.3d 117, 126-27 (2d Cir. 2007). Second, the legislative record supports the conclusion that Congress intended an implied statutory penalty of removal. See 113 Cong. Rec. 37,377 (1967) (“Discovery of such an appointment [in violation of section 3110] will result in the removal of the appointee from office.”) (statement by House Majority Leader Albert of accomplishments of the first session of the 90th Congress). Moreover, as noted above, there is no suggestion in the relevant legislative history that Congress intended appointments of relatives to uncompensated positions to be treated more leniently than such appointments to compensated positions. Third, it makes little sense to construe the available remedies under section 3110 as limited to denial of compensation, since such a reading would mean that an illegal paid appointee is subject to loss of his compensation, but not to loss of his position. We doubt that Congress’s intent in enacting section 3110 was to permit improperly appointed relatives to remain as volunteers in their formerly compensated positions.

To be sure, “it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.” *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 20 (1979). This canon may “yield,” however, “to persuasive evidence of a contrary legislative intent,” *id.*, including the text, the “legislative history[,] and the overall structure” of a statute, *Sec. Investor Prot. Corp. v.*

Barbour, 421 U.S. 412, 419 (1975). Cf. *Transamerica Mortgage Advisors*, 444 U.S. at 18-19 (concluding that statutory language, “[b]y declaring certain contracts void,” “itself fairly implies” a cause of action to bring “suit for rescission or for an injunction against continued operation of the contract, and for restitution,” which suits are “customary legal incidents of voidness”); *Chauffeur’s Training Sch., Inc.*, 478 F.3d at 126-27 (“We are not persuaded that Congress, by describing some remedial actions available to the Department [of Education], intended to preclude the Department from taking other reasonable remedial actions.”). As discussed above, we have identified such “persuasive evidence” here.

Accordingly, we conclude that subsection (c) is best read as affording an additional specific penalty for appointments to compensated positions made in violation of section 3110, but not as limiting the universe of prohibited appointments to only those that are compensated.

Advisory Character. As discussed above, this Office has also advised that section 3110 applies to presidential appointments to positions that are strictly advisory.⁴ We remain of this view, and therefore believe that the purely advisory functions of the Fitness Council and the Fellowships Commission would not remove their members from occupying “civilian positions.”

“Members of advisory committees are usually considered to be employees of the United States,” Memorandum for C. Boyden Gray, Counsel to the President, from William P. Barr, Assistant Attorney General, Office of Legal Counsel at 1-2 (May 15, 1989) (“Barr Memo”). That would be clearly true here, as we are advised that members of the Fitness Council and the Fellowships Commission are appointed as special government employees. Moreover, members of these bodies, like the members of other advisory committees, “hold positions that are expressly created by federal authority, they are charged with federal responsibilities, and they are often entrusted with access to government information not available to the public.” *Application of 18 U.S.C. § 219 to Members of Federal Advisory Committees*, 15 Op. O.L.C. 65, 68 (1991) (“Section 219 Opinion”).⁵ In light of the purposes underlying section 3110—including Congress’s concern that appointments of relatives were impairing government operations—we believe that the prohibition applies to positions that carry these indicia of authority and responsibility.

We note, moreover, that application of section 3110 in the present circumstances hardly constitutes an unprecedented example of congressional regulation of volunteer service in Executive Branch advisory positions. Were they to be appointed, both the President’s brother-in-law and his half-sister would be subject as special government employees to a number of statutory restrictions on their conduct. See Fitness Council Memo at 8 (members of Fitness Council, as federal employees, are subject to conflict-of-interest laws, including 18 U.S.C.

⁴ See Mental Health Commission Memo at 1; see also CPSI Memo at 2; cf. 3/23/77 Harmon Memo at 1 (appointment to White House staff); Cramton Memo at 1-2 (same).

⁵ The Section 219 Opinion, from which this characterization of advisory committees is drawn, concluded that members of such committees “hold offices of profit or trust within the meaning of the Emoluments Clause[, U.S. Const. art. I, § 9, cl. 8].” 15 Op. O.L.C. at 68. The Office subsequently receded from the view that the Emoluments Clause applies to entities of this type, see *The Advisory Committee on International Economic Policy*, 20 Op. O.L.C. 123 (1996); see also *infra*, fn. 6, but the Section 219 Opinion’s characterization of the nature and functions of advisory committees remains sound.

§ 208); *see also* Barr Memo at 2 (“As special government employees, advisory committee members are subject to some—but not all—of the conflict laws.”); Memorandum for Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, from Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 4203, Advisory Panel on Government Debt Collection Act* at 5 & n. 5 (Apr. 24, 1986) (same); *see, e.g.*, 18 U.S.C. § 208 (2006) (precluding government employees from participating personally and substantially, including through “recommendation [or] the rendering of advice,” in any matter in which they have a financial interest, absent a waiver).⁶

