Box 4 - JGR/Appointments Clause (2) - Roberts, John G.: Files
SERIES I: Subject File
THE WHITE HOUSE
WASHINGTON

March 6, 1984

MEMORANDUM FOR FRED F. FIELDING
FROM: JOHN G. ROBERTS
SUBJECT: Appointments Clause Controversy

As you know, the Administration has expressed constitutional concerns about Public Law 98-101, the statute establishing the Commission to Coordinate the Commemoration of the Bicentennial of the Constitution. These concerns, expressed by the President in a signing statement, center on the role of the Chief Justice, Speaker of the House, and President pro tempore of the Senate on the Commission, and the consistency of that role with the Separation of Powers and the Incompatibility Clause. The President expressed the view that the heads of the other two branches could exercise only advisory and ceremonial functions under the Act.

Senator Hatch responded to the President's statement in an October 20, 1983 letter to Edwin Meese. Hatch argued that the Incompatibility Clause was not violated when Congressmen served without pay on temporary commissions, even if the commissions have more than advisory powers. On December 9, 1983, the Congressional Research Service of the Library of Congress issued an analysis supporting Hatch's views. On February 2, 1984 Assistant Attorney General Ted Olson responded to the CRS study in a memorandum for the Attorney General. On February 7, Olson forwarded that memorandum to you, along with a letter to Hatch, over Assistant Attorney General Robert McConnell's signature, noting that the Department was not persuaded by the CRS analysis.

On February 22, Olson sent you a memorandum to alert you to related developments concerning H.R. 1492 and S. 500, The Christopher Columbus Quincentenary Jubilee Act. Last year the Justice Department objected to S. 500 on the ground that it violated the Appointments Clause by specifying that the Majority Leader of the Senate and Speaker of the House would appoint members to the Commission. The Senate Judiciary Committee agreed and appropriately revised the bill to provide that the members be appointed by the President (albeit on the recommendation of the Majority Leader and Speaker). On February 1, 1984, during floor debate on S. 500, the Senate also deleted the Secretary of the Smithsonian Institution as a member of the Commission, expressly to bring the bill into compliance with the Appointments...
Clause (the Secretary is not appointed by the President). The critical point, in Olson's view, was that the Committee explicitly recognized that the initiation and conducting of commemorative activities was a function that could only be performed by an Officer of the United States.

In other words, the Judiciary Committee has taken the Justice Department's side in the dispute between Hatch and the Justice Department.

You wanted to see me about the Bicentennial Commission. There is no urgency to the matter that I can see, although the issue needs to be finally resolved before the members of the Commission can be appointed and the Commission can begin its work.
**WHITE HOUSE**
**CORRESPONDENCE TRACKING WORKSHEET**

- **O - OUTGOING**
- **H - INTERNAL**
- **I - INCOMING**

| Date Correspondence Received (YY/MM/DD) | 1 | 1 |

**Name of Correspondent:** Ted Olson

**Mi Mail Report**

**User Codes:** (A) (B) (C)

**Subject:** Commission on the Bicentennial of the Constitution (callereas copy of Feb 284 ref to Sec. Dated)

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**ROUTE TO:**

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**ACTION CODES:**
- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure

**DISPOSITION CODES:**
- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

**FOR OUTGOING CORRESPONDENCE:**
- Type of Response = Initials of Signer
- Completion Date = Date of Outgoing

**Comments:**

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Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.
Fred

1. I am also enclosing for you a copy of my letter to Senator Hatch—which I've sent to McConnell for transmission.

2. Give Ed Meese a copy of my memo to you if you wish. I have sent him a copy of my memo to the SEC. He is interested in what is going on here.
MEMORANDUM FOR FRED F. FIELDING
COUNSEL TO THE PRESIDENT

Re: Commission on the Bicentennial of the Constitution

Enclosed is our memorandum dated February 2, 1984, concerning Senator Hatch's letter and the Congressional Research (CRS) memorandum on the Commission on the Bicentennial of the Constitution. As you will see from our memorandum, we are not persuaded by the arguments set forth in the CRS memorandum. Most of the CRS memorandum discusses authorities that are simply not relevant to issues regarding the Appointments and Incompatibility Clauses. With respect to these specific issues, Buckley clearly sets forth the relevant standard, which seems to resolve the question with respect to the Commission. Even under the standards that were applied prior to Buckley, we see no way of characterizing a commission that will last for six years and possess certain clearly executive functions, as not subject to the Appointments and Incompatibility Clauses.

In any event, we regard this entire dispute as something of a tempest in a teapot because even given our conclusions, there will be little impact on the actual operation of the Commission. The statutorily designated individuals may still serve on the Commission; they must simply refrain from performing any executive functions. We do not believe that this restriction will be a major inconvenience or that it will impair the Commission’s functions in any way. On the other hand, there are very good reasons for imposing this minor adjustment on the duties of the statutorily designated Commissioners. It would be ironic indeed if the Commission on the Bicentennial of the Constitution were subject to challenge because of an unconstitutional appointment procedure that allowed non-Officers of the United States to participate in executive functions that should properly be performed only by duly appointed Officers.
You also asked us how our opinion relates to the Advisory Committee on Federal Pay. That Committee, created to assist the President in carrying out the provisions of the Pay Comparability Act, performs only advisory functions. See 5 U.S.C. § 5306 (1982). Moreover, the individuals on that Committee are, in any event, appointed by the President. Thus, that Committee does not seem to raise any Appointments or Incompatibility Clause questions.

