30 Box 4 - JGR/Appointments Clause (1) - Roberts, John G.: Files
SERIES I: Subject File
Mr. BAKER. Mr. President, I move to reconsider the vote by which the resolution was agreed to.

Mr. THURMOND. I move to lay the motion to lay the table.
CONGRESSIONAL RECORD - SENATE

February 1, 1934

S 663

events, places, documents, artifacts, and personal
local libraries or museums or be otherwise	
disposed of by the Commission after consul-
tation with the Librarian of Congress, the
Secretary of the Smithsonian Institution,
the Archivist of the United States, or the
Administrator of General Services, as the
case may be.

COORDINATION OF EFFORTS

Sec. 6. (a) In carrying out the purposes of this
Act, the Commission shall consult, co-
operate with, and seek advice from appro-
priate Federal departments and agen-
ties, State and local public bodies, for-
egnernational, regional, and local societies,
historical, patriotic, philanthropic, pro-

essional, and related organizations. Such
Federal departments and agencies are au-
thorized and directed to cooperate with the
Commission in planning, coordinating, and
directing appropriate cooperative activities.

(b) The Secretary of State shall undertake
a study of appropriate cooperative arrange-
ments that might be taken with foreign govern-
ments to preserve and develop historic sites
related to the voyages of discovery of Chris-
topher Columbus, at such time and in such
manner as will ensure that fitting observ-
ances and exhibits may be held at such each site
during the commemoration. The Secretary may consult with the go-

governments of the nations of the Western
Hemisphere which have a Columbian heritage
and with the governments of Spain andItaly with respect to joint participation
in events in the United States and in such
nations. The Secretary shall submit the re-
results of the study to the Commission,
consistent with his recommendations, affording
the Commission an opportunity to review the
study, and to incorporate such of its
findings and recommendations as the Com-
mission may deem appropriate in the report
required by this Act.

(c) The Chairman of the National Council
of the Arts and Humanities, the Chairman
of the National Endowment for the Arts,
and the Chairman of the National Endow-
ment for the Humanities shall cooperate
with the Commission, especially in the en-
couragement and coordination of scholarly
works and presentations dealing with the
history, culture, and political thought of the
period surrounding the voyages of discov-
ery.

(d) The Librarian of Congress, the Secre-
tary of the Smithsonian Institution, and the
Archivist of the United States shall cooper-
ate with the Commission, especially in the
development and display of exhibits, in the
production of bibliographies, catalogs, and other
materials relevant to the topics covered in
such exhibits.

(e) Nothing, in this Act shall be construed to
restrict, abridge, or otherwise limit the
planning, development, conduct, operations, or
activities of the 1992 World's Fair to be
held in Chicago, Illinois, and in Seattle,
Washington, except that any provision of this Act
shall be construed to vest in the Commission any
rights or responsibilities to regulate, or to
oversee the planning, development, conduct,
operations, or activities of such Fair.

DONATIONS

Sec. 7. (a) The Commission may accept do-
nations of money, property, or personal
services, except that the Commission may
not accept donations—

(1) the aggregate value of which exceeds
$25,000, in the case of donations from an
individual; or

(2) the aggregate of which exceeds
$100,000 in the case of donations from a for-
egnernamental organization, a partnership,
or any other person.

(b) All books, manuscripts, miscellaneous
prints, maps, documents, records, or other
materials relating to the period and donated
to the Commission may be deposit-
ed for preservation in national, State, or


COMPENSATION

Sec. 8. (a) Members of the Commission ap-
pointed under this Act shall serve without
compensation, but may be reimbursed for travel,
subsistence, and other necessary expenses
incurred by them in the performance of their
duties.

(b) Persons appointed, designated, or
invited to assist the Commission under section
3(a), the second paragraph of section 8(d), sec-

tion 4(e), or section 8(b)(2) of this Act shall
describe their services and shall not be
entitled to reimbursement for travel, sub-

sistence, or other expenses incurred by
them in the performance of their duties.

PENALTY

Sec. 10. (a) The Commission shall pres-
cribe rules and regulations regarding the use
of any logos, symbols, or marks originat-
ed under authority of and certified by the
Commission for use in connection with the
celebration of the quincentennial, or any facsimile thereof. Under the rules and regu-
lations, the Commission may sell, lease, or otherwise grant to any person the
use of such logo, symbol, or mark in connection with the production or manuf-
acture of any commercial goods, as part of the advertisement promoting any com-
mercial good or service, or as part of an
endorsement for any such goods or services.

(b) Any person who, except as authorized
by rules and regulations issued by the
Commission, knowingly manufactures, re-
produces, or uses any such logos, symbols,
or marks, or any facsimile thereof, in a
manner as suggests any such logos, symbols,
or marks may be fined not more than
$10,000, or imprisoned more than one
year, or both. This section shall only apply
in the case of such logos, symbols, and marks for which the Commission has
published in the Federal Register the
identification of certification.