That members of the Fitness Council and the Fellowships Commission are charged with advising the President does not affect our conclusion in this case. In particular, we do not believe that Congress’s barring of the appointment of presidential relatives to such advisory committees impermissibly “restrict[s] the President’s ability to seek advice from whom and in the fashion he chooses,” *AAPS*, 997 F.2d at 909. *See* Cramton Memo at 1-2 (concluding that while section 3110 may present constitutional concerns as applied to presidential appointments of “high-level” officials, it “seems clearly applicable to subordinate positions on the White House staff, which fall within the category of ‘inferior officers’ subject to Congressional control”). The U.S. Court of Appeals for the District of Columbia Circuit has “construe[d]” FACA “strictly” in determining whether it applies to presidential advisory committees to avoid potential separation of powers concerns. *In re: Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005); *see also* *Ctr. For Arms Control and Non-Proliferation v. Pray*, 531 F.3d 836, 843-44 (D.C. Cir. 2008); *AAPS*, 997 F.2d at 910-11. The court has expressed the view that subjecting such committees to FACA—which requires, among other things, balanced committee membership, open committee meetings, and the public availability of committee documents, *see* 5 U.S.C. app. §§ 5(b)(2); 10(a), (b) (2006)—risks impermissible interference with the President’s constitutional entitlement “to consult with his advisers confidentially [and,] as a corollary, . . . to organize his advisers and seek advice from them as he wishes.” *AAPS*, 997 F.2d at 909; *see also* *Cheney*, 407 F.3d at 728 (identifying President’s need, “[i]n making decisions on personnel and policy, and in formulating legislative proposals, . . . to seek confidential information from many sources, both inside the government and outside”); *cf. Pub. Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 466 (1989) (construing FACA not to apply to the judicial recommendation panels of the American Bar Association to avoid “formidable constitutional difficulties”). But whatever the merits of the D.C. Circuit’s analysis in the context of FACA, we do not believe that the application of section 3110 to prevent a President’s relative from serving on a presidential advisory committee threatens to “impermissibly undermine[] the powers of the Executive

⁶ We recognize that members of the Fitness Council and the Fellowships Commission might not be subject to a number of statutory and constitutional standards of conduct that apply only to employees of the federal government who exercise some substantive authority. *See* 20 Op. O.L.C. 123 (1996) (appointees do not hold an “Office[] of Profit or Trust” for purposes of the Emoluments Clause when they “meet only occasionally, serve without compensation, take no oath, and do not have access to classified information,” and when “the Committee” on which they serve “is purely advisory, is not a creature of statute, and discharges no substantive statutory responsibilities”); *Dixson v. United States*, 465 U.S. 482, 496, 499 (1984) (in order to qualify as a “public official” for purposes of the federal bribery statute, 18 U.S.C. § 201, a person must “occup[y] a position of public trust with official federal responsibilities,” and “must possess some degree of official responsibility for carrying out a federal program or policy”). These standards are phrased differently than section 3110, and they are motivated by different purposes. Accordingly, we do not view any limits on their application as shedding significant light on the present inquiry.

Branch” or to “disrupt[] the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions.” *Morrison v. Olson*, 487 U.S. 654, 695 (1988) (internal quotation marks, alterations, and citation omitted). The President remains free to consult his relatives in their private, individual capacities at the time and place of, and on the subjects of, his choosing, and, in any event, “the effect of the qualification requirement is to eliminate only a handful of persons from the pool of possible appointees,” 3/15/77 Kneeder Memo at 4.

IV

We next address whether the proposed appointments would be to positions “in [an] agency” as defined in section 3110. We have previously determined that positions on the President’s staff and the White House Office staff and as a member of the Mental Health Commission would be “in [] agenc[ies]” for purposes of section 3110.⁷ We conclude the same with respect to seats on the Fitness Council and the Fellowships Commission.

Section 3110 defines “agency” to mean “Executive agency,” 5 U.S.C. § 3110(a)(1)(A), which in turn is defined for title 5 generally as “an Executive department, a Government corporation, and an independent establishment,” *id.* § 105. Thus, for a seat on the Council or the Commission to be “in [an] agency” for purposes of section 3110, the Council or the Commission must either constitute or be located in one of the kinds of entities that qualify as an “Executive agency” under section 105.⁸ Neither the Fitness Council nor the Fellowships Commission is, or is part of, a Government corporation, *see id.* § 103, so whether membership on the Council or the Commission would be “in [an] agency” turns on whether the Council or the Commission constitutes, or is situated in, an “Executive department” or an “independent establishment.”

Fitness Council. We believe that the Fitness Council has a sufficiently close and substantial relationship with the Department of Health and Human Services (“HHS”) that the Council should be considered within that Department for purposes of determining whether section 3110 applies. Since the Department of HHS is one of the “Executive Department[s]” listed in 5 U.S.C. § 101 (2006), membership on the Council constitutes a position in an “Executive department,” and thus “in [an] agency.” The position therefore falls within the scope of section 3110.

The executive order establishing the Fitness Council does not specify its location, but the order does indicate a close connection between the Council and the Department of HHS. *See* Executive Order No. 13265; *see also infra* pp. 11-12. In order to determine whether the Council is actually a part of HHS for purposes of section 105 (and thus section 3110), we must perform a “fact-specific analysis,” as guided by our prior Office precedent. *Applicability of the Federal*

⁷ *See* CPSI Memo; 3/23/77 Harmon Memo at 2; Mental Health Commission Memo; Cramton Memo; *see also* Family Violence Task Force Memo at 2 (service on Attorney General’s Task Force on Family Violence—located within the Department of Justice—is “in [an] agency” for purposes of section 3110).

⁸ An independent establishment cannot be “part of an independent establishment,” 5 U.S.C. § 104(1), but an entity that is part of an independent establishment is subject to “the provisions of [title 5] applicable to the independent establishment of which [the entity is] a constituent or part.” S. Rep. No. 89-1380, at 22 (1966); H.R. Rep. No. 89-901, at 6 (1965).

Vacancies Reform Act to Vacancies at the International Monetary Fund and the World Bank, 24 Op. O.L.C. 58, 63 (2000) (“IMF Memo”).

