




Office of the
Assistant Attorney General

Washington, D.C. 20530

January 13, 1994

**MEMORANDUM FOR NEIL EGGLESTON,
ASSOCIATE COUNSEL TO THE PRESIDENT**

From: Walter Dellinger 
Assistant Attorney General

Re: Appointment of an Acting Staff Director of the United States Commission on Civil Rights

You have asked whether the Commission on Civil Rights had the authority to appoint Bobby D. Doctor as its Acting Staff Director. This appointment was made in response to ~~the~~ and in order to override the President's prior appointment of Stuart Ishimaru as Acting Staff Director. We must answer two questions before offering a conclusion. First, we must determine whether the President possesses authority to appoint an Acting Staff Director. Second, we must consider whether, if the President has such authority, the Commission may supersede its exercise. We consider these questions in turn and conclude that the Constitution vests the President with authority to appoint an Acting Staff Director for the Commission on Civil Rights and that the Commission has no authority to override the President's appointment.

I

The Commission on Civil Rights ("Commission") was established to study and make recommendations regarding the nation's civil rights laws. The Commission is also authorized to conduct investigatory hearings into alleged deprivations of voting rights and to issue reports as to its findings. 42 U.S.C. § 1975c. The Commission comprises eight commissioners, four appointed by the President alone and four appointed by Congress. Id. § 1975(b). The President holds the power to appoint the Staff Director, with the concurrence of a majority of the commissioners. Id. § 1975d(a)(1).

Since at least January 21, 1993, the Commission has had no Staff Director appointed pursuant to § 1975(a)(1). On December 2, 1993, President Clinton appointed Stuart Ishimaru to be the Commission's Acting Staff Director. Apparently viewing the President to

be without authority to make this appointment,¹ the Commission met the following day and voted to name Bobby Doctor Acting Staff Director.²

II

The Department of Justice has long taken the position that the President possesses authority to make appointments in order to "keep[] the Government running." 2 Op. O.L.C. 405, 409-10 (1978); 39 Op. Att'y Gen. 343, 347 (1939)("The Executive has powers not enumerated in the statutes--powers derived not from statutory grants but from the Constitution. . . . These constitutional powers have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances."); 25 Op. Att'y Gen. 258, 261 (1904)(opining that the President has a "fundamental right as Chief Executive to make such a temporary appointment, designation, or assignment of one officer to perform the duties of another whenever the administration of the Government requires it . . . [and] the executive department of the Government ha[s] authority to appoint officers and agents to carry into effect a law or resolution of Congress"); 6 Op. Att'y Gen. 357, 365 (1854)(the President "is limited in the exercise of his powers by the Constitution and the laws: but it does not follow that he must show a statutable provision for everything he does. The Government could not be administered upon such a contracted principle."); 4 Op. Att'y Gen. 248, 248 (1843)("opini[ng] . . . that [the President] ha[s] the power to appoint an agent or commissioner"). This authority derives from the President's obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3; see 4 Op. Att'y Gen. at 248. Although this view of the President's authority has never been expressly affirmed in court, it has never been rejected. Moreover, the United States Court

¹ See Commission Meeting Continued from Monday, November 29, 1993, at 68-69 (Dec. 3, 1993)(statement of Commissioner Fletcher).

² Bobby Doctor was named Acting Staff Director on January 21, 1993 by outgoing Staff Director Wilfredo J. Gonzalez. See Memorandum of Lawrence B. Glick for the Commissioners of the United States Commission on Civil Rights re: Staff Changes (Nov. 29, 1993). We express no opinion here as to whether this action was valid. Assuming arguendo that it was, Mr. Doctor was validly removed from the position of Acting Staff Director on December 2, 1993. As discussed infra, the President has authority to appoint an Acting Staff Director. Since the power of removal attends the power of appointment, absent a clear provision to the contrary, the President has authority to remove an Acting Staff Director. See, e.g., Myers v. United States, 272 U.S. 52, 110 (1926); Keim v. United States, 177 U.S. 290, 293 (1900); Ex parte Hennen, 38 U.S. (13 Pet.) 230, 259 (1839). Removal is effected when the President appoints a replacement. See Quackenbush v. United States, 177 U.S. 20, 25 (1900). Therefore, Mr. Doctor was removed from the position of Acting Staff Director upon the appointment of Stuart Ishimaru to that position, and we need not reach the question of whether his initial appointment was valid. Because we do not reach this question, we do not address such issues as whether, in the absence of Presidential action, any other actor, such as the Commission, the Chairperson, or an outgoing Staff Director, may appoint an Acting Staff Director, whether the President may delegate the authority to appoint an Acting Staff Director, or whether the de facto officer doctrine would apply to actions taken by an improperly appointed Acting Staff Director.