AUTHORIZATION FOR APPROPRIATIONS

Sec. 11. (a) There are authorized to be ap-
propriated, for the purposes of this Act, $220,000 for each fiscal year for each of
the fiscal years beginning after September
30, 1983, and ending before October 1, 1992;
and for the period beginning on
October 1, 1992, and ending before November 15, 1992.

(b) Amounts appropriated under this sec-
tion for any fiscal year shall remain availa-
able until November 15 of the following year.

(c) The total appropriations authorized under this Act or any Act for the purposes
of this Act shall not exceed $2,000,000.

TERMINATION

Sec. 12. (a) A final report shall be made to
the Congress on or before November 15, 1992, upon which date the Commission
shall terminate.

(b) Any property acquired by the Com-
mission remaining upon termination may be
used by the Secretary of the Interior for
purposes of the National Park Service, or
may be disposed of in accordance with the
Federal Property and Administrative Services
Act of 1949 (40 U.S.C. 471 et seq.).

Mr. BAKER. Mr. President, I design-
ate the distinguished Senator from
Maryland (Mr. MATTHIAS) to manage the
time on this side.

I say to Senators that I understand that there will be a rollcall vote on
this measure.

Mr. MATTHIAS. Mr. President, I sug-
gest the absence of a quorum.

The PRESIDING OFFICER. The
clerk will call the roll.

The assistant legislative clerk
proceeded to call the roll.

Mr. MATTHIAS. Mr. President, I ask
unanimously that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without
objection, it is so ordered.

Mr. MATTHIAS. Mr. President, what
is the pending business?

The PRESIDING OFFICER. The
pending business is S. 500.
Union Calendar No. 95

98TH CONGRESS 1ST SESSION H. R. 1492

[Report No. 98-150]

To establish the Christopher Columbus Quincentenary Jubilee Commission.

______________________________

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 15, 1983

Mr. RODINO (for himself, Mr. CONTE, Mr. GARCIA, and Mr. COURTER) introduced the following bill; which was referred to the Committee on Post Office and Civil Service

MAY 16, 1983
Additional sponsor: Mrs. SCHROEDER

MAY 16, 1983

Reported with amendments, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Omit the part struck through and insert the part printed in italic]

______________________________

A BILL

To establish the Christopher Columbus Quincentenary Jubilee Commission.

1. Be it enacted by the Senate and House of Representa-
   tives of the United States of America in Congress assembled,

2. That this Act may be cited as the “Christopher Columbus

3. Quincentenary Jubilee Act”
The President may from time to time, by and with the advice and consent of the Senate, appoint such number of aforesaid persons as he may think fit, and may remove the same, and may, by and with the advice and consent of the Senate, create such other officers and Employees of the Department of the Interior, as he may deem necessary.

(2) The President shall be the head of the Department of the Interior, and in that capacity shall have the power to appoint all Officers of the department, and to appoint such other Officers as may be necessary and proper for the execution of the laws of the United States, and such other Officers as may be necessary for the execution of the laws of the several States.

(3) The President shall have the power to require the returns of all Departments of the interior, and to call for the information of any kind relating to the affairs of the Department.

(4) The President shall have the power to make such rules and regulations as may be necessary for the execution of the laws of the United States, and for the regulation of the business of the Department.

(5) The President shall have the power to remove any Officer or Employee of the Department, with the consent of the Senate, upon such cause as the President shall deem sufficient.

(6) The President shall have the power to make such appointments and removals as he may deem necessary and proper for the execution of the laws of the United States.

(7) The President shall have the power to cause such returns to be made as may be necessary for the execution of the laws of the United States.

(8) The President shall have the power to call for such information as may be necessary for the execution of the laws of the United States.

(9) The President shall have the power to cause such rules and regulations to be made as may be necessary for the execution of the laws of the United States.

(10) The President shall have the power to remove any Officer or Employee of the Department, with the consent of the Senate, upon such cause as the President shall deem sufficient.

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(48) The President shall have the power to call for such information as may be necessary for the execution of the laws of the United States.

(49) The President shall have the power to make such rules and regulations as may be necessary for the execution of the laws of the United States.

(50) The President shall have the power to remove any Officer or Employee of the Department, with the consent of the Senate, upon such cause as the President shall deem sufficient.
33. The report required by the subcommittee shall be
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25. Recognize State and local public bodies, officers, and employees, including Federal, State, and local government officers, to participate in the planning and implementation of programs and projects that will contribute to the economic development of the area.

22. The President shall transmit the Commission's report to the Congress.

12. The President shall, at the request of the Commission, transmit to the Congress the Commission's report.

11. The Commission shall undertake such investigations as the President and the Congress shall require.

10. The Commission shall have the power to conduct investigations, to make recommendations to the appropriate committees of the Congress, and to take such other action as it may deem necessary.