Particularly instructive on this point is advice we provided in 1995 on whether the Regional Fishery Management Councils are components of the Commerce Department for purposes of section 15 of the Age Discrimination in Employment Act, 29 U.S.C. § 633a (1994). That statute applies to personnel actions affecting applicants to and employees in Executive agencies as defined in section 105. *See* Memorandum for Ginger Lew, General Counsel, Department of Commerce, from Dawn Johnsen, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: ADEA and Regional Fishery Management Councils* (Mar. 14, 1995) (“Regional Fishery Management Councils Opinion”). In concluding that the Councils are part of the Commerce Department, we identified the following factors as “substantial and persuasive”:

(1) the Councils’ primary function is to advise the Secretary of Commerce with respect to fishery management plans which are a Commerce responsibility; (2) those plans are subject to ultimate review and approval by the Secretary; (3) a majority of the Councils’ voting members are appointed by the Secretary, and those members are removable “for cause” by the Secretary on the recommendation of the Councils; (4) the Secretary determines what administrative employees (other than the executive directors) may be appointed by the Councils; (5) the Secretary prescribes the uniform standards that govern the organization, practice, and procedures adopted by the Councils in performing their functions; (6) the Councils must report annually to the Secretary; and (7) the compensation of Council members and staff, as well as its other costs and expenses, are paid by Commerce.

Id. at 4 n.1.

Also relevant is our advice on whether the United States Mission to the United Nations is within the Department of State for purposes of a since-superseded version of the Vacancies Act, 5 U.S.C. §§ 3345-3349 (1994), which applied to certain vacancies in “Executive agenc[ies]” as defined in section 105. *See* Memorandum for Files, from Daniel L. Koffsky, Special Counsel, Office of Legal Counsel, *Re: Permanent Representative to the United Nations* (July 14, 1998) (“1998 UN Memo”); Memorandum for Files, from Daniel L. Koffsky, Special Counsel, Office of Legal Counsel, *Re: Vacancy at United States Mission to the United Nations* (Apr. 8, 1996) (“1996 UN Memo”). In the 1996 UN Memo, we identified three factors as establishing that the Mission was part of the State Department: that instructions for the U.S. Permanent Representative to the United Nations (who heads the Mission) were sent through the Secretary of State, that the State Department controlled the Mission’s appropriations, and that the State Department’s organizational chart had an entry for the Permanent Representative. *See* 1996 UN Memo at 1-2. In the 1998 UN Memo, we reaffirmed this conclusion and deemed it “reinforce[d]” by “practice,” including that the State Department handled the Freedom of Information Act (“FOIA”), whistleblower, and ethics work for the Mission; that the State Department carried the Permanent Representative on its employment rolls; that there was a “home desk” for the Mission within the State Department; and that the State Department’s administrative officers treated the Permanent Representative as an official of the Department. *See* 1998 UN Memo at 2.

Finally, we find guidance in our 2000 advice on whether the U.S. Executive Director and the Alternate U.S. Executive Director at the International Monetary Fund and the World Bank (“U.S. representatives”) are part of the Department of the Treasury for purposes of the Federal Vacancies Reform Act, 5 U.S.C. §§ 3341-3349d (Supp. IV 1998). *See* 24 Op. O.L.C. at 61-65, 67-68. In concluding that they were not, we acknowledged that the President had delegated to the Secretary of the Treasury responsibility for conveying the government’s instructions to the U.S. representatives, that the Treasury Department is responsible for some aspects of the representatives’ receipt of certain employment benefits, and that the Department gives ethics advice to the representatives. *See id.* at 62-63. We nonetheless characterized the relationship of the U.S. representatives to the Treasury Department as “quite limited in scope and frequently ambiguous even within that limited area.” *Id.* at 61. Central to this determination was the fact that “[f]or some of the most central elements of personnel administration, the U.S. representatives are unconnected to the Department of the Treasury.” *Id.*⁹ Specifically, we noted that the Department was not responsible for setting or paying the U.S. representatives’ salaries and did not carry them on its employment roles and that the U.S. representatives’ staff were not employees of the Treasury Department. *See id.*

Consistent with this past advice, we believe that the relevant factors support the conclusion that the Fitness Council is part of the Department of HHS. The HHS General Counsel’s Office has advised us that it concurs with this conclusion. *Accord* Memorandum for Files, from Janis Sposato, Office of Legal Counsel, *Re: President’s Council on Physical Fitness and Sports Authority to Accept Gifts* at 1 (Aug. 2, 1982) (“[T]he Council is an advisory Committee attached to the Department of [HHS].”); S. Comm. on Homeland Sec. and Governmental Affairs, 110th Cong., U.S. Gov’t Policy and Supporting Positions 68 (Comm. Print 2008) (“Plum Book”), available at <http://www.gpoaccess.gov/plumbook/2008/> (locating Executive Director of Fitness Council within HHS Office of the Assistant Secretary for Public Health and Science).

Most importantly, the Fitness Council advises and makes recommendations directly to the Secretary of HHS on matters relating to the Secretary’s operational responsibilities—specifically, the Secretary’s development and coordination of a “program to enhance physical activity and sports participation,” Exec. Order No. 13265, § 1; *see id.* § 3(b), (d). *See* Regional Fishery Management Councils Opinion at 4 n.1 (noting that Councils advise the Secretary of Commerce regarding matters for which Secretary is responsible). Even the Council’s advice and recommendations for the President must be made “through the Secretary,” Exec. Order No. 13265, § 3(a).¹⁰ *Cf.* 1996 UN Memo at 1-2 (noting that instructions for U.S. Permanent Representative to the United Nations are sent through the Secretary of State). It is also significant that the Secretary appoints the Council’s Executive Director; must agree to the objectives of any subcommittees established by the Council; is responsible for furnishing the Council with necessary administrative services, including staff; and pays the Council’s expenses

⁹ We also noted that the responsibility for instructing the U.S. representatives had not originally been delegated to the Secretary of the Treasury, and that no action by the President or Congress in subsequently transferring this authority to the Secretary demonstrated an intent to “transfer the legal, administrative location of the U.S. representatives.” 24 Op. O.L.C. at 63.