of Appeals for the District of Columbia Circuit has indicated that this assessment is plausible. See Williams v. Phillips, 482 F.2d 669, 670-71 (D.C. Cir. 1973)(per curiam).³

The President's take care authority to make temporary appointments rests in the twilight area where the President may act so long as Congress is silent, but may not act in the face of congressional prohibition. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952)(Jackson, J., concurring). Thus, the Vacancies Act, 5 U.S.C. §§ 3345-3348, constitutes a restriction on the President's authority, as opposed to a source of power. If it applies to a given position, the Vacancies Act constitutes the sole means by which a temporary appointment to that position may be made.⁴ The Vacancies Act, however, does not apply to the Staff Director for the Commission on Civil Rights. The Vacancies Act only applies to temporary appointments "[w]hen an officer . . . resigns." 5 U.S.C. § 3346

³ The President's authority to make temporary appointments also finds support in the decisions of the Supreme Court of the United States. See, e.g., Myers v. United States, 272 U.S. 52, 117 (1926)("As [the President] is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws.").

Historical practice also is consistent with this view of presidential authority. For example, from 1798, when the Department of the Navy was established, until 1863, there was no statute authorizing the appointment of an acting Secretary of the Navy in the event of the Secretary's death, resignation, illness, or absence. Nevertheless, there were at least six occasions on which the President appointed without the advice and consent of the Senate an Acting Secretary. Biographical Directory of the American Congress 1774-1961, at 14-18 (1971).

⁴ The Department has issued opinions holding that the Vacancies Act, 5 U.S.C. §§ 3345-3348, does not cover particular temporary appointments on the grounds that the vacancy at issue did not arise in a manner specified in the Vacancies Act. See 28 Op. Att'y Gen. 486 (1910); 27 Op. Att'y Gen. 337, 345-46 (1909). In at least one such opinion, Attorney General George Wickersham drew from the inapplicability of the Vacancies Act the conclusion that the President was without authority to make the contemplated temporary appointment. 27 Op. Att'y Gen. at 345-46.

Without necessarily endorsing Attorney General Wickersham's conclusion, we note that his opinion is not inconsistent with the President having authority under the take care clause to make temporary appointments. See 2 Op. O.L.C. at 409-10 (opining that President, under some circumstances, has authority to make temporary appointments other than by statutorily prescribed method). First, the question of the President's general constitutional authority to make appointments was never raised. Second, the opinion means only that where Congress has provided a means for making a temporary appointment to a given office, the President is constrained to follow it and if the mechanism fails to allow a position to be filled under a given set of circumstances the position must remain vacant until a permanent appointment has been concluded. Id.; see also Olympic Fed. Sav. & Loan v. Office of Thrift Supervision, 732 F. Supp. 1183, 1200 (D.D.C. 1990)("The Vacancies Act does generally apply to vacancies in OTS. Where Congress has delegated to the President limited power to fill the kind of vacancy at issue, and where that power was not sufficient to permit the attempted designation, the Court should not broaden Congress' delegation by invoking an undefined and generally unrecognized Presidential power."). We need not determine whether these authorities are persuasive since, as will be shown, the Vacancies Act applies neither to the position of staff director nor to the Commission as a whole.

(emphasis added). Since the Staff Director for the Commission on Civil Rights is not a constitutional officer, the Vacancies Act does not apply. See Olympic Fed. Sav. & Loan Assn. v. Office of Thrift Supervision, 732 F. Supp. 1183, 1195 (D.D.C.), appeal dismissed and remanded, 903 F.2d 837 (D.C.Cir 1990). Indeed, since there are no, and can be no, constitutional officers on or employed by the Commission, the Vacancies Act does not apply to the Commission at all.⁵

The question then is whether Congress has somehow divested the President of his authority under the take care clause to appoint an Acting Staff Director and vested that authority instead in the Commissioners. To the contrary, the statute establishing the Commission in its current form unequivocally grants the President the power to appoint the Commission's Staff Director. 42 U.S.C. § 1975d(a)(1). The statutory scheme withholds from the Commissioners any authority, other than concurrence, with respect to appointment of the Staff Director. The provisions for hiring the Commission's staff are found at 42 U.S.C. § 1975d(a)(1)-(3). Paragraph (a)(1) reserves to the President the power, subject to the concurrence of the Commissioners, to appoint a Staff Director. Paragraph (a)(2) provides for the continued employment of employees of the Commission's predecessor. Paragraph (a)(3) authorizes the Commissioners to "appoint such other personnel as it deems advisable." Id. § 1975d(a)(3)(emphasis added). The statute by its express terms grants the Commission authority only to hire personnel other than the Staff Director, reserving that power to the President.