9. The Commission shall have the power to make recommendations to the appropriate committees of the Congress, and to take such other action as it may deem necessary.

8. The Commission shall have the power to make recommendations to the appropriate committees of the Congress, and to take such other action as it may deem necessary.

7. The Commission shall have the power to make recommendations to the appropriate committees of the Congress, and to take such other action as it may deem necessary.

6. The Commission shall have the power to make recommendations to the appropriate committees of the Congress, and to take such other action as it may deem necessary.
The provision and conduct of the Commission may be disposed of under
money, property, or personal services, except that the Com-
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mission may accept donations—
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mission may accept donations.
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DONATIONS

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and other materials referred to the period.
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(4) The Secretory, the Secretary of the
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The mission of the Commission shall be to:
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the development and dissemination of the history, culture, and
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development and dissemination of the history, culture, and
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and other materials referred to the period.
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and the activities of the United
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and the activities of the United
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(6) The Secretary of Congress, the Secretary of the
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departments and agencies of the United States shall cooperate with the Commission.
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For the purposes of this section, the National Endowment
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.cooperate with the Commission.
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and for the purposes of this section, the National Endowment
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(Download)
for preservation in national, State, or local libraries or museums or be otherwise disposed of by the Commission after consultation with the Librarian of Congress, the Secretary of the Smithsonian Institution, the Archivist of the United States, or the Administrator of General Services, as the case may be.

ADMINISTRATION

Sec. 8. (a)(1) The Chairman, with the advice of the Commission, shall appoint, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, a Director who will may be compensated at a rate equal to not to exceed the rate of basic pay payable for level IV of the Executive Schedule established under section 5315 of such title and a Deputy Director who will may be compensated at a rate equal to not to exceed the rate of basic pay payable for level V of the Executive Schedule established under section 5316 of such title. Such officers shall serve at the pleasure of the Chairman.

(2) The Commission shall delegate such powers and duties to the Director as may be necessary for the efficient operation and management of the Commission.

(b) Subject to such rules and regulations as may be adopted by the Commission, the Commission may—

(1) appoint and fix the compensation of such additional personnel, not to exceed twenty staff members,
(c)(1) Upon request of the Commission, the head of any Federal agency may detail any of the personnel of such agency to the Commission to assist the Commission in carrying out its duties under this Act. Details under this subsection shall be without reimbursement by the Commission to the agency from which the employee concerned was detailed.

(2) The Commission may accept the services of not to exceed twenty employees under this subsection at any time.

Compensation

Sec. 9. (a) Members of the Commission appointed under section 3(b) of this Act shall serve without compensation, but shall may be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties.

(b) Persons appointed, designated, or invited to assist the Commission under the second sentence of section 3(d), section 4(e), or section 8(b)(2) of this Act shall serve without compensation, and shall not be entitled to reimbursement for travel, subsistence, or other expenses incurred by them in the performance of their duties.

Penalty

Sec. 10. (a) The Commission shall prescribe rules and regulations regarding the use of any logos, symbols, or marks originated under authority of and certified by the Commission for use in connection with the Commemoration commemor-

tion of the quincentennial, or any facsimile thereof. Under the rules and regulations, the Commission may not sell, lease, or otherwise grant to any person the right to use any such logo, symbol, or mark in connection with the production or manufacture of any commercial goods, as part of an advertisement promoting any commercial goods or services, or as part of an endorsement for any such goods or services.

(b) Any person who, except as authorized under rules and regulations issued by the Commission, knowingly manufactures, reproduces, or uses any such logos, symbols, or marks, or any facsimile thereof, or in such a manner as suggests any such logos, symbols, or marks, shall be fined not more than $10,000, or imprisoned not more than one year, or both. This section shall only apply in the case of such logos, symbols, and marks for which the Commission has published in the Federal Register a notification of certification.

Authorization for Appropriations

Sec. 11. (a) There are authorized to be appropriated to carry out the provisions of this Act, $200,000 for the fiscal year ending September 30, 1984, $250,000 per fiscal year for each of the fiscal years ending before October 1, 1992, and $50,000 for the period beginning on October 1, 1992, and ending on November 15, 1992.

(b) Amounts appropriated under this section for any fiscal year shall remain available until November 15, 1992.
TERMINATION

SEC. 12. (a) A final report shall be made to the Congress no later than November 15, 1992, upon which date the Commission shall terminate.

(b) Any property acquired by the Commission remaining upon its termination may be used by the Secretary of the Interior for purposes of the National Park Service, or may be disposed of in accordance with the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 471 et seq.).
Attached per your request is the draft position statement and a copy of H.R. 1492 as reported -- which is now irrelevant for reasons set out in the position statement.