¹⁰ Prior to 2002, the Council had advised and provided recommendations to the President directly. *See* Exec. Order No. 12345, § 3(a), 47 Fed. Reg. 5,189 (Feb. 2, 1982).

out of her own funds. *See* Exec. Order No. 13265, § 4(c), (d), & (e). Finally, we note that the Secretary is responsible for performing all of the President’s functions under FACA with respect to the Council (except reporting to Congress), *see id.* § 5(a), including “evaluating and taking action, where appropriate, with respect to all public recommendations” the Council makes to the President, 5 U.S.C. app. § 6(a).

Although the President, not the Secretary of HHS, appoints the members of the Fitness Council, that does not outweigh the other relevant considerations we have identified. *See* 1998 UN Memo (deeming the U.S. Mission to the United Nations part of the State Department despite the fact that the President, not the Secretary of State, appoints the Permanent Representative, *see* U.S. Const. art. II, § 2, cl. 2); *see also* 1996 UN Memo (same). Taken together, these factors—particularly the fact that the Secretary either receives herself or conveys to the President all of the Fitness Council’s advice—suffice to make the Council a part of the Department of HHS for purposes of section 105, and thus to render appointments to it subject to section 3110.¹¹

Fellowships Commission. The Fellowships Commission is not one of the Executive Departments listed in section 101 and has no connection with any of those Departments. Accordingly, whether membership on the Commission constitutes a position “in [an] agency” turns on a distinct question—namely, whether the Commission is, or is part of, an “independent establishment” for purposes of section 105.

An “independent establishment” is defined as “an establishment in the executive branch (other than the United States Postal Service or the Postal Regulatory Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment.” 5 U.S.C. § 104(1) (2006). The executive order establishing the Commission does not specify its location, *see* Exec. Order No. 11183, and so we must look beyond the text of the order. We discern four realistic possibilities: either the Commission is in OPM, which “provid[es] the Commission with administrative services, staff support, and travel expenses,” *id.* § 4(b); it is within the White House Office; it is elsewhere in the Executive Office of the President (“EOP”); or it is a freestanding Executive Branch entity.

If the Commission were in OPM, then Commission memberships would be subject to section 3110, since OPM is an independent establishment, *see* 5 U.S.C. § 1101 (2006). Looking to the same factors that were relevant in assessing whether an entity is part of an Executive department, however, we are of the view that the Commission is not part of OPM. The OPM General Counsel’s Office has advised us orally that it agrees with this conclusion.

OPM provides the Commission with administrative support, but that relationship is not itself dispositive of the Commission’s status. We are mindful that, since title 5 “largely deals with personnel matters,” we have advised that if an Executive Branch entity has no connection with an Executive department for certain “essential aspects of personnel administration,” then

¹¹ This conclusion is consistent with those executive orders creating advisory committees similar to the Fitness Council in which the location of the committee is specified. *See* Exec. Order No. 13256, 67 Fed. Reg. 6,823 (Feb. 12, 2002) (locating President’s Board of Advisors on Historically Black Colleges and Universities within the Department of Education); Exec. Order No. 13270, 67 Fed. Reg. 45,288 (Jul. 3, 2002) (locating the President’s Board of Advisors on Tribal Colleges and Universities within the Department of Education).

“the compelling implication” is that the entity does not reside within that Executive department. 24 Op. O.L.C. at 62. But the converse of this proposition—that if an Executive department or independent establishment is responsible for an entity’s “essential aspects of personnel administration,” then the entity is necessarily part of that Executive department or independent establishment—is not necessarily true. Indeed, we are loath to treat the identity of the agency providing administrative services as dispositive of the location of the entity receiving the services when, as in this instance, the receiving entity is a FACA advisory committee. FACA permits the “establishing authority” to provide for a committee to receive “support services” from an entity other than the one that established the committee or receives advice from it. *See* 5 U.S.C. app. § 12(b) (2006); *see, e.g.*, Exec. Order No. 13498, § 2(a), (d)(5), 74 Fed. Reg. 6,533 (Feb. 5, 2009) (establishing President’s Advisory Council on Faith-Based and Neighborhood Partnerships within the Executive Office of the President (“EOP”), but specifying that the Department of HHS shall provide administrative support to and fund the Council).¹² It would give too much weight to the establishing authority’s discretionary choice of a particular entity to provide support services—possibly for budgetary or other practical reasons—to treat that choice as determinative of the location of the committee receiving the support.¹³

We therefore must consider the other indicia of the Commission’s form and function, all of which—by suggesting the Commission’s close connection to the President—militate against placing it within OPM. In particular, the Commission’s “basic function . . . is to provide recommendations” regarding prospective White House Fellows to the President, for his “ultimate decisions,” Fellowships Commission Letter at 2; *see* Exec. Order No. 11183, § 2—a process that does not involve OPM in any way. Moreover, the President—not OPM—selects the members of the Commission and its Chairman. The evolution over time of the Commission’s structure also supports treating it as separate from OPM. The original version of the executive order

¹² The discretion of the establishing authority under section 12(b) of FACA to choose which entity will supply support services to a committee applies equally with respect to presidential advisory committees. To be sure, section 12(b) provides that “[i]n the case of Presidential advisory committees, [support] services may be provided by the General Services Administration.” But any argument that this language implicitly “requires that administrative support [for a presidential advisory committee] come from either the appropriation for the Executive Office of the President or from the GSA, and not some other agency,” finds no support in Executive Branch practice or the legislative history of FACA, Memorandum for Files, from Thomas O. Sargentich, Office of Legal Counsel, *Re: Contemplated Executive Order to establish Presidential Advisory Committee on the Arts and Humanities* at 2 (May 28, 1981).