This reading of the Commission's statutory charter gains further support from the uniqueness of the provision for appointing the Staff Director. For other independently established commissions that have a statutorily authorized Staff Director or its equivalent,⁶

⁵ See Statement on Signing H.R. 2230 into Law, 19 Weekly Comp. Pres. Doc. 1626-27 (Nov. 30, 1983)(statement by the Department of Justice). All federal officers, that is anyone who holds a position with significant authority and continuing duration, duties, and emoluments, must be appointed conformably to the Appointments Clause, U.S. Const. art. 2, § 2, cl. 2. See Buckley v. Valeo, 424 U.S. 1, 124-26 (1976); United States v. Germaine, 99 U.S. 508, 511-12 (1878). The Commission possesses no authority, it is authorized only to conduct investigatory hearings and to appraise, study, and collect information relating to federal civil rights laws and policies. 42 U.S.C. § 1975c. See Hannah v. Larche, 363 U.S. 420, 441 (1960). Because this does not constitute significant authority for Appointments Clause purposes, members as well as employees of the Commission are not officers within the meaning of that clause. 19 Weekly Comp. Pres. Doc. at 1626-27. Moreover, since four members of the Commission and the staff director are appointed in a manner not specified in the Appointments Clause, the Commission as currently configured is constitutionally prohibited from exercising significant authority.

⁶ The Commission on Civil Rights is an independent establishment in that it is not established within an executive department or agency. The act that created the Commission on Civil Rights expressly provided that it was "created in the executive branch of the Government." 42 U.S.C. § 1975(a)(1982). When the commission was reauthorized in 1983, Congress wholly revised its structure, providing inter alia that commissioners could be removed only for cause and omitting any reference to the branch in which the Commission is created. 42 U.S.C. § 1975. We have treated these amendments as rendering the Commission an independent agency. See Statement on Signing H.R. 2230 into Law, 19 Weekly Comp. Pres. Doc. 1626-27 (Nov. 30, 1983)(statement by

authority to make the appointment is not vested in the President.⁷ Thus, it might be inferred that Congress intended to withhold any appointing authority with respect to the Staff Director position from the Commission. At the very least, the uniqueness of this provision is consistent with this position. Moreover, it cannot be contended that appointing authority with respect to the Staff Director was withheld through inadvertence. Had Congress intended to extend this authority to the Commissioners, Congress plainly knew how to do so.

Upon similar analysis, we opined that the President has undisplaced authority to appoint an acting Chairman of the Board of Governors of the Federal Reserve System. In that case, the incumbent Chairman's term was set to expire imminently and we were asked to determine where the authority to appoint an acting chairman, in the event a successor had not been timely confirmed, resided. We opined that the Board of Governors did not have authority to designate one of its members as acting chairman on the grounds that, where Congress thought it necessary for an independently established commission to itself appoint a

the Department of Justice). Assuming arguendo that the Commission is properly viewed as an independent agency, this has no effect on our conclusion, as the President's authority to make temporary appointments extends equally to such entities. See, e.g., 2 Op. O.L.C. 394, 396 (1978).

Similarly, the fact that the Staff Director is not an officer within the meaning of the appointments clause, U.S. Const. art. II, § 2, cl. 2, does not deprive the President of the power to appoint an Acting Staff Director. The President's authority derives from his obligation to take care that the laws be faithfully executed. Although the Staff Director, like the Commission as a whole and the individual commissioners, does not exercise significant authority within the meaning of Buckley v. Valeo, 424 U.S. 1, 126 (1976), the Commission and its Staff Director do perform a significant governmental function. The Commission's investigations, studies, and reports are important aids to the President in enforcing the civil rights laws of the United States and therefore in taking care that the laws are faithfully executed. As a result, the President's general constitutional authority to make temporary appointments encompasses the position of Staff Director for the Commission on Civil Rights.