Attachment
H.R. 1492 - Christopher Columbus Quincentenary Jubilee Act
(Rodino (D) New Jersey and 3 others)

The Administration would favor House passage of H.R. 1492 if Committee amendments are adopted that give the President the authority to appoint the members of the Christopher Columbus Quincentenary Commission and insure that work of the Commission does not conflict with or have a negative effect on the work of the organizers of the 1992 World's Fair to be held in both Chicago and Seville, Spain.

* * * * *

(Not to be Distributed Outside Executive Office of the President)

H.R. 1492 as reported would establish the above Commission, with 31 members, to plan, encourage, coordinate and conduct the commemoration of the 500th anniversary of the voyage of Christopher Columbus leading to the discovery of America. The bill authorizes appropriations for the Commission totaling $2.25
million during 1984-1992, and limits the contributions that individuals and corporations can make to the Commission to $25,000 and $50,000, respectively.

Reports sent to the Hill by Justice (6/3/82) and Commerce (6/7/83) express the Administration's position that H.R. 1492 should be amended to (1) eliminate provisions authorizing Commission activities that would compete or conflict with the 1992 World's Fair, which will be held in both Chicago and Seville, Spain; (2) limit the Commission's activities to planning, encouraging, and coordinating the commemoration of Columbus' voyage, thereby avoiding the constitutional appointment problem -- that is, having Members of Congress serving on a Commission with Executive branch responsibilities; (3) provide that an equal number of members from each of the Executive and Legislative branches (15 from each branch, subject to the same limitations on appointments, would serve on the Commission; and (4) delete authorizations for consultations with foreign nations regarding joint participation in events in the United States or other nations, since this could contravene United States obligations under the Paris Convention of 1928 governing international expositions. Commerce and Justice have been working with committee staff to resolve differences.

George Omas (Minority Staff, House Post Office and Civil Service Committee) advises informally that the Committee amendments described in the statement to be sent to the Hill will be offered
in a revised bill when H.R. 1492 comes up for a vote. Omas further advises that a floor colloquy will clarify the intent of the bill to meet Administration concerns not specifically covered by the bill -- most especially that the Commission will not exercise "significant executive functions" so as to raise an appointments clause problem. Commerce (Zarin/Staff of the General Counsel for Legislation) and Justice (Logan/Staff, Office of Legislative Counsel) confirm Omas' statements.

This draft of a position was prepared by LR. in consultation with TCH (Ryder), WH-OPD (Uhmann), WH Counsel (Wilson), Justice (Logan), and State (Maurer/Assistant Legal Adviser/Office of Legal Affairs). Commerce (Zarin) advises that because of political considerations, related primarily to Senator Percy's concerns about Columbus Jubilee legislation conflicting with the Chicago World's Fair, a call needs to be made at the Department's political level as to whether the position should be "would not object to passage ...." or "favor House passage...." Such a decision has not yet been made.

LRD DRAFT
June 17, 1983
THE WHITE HOUSE
WASHINGTON

June 17, 1983

MEMORANDUM FOR RICHARD A. HAUSER

FROM: D. EDWARD WILSON, JR.

SUBJECT: H.R. 1492, A Bill to Establish the Christopher Columbus Quincentenary Jubilee Commission

After our discussion at approximately 11:30 am on Friday, June 17, 1983, concerning this bill, I reviewed a draft OMB position paper. In its current form, this bill would create an operational, Executive branch body, to celebrate the quincentenary of Christopher Columbus' "discovery" of America. Members would be appointed by the President pro tempore, the Speaker of the House of Representatives, and the President.

After I received the attached memorandum (and bill) from OMB, I discussed it briefly with Peter before Bill Maxwell of OMB called me for our comments. He explained to me that an agreement had been reached on a substitute bill that would be offered on the floor and adopted. That bill would make the Commission an advisory body, reserve the appointment power to the President and, in either the legislation itself, or in floor statements, make clear that the President had the right to appoint from among a list of recommended members submitted by the Speaker and President pro tempore, respectively.

I explained to him that, absent seeing such draft language, I was reluctant to sign off on the OMB memorandum but, in view of the fact that the bill is scheduled to come up on the House floor on Monday, June 20, 1983, I agreed to the memorandum, with certain changes. The first change is on the first page, in the paragraph that will be made public as the Administration's position. I explained to him that a clause should be added after the word "adopted" in the second line to read "setting forth the advisory role of the committee and giving" and deleting the words "that give" in that line.

The next change is on page two of the memorandum, in that part of it that is the internal position paper. I asked for two changes in the paragraph on page two, both in the second point made there. The request was that this language be made to state the advisory nature of the committee's activities more explicitly and to make clear that there are two constitutional problems, not one. The first is an appointments clause problem; the current
legislation has persons other than the President appointing people to the Executive branch. The second is an Article I, Section 6 problem that will be cured only if the Commission is made into an advisory one.