¹³ We advised in the IMF Memo that the offices of the U.S. representatives are “component part[s] of the IMF [and World Bank]” because those organizations fully fund the offices—including setting and paying the compensation of the representatives and their staffs and the offices’ operating expenses—and staff the offices with IMF and World Bank employees. 24 Op. O.L.C. at 66. We thus appeared to take the position that the offices of the U.S. representatives were components of the IMF and the World Bank at least in large part because those organizations were responsible for funding and staffing the offices. In rejecting the proposition that a federal government entity’s responsibility for providing administrative support and staff to a FACA advisory committee suffices to establish the committee’s location within that entity, we do not call the validity of this previous advice into question. We addressed in the IMF memo only whether an entity was within an international organization or the federal government. The standards for resolving this question may not necessarily be the same as those we have applied here in determining whether the Fitness Council and Fellowships Commission—entities that are unquestionably within the Executive Branch—are free-standing or components of an Executive department or independent establishment. Moreover, the offices of the U.S. representatives are not FACA advisory committees, and we have already explained why we are particularly reluctant to treat the identity of the entity providing administrative support to such a committee as dispositive of where the committee resides.

establishing the Commission, issued in 1964, provided that the “Civil Service Commission shall . . . assist in the conduct of the [Fellowships] Commission’s work.” Exec. Order No. 11183, § 4(b). The 1972 order amending that original order eliminated this requirement, *see* Exec. Order No. 11648, § 4, although it retained the requirement that the Civil Service Commission provide administrative services to the Fellowships Commission. Thus, in issuing the 1972 executive order, the President appears to have intended to limit the involvement in the Commission’s activities of the entity charged with providing it with administrative support. Considering all of the relevant factors, we conclude that the Commission is not part of OPM.

We also do not believe that the Commission is part of the White House Office. The executive order establishing the Commission does not place it within the White House Office, *cf.* Exec. Order No. 13283, § 1, 68 Fed. Reg. 3,371 (Jan. 21, 2003) (establishing Office of Global Communications within the White House Office); Exec. Order No. 13254, § 4, 67 Fed. Reg. 4,869 (Jan. 29, 2002) (establishing USA Freedom Corps Office as “a component of the White House Office”); Exec. Order No. 12537, § 1, 50 Fed. Reg. 45,083 (Oct. 28, 1985) (establishing President’s Foreign Intelligence Advisory Board within the White House Office), and no member of the President’s personal staff serves on the Commission, *cf.* Exec. Order No. 13503, § 5(b), 74 Fed. Reg. 8,139 (Feb. 19, 2009) (designating Deputy Assistant to the President and Director of Urban Affairs as head of the White House Office of Urban Affairs); Exec. Order No. 13199, § 4(b), 66 Fed. Reg. 8,499 (Jan. 29, 2001) (designating the Assistant to the President for Faith-Based and Community Initiatives as head of the White House Office of Faith-Based and Community Initiatives). In addition, the Plum Book lists the Commission among the “independent agencies and government corporations,” not as part of the White House Office (or the Executive Office of the President). Plum Book at 180; *cf.* 1996 UN Memo at 2 (looking to State Department organizational chart in determining location of U.S. Permanent Representative to the United Nations). We note, moreover, that OPM, not the White House Office, provides “the Commission with administrative services, staff support, and travel expenses,” Exec. Order No. 11183, § 4(b), and indeed the Commission has informed us that it receives no funding through the White House Office. *See* 24 Op. O.L.C. at 62-63 (noting that if Treasury Department does not employ or pay the salaries of the U.S. representatives, the “compelling implication is that [they] are not located in the Department”). Finally, based on our discussions with your Office, we are not aware of any other factors that would suffice to warrant treating the Commission as part of the White House Office under our precedents.

It is true that the White House website identifies the “White House Fellows” as within the White House Office, *see* <http://www.whitehouse.gov/administration/eop/>, but this may be a reference to the administrative location of the fellowship program itself, not to the location of the Commission. *See* Congressional Quarterly, Inc., Federal Staff Directory 12, 43-44 (56th ed. 2008) (separate entries for “White House Fellowships,” which is situated within the Office of the President, and the “President’s Commission on White House Fellowships,” which is situated outside the Office of the President as an agency of the EOP). In any event, as we have noted, the other available evidence points away from the Commission’s location within the White House Office.

Having determined that the Commission is part of neither OPM nor the White House Office, the remaining alternatives are either that it resides elsewhere in the EOP or that it constitutes a free-standing entity within the Executive Branch. There is some support for

locating the Commission, which is charged solely with advising the President, in the EOP, since we have in the past advised that entities of this type reside in the EOP. *See* Memorandum for Files, from Paul P. Colborn, Special Counsel, *Re: Records of the Information Coordination Center* at 2 (Nov. 14, 2000) (“As with other presidential boards and commissions, the [President’s Council on Year 2000 Conversions] resided in the Executive Office of the President.”). However, in light of our conclusion below that the Commission amounts to an “establishment,” *see infra* pp. 15-18, we need not resolve this question definitively. Regardless whether the Commission is part of the EOP or free-standing, the Commission’s status as an establishment means that membership on the Commission constitutes a position *in* an independent establishment for purposes of section 105—and thus “in [an] agency” for purposes of section 3110.

Three separate possible lines of analysis lead to this same conclusion. If the Commission is a free-standing establishment, then it would qualify as an independent establishment, and its members would hold positions in an independent establishment. If the Commission is in the EOP, then there are two further possibilities, depending on whether EOP itself is an independent establishment, but both lead to the conclusion that so long as the Commission amounts to an establishment, its members occupy positions in an independent establishment and thus in an agency under section 3110. If the EOP itself is an independent establishment, as we have suggested at times in the past,¹⁴ then Commission memberships would constitute positions in that independent establishment. If the EOP is not an independent establishment—the view that we have espoused more recently¹⁵—then, so long as the Commission constitutes an “establishment,” its members would hold positions in an independent establishment, since the Commission would be independent in the sense of not being part of any department or independent establishment.

We turn, then, to the ultimate question of whether the Commission constitutes an “establishment,” as that term is used in sections 104 and 105. Although the question is not entirely free of doubt, we conclude that it does.