⁷ For example, the Staff Director, or equivalent functionary, is appointed by the Chairperson of the Equal Employment Opportunity Commission, 42 U.S.C. § 2000e-4(a), the International Trade Commission, 19 U.S.C. § 1331(a)(1)(A), the Interstate Commerce Commission, 49 U.S.C. § 10303, the Federal Energy Regulatory Commission, 42 U.S.C. § 7171(c),(e) (the chair is the administrative officer and is given express statutory authority to designate an acting chair), the Commission on Veterans' Education Policy, 38 U.S.C. § 1792 note, the Consumer Product Safety Commission, 15 U.S.C. § 2053(g)(1), the Federal Communications Commission, 47 U.S.C. § 155(f), and the National Commission on Acquired Immune Deficiency Syndrome, 42 U.S.C. § 300cc note. Appointment is vested in the commission as a whole for the Federal Election Commission, 2 U.S.C. § 437c(f)(1), the Federal Trade Commission, 15 U.S.C. § 42, the Commission on Education of the Deaf, 20 U.S.C. § 4343(a)(1), and the National Capital Planning Commission, 40 U.S.C. § 71a(c).

The statute authorizing the Consumer Product Safety Commission is particularly instructive. It provides that "The appointment of any officer (other than a Commissioner) or employee of the Commission shall not be subject, directly or indirectly, to review or approval by any officer or entity within the Executive Office of the President." 15 U.S.C. § 2053(g)(4). Had Congress intended to withhold from the President the authority to appoint an Acting Staff Director, it could easily have adapted the above language to this purpose.

temporary chairperson, Congress had expressly devolved this power on the Commission. See, e.g., 47 U.S.C. § 155(a)(acting chairperson of the Federal Communications Commission to be appointed by the Commission). Because "Congress ha[d] not limited the President's authority with regard to the Federal Reserve Board . . . [and] ha[d not] otherwise clearly specified the procedure to be used in handling a vacancy in the chairmanship," we concluded that the President retained authority to name an acting chair. See 2 Op. O.L.C. at 396. As to the Commission on Civil Rights, Congress similarly has not limited the President's authority to appoint a Staff Director and has not provided for alternative means of filling a vacancy in that position.⁸

III

Having determined that the President has authority to appoint an Acting Staff Director and that Congress has not acted to limit this power, the second question, whether the Commission may override the President's exercise of this appointment power, is readily dispatched. The only possible basis for finding such a power in the Commission is the statutory requirement that the Commission concur in the appointment of a permanent, or non-acting, Staff Director. However, a requirement that an appointee be confirmed by the Senate does not prohibit the President from acting alone in making a temporary appointment. See, e.g., 2 Op. O.L.C. at 409 ("we do not believe that . . . vacancies may not be filled at all on a temporary basis, if no advice and consent officers are available"). We see no reason to view the Commission's concurrence differently.⁹

⁸ Our conclusion comports with the only two legal analyses of this question that, to date, have been undertaken. See Telephonic Special Open Commission Meeting 33 (Nov. 29, 1993)(statement of Lawrence Glick); Congressional Research Service, American Law Division, Presidential Authority to Fill a Vacancy in the Office of Staff Director of the Civil Rights Commission (June 1993).

⁹ This applies as well to the final alternative contained in the Commission's motion, "to vest in Mr. Doctor the authority of the Staff Director." Commission Meeting Continued from Monday, November 29, 1993, at 66 (Dec. 3, 1993). This provision, particularly read in context with the remainder of the motion, is plainly an attempt to appoint Mr. Doctor Acting Staff Director. As discussed in section II of this memorandum, Congress expressly provided for the position of Staff Director and vested appointing authority in the President. Congress did give the Commissioners authority "to make such rules and regulations as are necessary to carry out the purposes of this chapter," and this may include at least some power to define the duties of the Staff Director. (In this regard, there is no distinction between the Commission's authority vis-a-vis a Staff Director as opposed to an Acting Staff Director.) However, even legitimate power is subject to abuse, and the courts will not permit legitimate authority to be used to achieve a prohibited end. See, e.g., United States v. Bisceglia, 420 U.S. 141, 146 (1975); Kilbourn v. Thompson, 103 U.S. 168, 198-99 (1880). As demonstrated in section II, the authority to appoint a Staff Director is withheld from the Commission. Thus, whatever the Commission's authority to define the role and functions of the Staff Director, it may not deploy this power to usurp the President's authority to appoint a Staff Director or an Acting Staff director. Cf. Springer v. Government of the Philippine Islands, 277 U.S. 189, 202 (1928)("the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection").

IV

Based on the foregoing analysis, we believe the President possessed authority to appoint Stuart Ishimaru Acting Staff Director for the Commission on Civil Rights and that the Commission's attempt to override the President's appointment and to appoint another individual to the position of Acting Staff Director was without legal authority and is, therefore, void.