After talking with Bill Maxwell, I called John Logan, Office of Legislative Affairs, DOJ, and explained to him my concerns. He shares them and said he has been working with George Omas, Minority Staff, House Post Office and Civil Service Committee, on this matter. He did not have as much confidence as Bill that the amendments would accomplish the desired result, particularly as he has not seen draft substitute language. Nor did he share Bill's belief that the proper statements concerning the President's appointment power would be made on the floor of the House. He said he would call Mr. Omas and work with him on this.

I then talked with Mike Uhlmann and explained to him the situation while awaiting a return call from Bob Shanks. He agreed that Bob should work with John in seeing that our concerns are addressed on the Hill. Bob and I then talked and he will work with John.

Bob also agrees that you, Ted and Bob McConnell should discuss this type of problem as it appears to arising more and more frequently and attempt to address our concerns in a generic way with representatives from the House and Senate leadership. Bob thought this should be done early next week, if possible, as there are approximately three more similarly drafted bills in the works.
THE WHITE HOUSE
WASHINGTON

September 15, 1983

MEMORANDUM FOR FRED P. FIELDING
FROM: D. EDWARD WILSON, JR.
SUBJECT: Department of Justice Proposed Report on
H.R. 1492, Christopher Columbus Quincentenary
Jubilee Commission

Attached for your review and comment or signature with the
incoming and an earlier memorandum I prepared for RAH is a
memorandum for James C. Murr expressing your comments on the
above-referenced draft report. I have discussed it with John
Logan, Office of Legislative Affairs, Department of Justice, as
we have discussed this matter on previous occasions. John's and
my agreement that the position occupied by the Secretary of the
Smithsonian Institution as a source of problem with regard to the
draft legislation should be explained in greater detail is
reflected in the draft memorandum.

This item is due by COB Thursday, September 15, 1983.
At your request, we have reviewed the above-referenced proposed report and recommend that the report be expanded to explain why the Secretary of the Smithsonian Institution poses a problem with regard to the draft legislation. We have discussed the suggestion with the Office of Legislative Affairs, Department of Justice, and that office is in general agreement with it.
LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer
Smithsonian Institution

SUBJECT: Justice proposed report on H.R. 1492, Christopher Columbus Quincentenary Jubilee Commission.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than Thursday, September 15, 1983. Oral comments acceptable.

Questions should be referred to William A. Maxwell (395-3890), the legislative analyst in this office.

[Signature]
James C. Muff for Assistant Director for Legislative Reference

Enclosures
cc: John Cooney
    Ed Wilson
    John Dyer
    Mike Uhlmann
Honorable Strom Thurmond  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510  

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 1492, a bill "To establish the Christopher Columbus Quincentenary Jubilee Commission," as passed by the House of Representatives on June 21, 1983 and supplements our views set forth in our letter to you on S. 500, a similar bill. We believe that H.R. 1492 should be amended consistent with the discussion set forth below.

H.R. 1492 would establish a Commission "to plan, encourage, coordinate and conduct the commemoration of the voyages of discovery of Christopher Columbus. . . ." §3(a). The Commission will be comprised of thirty (30) members, 24 appointed by the President and six ex-officio members. §3(b). The Secretary of the Smithsonian Institution is one of the ex-officio members. §3(b)(7).

If the Commission performs duties which can be characterized as "Executive," its members are "Officers of the United States" and therefore must be appointed pursuant to the Appointments Clause of the Constitution. See Art. II, Section 2, cl. 2; Buckley v. Valeo, 424 U.S. 1 (1976). The Appointments Clause requires that "any appointee exercising significant authority pursuant to the laws of the United States" must be appointed by the President, with the advice and consent of the Senate, or if authorized by Congress, by the President alone, the courts or the heads of Departments. Buckley v. Valeo, 424 U.S. at 126.

The presence of the Secretary of the Smithsonian Institution, an individual who is not appointed consistent with the Appointments Clause, raises the question as to whether any of the Commissioners perform Executive functions and therefore are "Officers" within the meaning of the Constitution. In addition to preparing a comprehensive program for commemorating the anniversary, the Commission is also authorized to "plan, encourage, coordinate and conduct observances and activities . . . " to commemorate Columbus's voyages. Given this language, it is arguable that the Commission will perform certain Executive functions.
Accordingly, if Congress desires the Commission to have operational functions, we urge that H.R. 1492 be amended to remove the Secretary of the Smithsonian Institution as a member of the Commission. Alternatively, if such is not Congress's intent, we urge that an amendment or unambiguous legislative history establish clearly that the functions of the Commission will be limited to planning, advice and voluntary coordination and that it shall not have operational functions.

In summary, the Department of Justice recommends that H.R. 1492 be amended consistent with the alternatives discussed above.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ROBERT A. McCONNELL
Assistant Attorney General
THE WHITE HOUSE  
WASHINGTON  

September 16, 1983  

MEMORANDUM FOR FRED F. FIELDING  

FROM: D. EDWARD WILSON, JR.  