This Office has consistently read the statutory term “establishment” as having “broad” application. 24 Op. O.L.C. at 65. We have sometimes suggested that the term is a catch-all for “essentially any . . . organization in the Executive Branch” that is not an Executive department or a Government corporation. *Applicability of the Hatch Act to the Chairman of the Native Hawaiians Study Commission*, 6 Op. O.L.C. 292, 293 (1982). Thus, we have characterized it as intended to sweep in “all agencies and instrumentalities in the Executive Branch.” Memorandum for Charles H. Atherton, Secretary, Commission of Fine Arts, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of Exec. Order 11988 Concerning Floodplain Management to the Commission of Fine Arts* at 4 (June 7, 1984) (“1984 Fine Arts Memo”). That approach is consistent with the most basic definition of “establishment”: “[t]hat which is established.” Webster’s New International Dictionary at 874.

¹⁴ *See* Memorandum for Bernard Nussbaum, Counsel to the President, from Daniel L. Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Use of GSA Authority to Accept Gift of Equipment* at 5 (Aug. 3, 1993) (“the ordinary meaning of . . . ‘independent establishment in the executive branch’” as used in 40 U.S.C. § 472(a) “would seem to” encompass the EOP and some of its “principal components”); 3/15/77 Kneeder Memo at 4.

¹⁵ *See* Memorandum for Files, from Daniel Koffsky, Special Counsel, *Re: OSTP* (Apr. 23, 1998); Memorandum to Files, from Daniel Koffsky, Special Counsel at 2-3 (Jan. 9, 1998).

More recently, we have indicated that section 104(1)'s use of the term "establishment" is not quite all-encompassing, but rather should include only entities with "[their] own structure and unity." 24 Op. O.L.C. at 65; *cf. id.* at 60 ("The use of the phrase 'of an Executive agency' imposes a meaningful limitation on the scope of the [Federal Vacancies Reform Act]."); Memorandum for Bernard Nussbaum, Counsel to the President, from Daniel L. Koffsky, Acting Assistant Attorney General, *Re: Use of GSA Authority to Accept Gift of Equipment* at 5 (Aug. 3, 1993 (not clear "whether more ad hoc and less formal entities under the EOP would meet this definition"). This approach is consistent with that of the U.S. Court of Appeals for the District of Columbia Circuit in addressing the meaning of "establishment" as used in FOIA's somewhat different definition of "agency." *See Meyer v. Bush*, 981 F.2d 1288, 1296 (D.C. Cir. 1993) ("FOIA, by declaring that only 'establishments in the executive branch' are covered, 5 U.S.C. § 552(e), requires a definite structure for agency status."); *Armstrong v. EOP*, 90 F.3d 553, 558 (D.C. Cir. 1996) ("a definite structure may be a prerequisite to qualify as an 'establishment within the executive branch'"); *see also* Memorandum for J. Michael Farren, Deputy Counsel to the President, from Steven A. Engel, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Whether the Office of Administration Within the Executive Office of the President Is an "Agency" for Purposes of the Freedom of Information Act* at 2-3 (Aug. 21, 2007).

The legislative history of section 104, which was added to the U.S. Code as part of the codification of title 5, *see* Pub. L. No. 89-554, 80 Stat. 378, 379 (1966), does not shed much light on the question. But the amendment history of section 3110 suggests that Congress intended section 3110 to bar appointments to a broad range of Executive Branch entities. Introduced in the House as a floor amendment to extensive legislation for the revision of postal rates and salaries, *see* Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, § 221, 81 Stat. 613, 640, section 3110 as adopted by the House prohibited the appointment of relatives to positions in the appointing official's "Department," meaning "each department, agency, establishment, or *other organization unit in or under the . . . executive branch.*" 113 Cong. Rec. 28,658 (1967) (emphasis added). When the bill was reported out of Senate committee, that definition had been replaced with the current language referencing the official's "agency," defined to incorporate the title 5 definition of "Executive agency." The rationale for the change is unclear—the legislative history suggests it was intended to allay concerns that the original definition of "Department" included military as well as civilian entities, *see* Section 3110 Hearings at 363; *see also* 5 U.S.C. § 104 (excluding "military department" from definition of "independent establishment")—but there is no indication that the purpose of the shift from "Department" to "Executive agency" was to limit the application of the prohibition to a smaller subset of civilian Executive Branch entities.

In accord with our broad reading of "establishment," we have repeatedly advised that particular advisory committees constitute establishments for purposes of sections 104 and 105 of title 5.¹⁶ For example, in concluding that section 3110 would bar President Carter's appointment of the First Lady as Chairperson of the Mental Health Commission, which was a federal advisory committee, *see* Exec. Order No. 11973, 42 Fed. Reg. 10,677 (Feb. 17, 1977), we observed that

¹⁶ We have observed generally that "[a]n entity in the Executive Branch may be both an advisory committee within the meaning of FACA and an executive agency within the meaning of 5 U.S.C. § 105." 1984 Fine Arts Memo at 5 n.4.

“[t]he comprehensive term ‘establishment’ would clearly cover the [Commission].” Mental Health Commission Memo; *see also* CPSI Memo (stating that the reasons for deeming the Mental Health Commission an establishment would apply equally to the CPSI). We also have concluded that another FACA advisory committee, the Commission of Fine Arts (“Fine Arts Commission”), is an establishment for purposes of section 104,¹⁷ and we have suggested that the Advisory Board for Cuba Broadcasting “probably qualifies” as one as well, Memorandum for Files, from Daniel Koffsky, Special Counsel at 2-3 (Jan. 9, 1998). *See also* 6 Op. O.L.C. at 293-95 (concluding that the Hatch Act, 5 U.S.C. § 7324 (1976), which applies to “[a]n employee in an Executive agency” as defined in section 105, applies to Native Hawaiians Study Commission).

In addressing the status of the Fine Arts Commission, we saw “no question” that the Commission—regardless of whether it was engaged in its “advisory function” or making “substantive, binding decision[s]”—“is performing functions constitutionally committed to the Executive Branch and, as such, is an executive agency within the meaning of [section] 105.” 1984 Fine Arts Memo at 5; *cf.* Memorandum for Charles H. Atherton, Secretary, Commission of Fine Arts, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of Executive Order 11988, entitled “Floodplain Management,” to the Commission of Fine Arts* at 2-3 (Nov. 14, 1980) (“1980 Fine Arts Memo”) (describing Commission’s functions as purely advisory and concluding that Commission is an establishment because it is congressionally created, composed of presidential appointees, and entirely financed by the federal government).

Assuming an entity must have some degree of ongoing structure and unity to qualify as an independent establishment within the meaning of section 105, we believe the Fellowships Commission meets the test. The Fellowships Commission has a structure—a formal membership comprising special government employees—and is unified—in its ability to deliberate and make decisions as a body. *See* Mental Health Commission Memo (identifying fact that President’s Commission on Mental Health is “comprised of persons who will be regarded as government employees” as among reasons that it is “clearly” an establishment) (citing Exec. Order No. 11973, §§ 4, 7). To be sure, the Commission has a fairly skeletal organization; functions as a body only on a small number of occasions per year; and possesses relatively limited powers, even as compared to some of the other advisory committees that we have deemed independent establishments. *Cf.* 1984 Fine Arts Memo at 5 (observing that Fine Arts Commission is established by statute and exercises “both advisory and substantive responsibilities”); Mental Health Commission Memo (observing that President’s Commission on Mental Health is “authorized, through its Chairman, to conduct hearings and procure independent services pursuant to 5 U.S.C. § 3109”) (citing Exec. Order No. 11973, § 7); Exec. Order No. 11973, § 7 (providing for compensation of members of Commission on Mental Health). Moreover, the Commission is a creature of executive order, and thus subject to abolition at the President’s discretion, unlike a number of the statutorily created advisory bodies that we have deemed establishments. *See, e.g.,* 40 U.S.C. § 9101 (2006) (establishing the Fine

¹⁷ *See* 1984 Fine Arts Memo at 5 & n.4; *see also* Memorandum for Charles H. Atherton, Secretary, Commission of Fine Arts, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of Executive Order 11988, entitled “Floodplain Management,” to the Commission of Fine Arts* at 2-3 (Nov. 14, 1980) (same); Letter for Charles H. Atherton, Secretary, Commission of Fine Arts, from Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel at 2 (May 20, 1985) (same).

Arts Commission); 22 U.S.C. § 1465c (2006) (establishing the Advisory Board for Cuba Broadcasting); Pub. L. No. 96-565, title III, §§ 301-307, 94 Stat. 3321, 3324-3327 (1980) (establishing the Native Hawaiians Study Commission). Nonetheless, in the context of the present inquiry, we do not think that these differences suffice to distinguish the Fellowships Commission from these other advisory committees, such that the Commission should not be considered an “establishment.” In reaching this conclusion, we give particular weight to the fact that the Commission was established during the Johnson Administration, and thus is now in its fifth decade of continuous operation. Accordingly, it cannot be disputed that, in a most basic sense, the Commission constitutes an established entity with its own structure, practices, and history. *Cf. Armstrong*, 90 F.3d at 560 (contrasting entity possessing sufficient structure to qualify as FOIA agency with “an amorphous assembly from which ad hoc task groups are convened periodically by the President”); *Meyer*, 981 F.2d at 1296 (“The President does not create an ‘establishment’ subject to FOIA every time he convenes a group of senior staff or departmental heads to work on a problem.”).

We are aware of two judicial decisions that either hold or suggest that particular free-standing Executive Branch entities that are not Executive departments or Government corporations are not independent establishments. *See Haddon v. Walters*, 43 F.3d 1488 (D.C. Cir. 1995); *AAPS*, 997 F.2d at 905. Neither of these opinions affects our conclusion here.

In *Haddon*, the D.C. Circuit held that section 2000e-16 of title 42, which prohibits certain discrimination in connection with “personnel actions affecting employees or applicants . . . in executive agencies as defined in [5 U.S.C. § 105],” did not apply to a personnel action affecting an employee of the Executive Residence. *Id.* at 1489. The court relied on two statutory rationales. First, the court construed 3 U.S.C. § 112 (2006)—which authorizes details from “any department, agency, or independent establishment of the executive branch” to a number of entities in the EOP, including the Executive Residence—as “suggest[ing] that Congress does not regard” the Residence to be an independent establishment. *Haddon*, 43 F.3d at 1490. Second, the court deemed it significant that section 2000e-16 incorporated *title 5*’s definition of Executive agency, since title 3 of the United States Code contains a provision that authorizes the President to appoint and fix the pay of the employees of the Executive Residence “without regard to any other provision of law regulating the employment or compensation of persons in the Government service,” 3 U.S.C. § 105(b) (2006). *See Haddon*, 43 F.3d at 1490.

Even assuming that the *Haddon* court’s reasoning is sound, neither of these rationales has any bearing on whether the Fellowships Commission qualifies as an “establishment.” The only entities that are grouped with the Executive Residence as possible recipients of details from independent establishments under 3 U.S.C. § 112—and thus, in the court’s view, distinct from those independent establishments—are the White House Office, the Office of the Vice President, the Domestic Policy Staff, and the Office of Administration. These are the same entities with respect to which title 3 grants the President special authority to appoint and fix the pay of employees without regard to other provisions of law regulating the employment or compensation of government workers, *see* 3 U.S.C. §§ 105, 106, 107 (2006)—the same special authority that the *Haddon* court deemed significant in concluding that the Executive Residence was not an independent establishment. Even if the *Haddon* court is correct that Congress wished to thus signify that the named entities are not independent establishments for purposes of section 105 of title 5, Congress expressed no such intent to similarly demarcate presidential advisory

committees not in the White House Office, such as the Fellowships Commission, which are mentioned in neither 3 U.S.C. § 112 nor in any special grant of appointment authority under title 3. Congress may well have concluded that the President's need to be free of title 5's strictures in appointing and paying the employees of the named entities did not extend to such advisory committees to the same extent.