SUBJECT: Department of Justice Proposed Report on H.R. 1492, Christopher Columbus Quincentenary Jubilee Commission  

This memorandum responds to your question marks on mine of September 15 (copy attached) as well as provide you with a redrafted memorandum for James C. Murr in accordance with your comments.  

Your question marks appear ask for an explanation of why I have discussed this matter with John Logan, Office of Legislative Affairs, Department of Justice, on previous occasions. These discussions grew out of a meeting at the Department of Justice on June 22, 1983 which RAH requested I attend with him. Also in attendance were Bob McConnell, Ted Olson, John Logan, Bob Shanks, Mike Fitts (OLC) and John Cooney (OMB) to discuss legislation involving appointments clause problems. Ted Olson's August memorandum to All Agency General Counsel concerning this topic, (copy attached) resulted from this meeting. During the preparation of Ted's memorandum, John, Bob Shanks and I discussed this matter (and related issues such as H.R. 1492 and S. 118 (Commission for the Bicentennial of the Constitution)) on several occasions.  

Please let me know if I should not have called John in this instance so that I might be guided in similar situations in the future.  

My marks were because you men was very difficult to follow......with this note  

> 9/16
THE WHITE HOUSE
WASHINGTON

September 16, 1983

MEMORANDUM FOR JAMES C. MURR
Chief, Economics-Science-General Government Branch
Office of Management and Budget

FROM: FRED F. FIELDING
Counsel to the President

SUBJECT: Justice Proposed Report on H.R. 1492, Christopher Columbus Quincentenary Jubilee Commission

At your request, we have reviewed the above-referenced proposed report and recommend that the report be expanded to explain more fully why the participation of the Secretary of the Smithsonian Institution poses a problem with regard to the draft legislation.
THE WHITE HOUSE
WASHINGTON

September 16, 1983

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Office of Management and Budget

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Counsel to the President

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At your request, we have reviewed the above-referenced proposed report and recommend that the report be expanded to explain more fully why the participation of the Secretary of the Smithsonian Institution poses a problem with regard to the draft legislation.
FROM: Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

TO: ALL AGENCY GENERAL COUNSEL

RE: Recent Legislation Raising Appointments
     Clause and Related Problems.

In recent months, an increasing number of bills have come
to our attention raising issues under the Appointments and
Incompatibility Clauses of the Constitution, Article II, § 2,
Cl. 2 and Article I, § 6, Cl. 2, respectively. The purpose
of this memorandum is to draw your attention to this matter
and to ask your assistance in identifying legislation containing
the types of constitutional problems outlined below. In
general, these bills seek to create new entities in, or
associated with, the Federal Government structure, such as
foundations, boards, agencies, commissions, committees and
corporations. These problems arise with regard to the manner
in which the entities' members are appointed and the categories
of persons designated by Congress for membership.

The Appointments and Incompatibility Clauses represent
important, related constitutional checks on Congress' authority
that are necessary to preserve the separation of powers. As
the Supreme Court recently stated in invalidating legislative
veto provisions, "The hydraulic pressure inherent within each
of the separate Branches to exceed the outer limits of its
power, even to accomplish desirable objectives, must be
resisted." Immigration and Naturalization Service v. Chadha,
No. 80-1832, slip op. at 31 (Sup. Ct. June 23, 1983). In
Chadha, the Court reiterated its earlier holdings that, while
the powers of the three Branches are not "hermetically sealed"
from one another, they are "functionally identifiable" and
must be kept distinct. \textit{Id. 1/} The Appointments and Incompatibility Clauses help to preserve this functional identity of legislative and executive powers.

The Appointments Clause provides that the President shall nominate all "Officers of the United States" whose appointment is not otherwise provided for in the Constitution. \textit{2/} The Supreme Court has stated that the term "Officers" includes all persons authorized to perform any "significant governmental duty exercised pursuant to a public law." Buckley v. Valeo, 424 U.S. 1, 126, 140-141. Persons who are not Officers may perform functions that are basically "investigative and informative," which are removed from the administration and enforcement of public law, such as advisory functions. \textit{Id. at 137-139.} The Court has explicitly stated, however, that certain functions must be performed by properly appointed Officers of the United States. \textit{Id. at 140-141.} These include, for example, the power (1) to make "determinations of eligibility for [public] funds," (2) to promulgate rules and regulations, (3) to issue advisory opinions, and (4) to conduct litigation to vindicate public rights. \textit{Id.}

Similarly, the Court specifically held in Springer v. Philippine Islands, 277 U.S. 189 (1928), that the power to appoint persons, such as directors of corporations, to manage government property rests with the President, not with

\textit{1/} Justice Powell succinctly stated the Court's holdings in his concurring opinion in \textit{Chadha} as follows:

Where, as here, Congress has exercised a power "that cannot possibly be regarded as merely in aid of the legislative functions of Congress," Buckley v. Valeo, 424 U.S., at 138, the decisions of this Court have held that Congress impermissibly assumed a function that the Constitution entrusted to another branch, see \textit{id.}, at 138-141; cf. Springer v. Philippine Islands, 277 U.S., at 202.