The *AAPS* court's views are more on point, but we find the court's brief discussion unpersuasive. The court expressed "doubt that Congress intended" section 3110 to apply to appointments to "the White House or the Executive Office of the President," although the court did not need to, and did not purport to, resolve that question definitively. 997 F.2d at 905; *see also id.* (speculating that the President might be "barred from appointing his brother as Attorney General, but perhaps not as a White House special assistant"). The only support the *AAPS* court advanced for its tentative view were citations to *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Meyer*, 981 F.2d 1288; and *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991). These decisions do not support changing our conclusion that the Commission is an "establishment" for purposes of section 105. *Cf. AAPS*, 997 F.2d at 921 (Buckley, J., concurring) ("Viewed purely as a matter of congressional intent, the [majority's] argument that the Anti-Nepotism Act applies only to the Departments and not to the White House . . . is a weak one.").

In *Meyer*, the court held that the President's Task Force on Regulatory Relief—an entity within the EOP—was not an "agency" subject to FOIA, 5 U.S.C. § 552(1), because it was not a body with "substantial independent authority" to direct Executive Branch officials. 981 F.2d at 1297; *see also Citizens for Responsibility and Ethics in Washington v. Office of Administration*, 566 F.3d 219, 224 (D.C. Cir. 2009); *cf. Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971) (stating that if EOP entity's "sole function were to advise and assist the President, that might be taken as an indication that the [entity] is part of the President's staff and not a separate agency" for purposes of the Administrative Procedure Act, 5 U.S.C. § 551(1) (Supp. V 1970), which at the time defined an agency as any "authority of the Government of the United States"). That holding is not of direct relevance here. It may be the case that the Fellowships Commission, which is charged solely with advising the President, would not qualify as an "agency" for FOIA purposes. *But see* Letter for the Honorable Abner J. Mikva, Counsel to the President, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel at 1 (Mar. 10, 1995) (noting that "[t]he Commission considers itself an agency subject to the Privacy Act," which incorporates the FOIA definition of "agency," *see* 5 U.S.C. § 552a(a)(1) (2006)). But we need not resolve that question for present purposes, since the Commission's status under FOIA is not dispositive of whether it is an Executive agency within the meaning of section 105. FOIA's legislative history is "unambiguous" that "'the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President' are not included within the term 'agency.'" *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (quoting H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. 15 (1974)); *see also Meyer*, 981 F.2d at 1291-92. At least when it comes to such entities within the EOP—and analogous entities outside the EOP that are "responsible directly to the President and assist[] him by performing whatever duties he may prescribe," *Sweetland v. Walters*, 60 F.3d 852, 854 (D.C. Cir. 1995)—the definition of an "agency" for FOIA purposes is plainly more restrictive than the section 105 definition of Executive agency. *See Armstrong*, 90 F.3d at 558 ("not every [Executive Branch] establishment is an agency under the FOIA"). As suggested previously, *see supra* p. 16, there is no legislative history for sections 104, 105, or 3110 that is comparable to

FOIA’s legislative history, and thus there is no support for construing their ambit to be similarly limited.

In *Franklin*, which the AAPS court also cited, the Supreme Court—“[o]ut of respect for the separation of powers and the unique constitutional position of the President”—declined to subject the President to the Administrative Procedure Act (“APA”) absent “an express statement by Congress,” 505 U.S. at 800-01. *See also Armstrong*, 924 F.2d at 289 (relying on clear statement rule in concluding that APA does not apply to the President). We have previously invoked this clear statement rule where “application [of a statute to the President] would involve a possible conflict with the President’s constitutional prerogatives,” *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350, 351 (1995); but the rule does not affect our construction of section 104, section 105, or section 3110 as applied to the Fellowships Commission. Congress defined “public official” in section 3110 expressly to include the President. 5 U.S.C. § 3110(a)(2). And although the definitions of “agency” in section 3110, “Executive agency” in section 105, and “independent establishment” in section 104 do not expressly include entities charged solely with advising the President, for the reasons discussed previously we do not think that the application of the prohibition to bar presidential appointments to such entities raises significant constitutional concerns. *See supra* pp. 8-9; *see also* 19 Op. O.L.C. at 357 n.11 (“The clear statement principle . . . does not apply with respect to a statute that raises no separation of powers questions were it to be applied to the President.”).

Accordingly, we conclude that the Fellowships Commission is an independent establishment and therefore is subject to the bar imposed by section 3110.¹⁸

Please let us know if we may be of further assistance.



David J. Barron
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¹⁸ We have previously advised that section 3110 would not bar the President from appointing a relative to an “honorary” position relating to an Executive Branch entity, so long as the appointee remains “sufficiently removed” from the entity’s “official functions.” Mental Health Commission Memo at 1; *see also* 2/17/77 Kneedler Memo at 7 (honorary appointee could attend entity’s meetings or hearings, submit ideas for the entity’s consideration, and offer and solicit support for the entity’s work). We have not independently examined this question, and express no view on the status of “honorary” appointments under section 3110. Even if they are permissible in cases where an appointment otherwise would be prohibited, the involvement of a nonemployee with the work of an advisory committee would potentially raise independent legal questions, requiring careful consideration, relating to the application of other laws, including FACA, FOIA, and the conflict of interest laws.