\textit{Id. (Powell, J., concurring) at 8.}

\textit{2/} Congress may vest the appointment of certain inferior Officers in the President alone, in the Courts, or in the Heads of Departments, Art. II, § 2, cl. 2.
Congress. In invalidating a legislative attempt to charter a corporation and control it through appointment of its directors, the Court stated:

Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint agents charged with the duty of such enforcement. The latter are executive functions . . .

Not having the power to appoint, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be usurping the power of appointment by indirection . . .

Id. at 202. The Court went on to state that

The appointment of managers (in-this instance corporate directors) of property or a business is essentially an executive act which the legislature is without capacity to perform directly or through any of its members.

Id. at 203.

A related constitutional issue arises where the Legislative Branch seeks to place Congressmen or Senators on various boards or commissions that perform other than investigative or informative functions. Article I, § 6, cl. 2 of the Constitution, the so-called Incompatibility Clause, provides:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.
Thus no Congressman or Senator is permitted to serve as an officer or director of any governmentally-created entity whose functions extend beyond conducting investigations and providing information -- in other words, whose duties extend beyond those "only in aid of those functions that Congress may carry out itself, or in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not Officers of the United States." Buckley v. Valeo, supra, 424 U.S. at 139.

In addition to these specific constitutional concerns regarding the Appointments and Incompatibility Clauses, some recent bills have raised more generalized separation of powers concerns because they purport to create entities that are not clearly located in, or responsible to, any of the three Branches of government. For example, one bill would have provided for appointment of members of a commission by the head of an agency. This method of appointment and the duties given the commission indicated it was to be part of the Executive Branch. At the same time, however, the bill would have authorized the Attorney General to sue the commission to recover any funds spent other than according to its statutory mandate. This authorization of action against the commission by the Attorney General is inconsistent with placement of the commission within the Executive Branch for the simple reason that since the President controls the Executive Branch, he, not the courts, has the responsibility for resolving internal Executive Branch disputes. Moreover, such litigation would seem unnecessary, since the commissioners would be subject to removal by the agency head who appointed them.

Similar problems exist when the Legislative Branch seeks to place a member of the Judicial Branch on other than an advisory body, or attempts to vest the appointment powers to such an entity in the Judiciary.

It is important that the Administration take a consistent principled position with respect to proposed legislation which would blur the distinction between legislative and executive entities and, consequently, dilute the authority of the Executive. As the Supreme Court recognized recently in Chadha, supra (slip op. at 37), it is essential to preserving and maintaining the separation of powers that "the carefully defined limits on the power of each Branch must not be eroded."
We therefore ask your assistance in identifying legislation that raises the kinds of constitutional concerns we have described. Experience has demonstrated that early awareness of proposed legislation creating such entities maximizes our ability to avoid constitutional problems through cooperation with Congress. Because such problems can arise in myriad forms and in a variety of contexts, we request that proposed legislation that creates a new, or materially alters the structure of an existing, foundation, board, agency, commission, committee, or other entity should be referred, for advisory purposes, to this Office. Please address your referrals and any inquiries to the attention of Deputy Assistant Attorney General Robert B. Shanks.

Thank you for your cooperation and assistance.

cc: Fred F. Fielding  
Counsel to the President

Michael J. Horowitz  
Counsel to the Director, OMB
THE WHITE HOUSE
WASHINGTON

Date 8/25/83
Suspense Date

MEMORANDUM FOR: COUNSEL'S OFFICE ATTORNEYS
FROM: DIANNA G. HOLLAND

ACTION

_______ Approved
_______ Please handle/review
XX For your information
_______ For your recommendation
_______ For the files
_______ Please see me
_______ Please prepare response for
                                 signature
_______ As we discussed
_______ Return to me for filing

COMMENT

________________________________________

________________________________________

________________________________________

________________________________________
THE WHITE HOUSE
WASHINGTON

October 4, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS Jr.

SUBJECT: U.N. Delegation and the Incompatibility Clause

Dianna has relayed to me your concern over the nomination of Congressmen to serve on the U.S. delegation to the U.N. General Assembly. The President is authorized by 22 U.S.C. § 287(c) to designate, by and with the advice and consent of the Senate, up to five representatives and an indeterminate number of alternates to attend sessions of the General Assembly of the United Nations. No provision is made for appointment of members of Congress, but since 1950 every United States delegation appointed pursuant to 22 U.S.C. § 287(c) has included two Congressmen, one from each party, chosen in alternating years from the Senate and House. An information sheet prepared by the State Department (attached) notes that the Congressmen are appointed as representatives, not alternates, "and serve as full regular members of the 'U.S. Delegation', representing the Government and not as Congressional advisers per se."

On September 20, we announced our intention to nominate two Congressmen as representatives.

The Incompatibility Clause, Article I, § 6, cl. 2, provides in part that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." The critical question is whether a Representative of the United States to the U.N. General Assembly is an officer of the United States. The question would seem to answer itself. The above-quoted language from the State Department information sheet also describes the Congressional members as "full regular members" of the delegation, so it seems difficult to argue that they serve in only a ceremonial or advisory role. I have no desire to rock this particular boat, but I see no honest way to defend the practice of appointing Congressmen to serve as our representatives to the General Assembly. In the future, if we are unwilling to depart from the 33-year practice, we should at least have the State Department redefine its view of the Congressional members, limiting their role to ceremonial and advisory matters.

Attachment
FORMING A DELEGATION TO THE UN GENERAL ASSEMBLY

Convenes in mid-September

UNGA Rules of Procedure limit delegations of Member States to five Representatives and five Alternate Representatives. There is no limitation on the number of advisers or staff that can be accredited. Although there is no requirement that we accredit the full complement of ten, this has been the custom for virtually all of the regular UNGA sessions. Special or resumed sessions have often had fewer than ten.

In practice, in the recent past, the ten Representatives and Alternates have included all five Ambassadorial level officials at USUN, headed by the U.S. Permanent Representative to the UN. (The Secretary of State is always listed as Chairman of Delegations ex officio for the period he is present at the General Assembly; however, he need not be counted among those ten.) The remaining five Representatives and Alternate Representatives include three Public Members and two Congressional members. This mix of Congressional and public members is not written into the UN Participation Act or other statutes but first appeared in the U.S. Delegation to the 5th UNGA (1950) and has been observed at every subsequent regular session. All Representatives and Alternates are appointed by the President with the advice and consent of the Senate.

The U.S. Ambassador to the UN is always listed first, as Chairman of the Delegation. While there is no hard and fast rule about the place of the Public Members on the delegation (Representative or Alternate), it has been the practice in recent years for the President to designate one of the Public Members to serve as a Representative. The two Congressional members are also appointed as Representatives, along with the Deputy U.S. Representative to the UN. The other three USUN Ambassadors serve as Alternates together with the other two Public Members.

Congressional Delegates

The two Congressional delegates have traditionally alternated between the Senate and the House, in each case one Democrat and one Republican. For the 36th Session, it will be the turn of the House. As noted above, these two delegates are appointed by the President and serve as full regular members of the "U.S. Delegation", representing the Government and not as Congressional advisers per se. Normally, they are selected directly by the White House in consultation with Congressional leadership. The standard letter from the Department to the Vice President and Speaker normally used to solicit Congressional participation at international conferences is not employed for the UNGA.
Public Members

The three Public Members are usually distinguished citizens who are not necessarily concerned professionally with foreign policy matters but bring to the delegation a first-hand experience and knowledge of the concerns and hopes of the American people. Nominations for public members have been traditionally handled by the White House personnel office. Public members, after their appointment, go on the USUN payroll and are paid on a "When Actually Employed" basis; that is, for the duration of the Session.

Because of the time required to process these appointments, including conflict of interest and security clearances and confirmation by the Senate, it is important to initiate action several months in advance of the opening of the General Assembly. From the time the nominations are announced, it is best to count on at least four weeks for the process to be completed. Of course, if the Senate goes out of session, the process can take longer.

Advisers on the Delegation

As stated above, there is no limit imposed by the General Assembly itself on the number of advisers that may be accredited. The number last year, for the 35th UNGA, totaled 64. In view of our efforts to reduce delegation size, it may be desirable to reduce that number somewhat this year.

There are two major categories of advisers: Special Advisers and Advisers. The former usually includes high ranking officials from Washington (e.g. the Under Secretary for Political Affairs, Assistant Secretary for International Organization Affairs, the Director of ACDA, etc.), and the U.S. Representatives to the various United Nations Commissions (e.g. Human Rights, Status of Women, Social Development). Delegation advisers are chosen primarily from USUN itself; virtually the entire substantive staff is accredited. Other advisers are detailed from Washington either for the full session or for limited periods to deal with specific issues as they come up on the agenda of the various Committees or in Plenary.

Regional Advisers

In addition to these advisers, it is customary to accredit five FSO political officers representing the five Geographic Bureaus in the Department. These officers work closely with
the political section of USUN, primarily on lobbying and analytical reporting. Sometime in July IO will solicit nominations from the Bureaus for these adviser positions.

**Congressional Staff Adviser**

In recent years it has been the practice to accredit one member from the staff of the Senate or House Committee on Foreign Relations. (Personal staff of Congressional members sometimes attend part of a session, but are not accredited as members of the Delegation.)

**Note Takers**

Finally, the Department provides three junior officers for three months TDY to assist the delegation with note taking. The three are not accredited as members of the delegation. IO looks to Personnel to fill these positions.