Finally, we note that some of the controversy with respect to the Commission might be alleviated if the President were actually to appoint the Chief Justice as one of the Commission members not specified by the statute. There is no Incompatibility Clause problem with respect to the Chief Justice, and presidential appointment might remove the Appointments Clause difficulties created by Congress's designation of the Chief Justice as a member. This might be a somewhat awkward mechanism, however, and this possibility raises other separation of powers questions which we intend to discuss in a separate memorandum to you. Attorney General Designate Meese has raised a similar question with us regarding the Chief Justice's position, and the three of us might want to get together to discuss this.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

Attachments
WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING

Date Correspondence Received (YY/MM/DD): 1

Name of Correspondent: worsening B. Olson

☐ MI Mail Report

User Codes: (A) _______ (B) _______ (C) _______

Subject: Appointments Place of the Constitution (Commission of the Bicentennial of the Constitution)

ROUTE TO:

Office/Agency (Staff Name)

1. [b] Holland

ACTION

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ACTION CODES:
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X - Interim Reply

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FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
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Completion Date = Date of Outgoing

Comments: ____________________________

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Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.
Honorable Howard Baker  
United States Senate  
Washington, D.C. 20510

Dear Howard:

This letter reaffirms the Administration's position on a provision in the Senate version of the 1985 Continuing Resolution that would reduce the number of commissioners on the Interstate Commerce Commission from seven to five effective October 1, 1984.

The 1982 Reconciliation Act provided for a reduction of commissioner positions in gradual steps, from eleven existing prior to 1982, to the current seven, to five by the end of calendar year 1985. Accordingly, last August I submitted three nominations to the Senate to fill seats on a seven member commission. The Senate confirmed all three nominees earlier this month. One of these most recent appointees that would be removed by the language proposed in the Continuing Resolution.

In light of the 1982 decision to reduce the number of commissioners in an orderly fashion and the recent confirmation of new commissioners, it is difficult to resist the conclusion that this provision is an effort to lay the groundwork for reregulation of surface transportation, to which I must object.

Even more important, however, is the manner in which the Senate bill would effect this change in policy. Commission appointments are made pursuant to the constitutional balance of power under which the President nominates and the Senate confirms. That balance is upset, however, when the Congress in effect chooses among Presidential nominees by the abolition of specifically designated seats, over the President's objection, during the term of an incumbent's appointment.

I urge the Senate to withdraw this provision from the pending 1985 Continuing Resolution. I believe it is premature to start changing the careful compromises worked out in 1982 and that it would be a bad precedent to withdraw support from Presidential appointees who have been confirmed by the Senate and are serving specific terms of office.

Sincerely,
Calendar No. 1057

98TH CONGRESS
2D SESSION

S. 2852

[Report No. 98–561]

Making appropriations for the Department of Transportation and related agencies for the fiscal year ending September 30, 1985, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 17, 1984

Mr. ANDREWS, from the Committee on Appropriations, reported, under authority of the order of the Senate of June 29 (legislative day, June 25), 1984, the following original bill; which was read twice and placed on the calendar

A BILL

Making appropriations for the Department of Transportation and related agencies for the fiscal year ending September 30, 1985, and for other purposes.

1  Be it enacted by the Senate and House of Representa-
2  tives of the United States of America in Congress assembled,
3  That the following sums are appropriated, out of any money
4  in the Treasury not otherwise appropriated, for the Depart-
5  ment of Transportation and related agencies for the fiscal
6  year ending September 30, 1985, and for other purposes,
7  namely:
ther, That the Board shall expend not to exceed $102,597
per year to restore guaranteed essential air transportation at
Hazleton, Pennsylvania, to the minimum level of service of
two round trip flights per day, five days per week, to either
Philadelphia, Pennsylvania, or New York, New York, as
determined by the community.

INTERSTATE COMMERCE COMMISSION

SALARIES AND EXPENSES

For necessary expenses of the Interstate Commerce
Commission, including services as authorized by 5 U.S.C.
3109, and not to exceed $1,500 for official reception and
representation expenses, $48,000,000: Provided, That joint
board members and cooperating State commissioners may
use Government transportation requests when traveling in
connection with their official duties as such: Provided further,
That (a) effective October 1, 1984, section 10301(b) of title
49, United States Code, is amended (1) by striking out "7"
and inserting in lieu thereof "5", and (2) by striking out "4
members" and inserting in lieu thereof "3 members".
(b) The office as member of the Interstate Commerce
Commission, referred to in section 502(c) of the Omnibus
Budget Reconciliation Act of 1982, Public Law 97-253,
which is scheduled, pursuant thereto, to be abolished as of
January 1, 1986, is hereby abolished, effective October 1,
1984.
(c) The office as member of the Interstate Commerce Commission, the term for which is prescribed by law to expire on December 31, 1988, is abolished, effective October 1, 1984.

(d) Effective October 1, 1984, section 502(d) of the Omnibus Budget Reconciliation Act of 1982 is repealed; Provided, however, That the person serving in the office described in subparagraph (d) of section 502, on July 1, 1984, may be reappointed to fill that office for a term which would end on December 31, 1985, notwithstanding the provisions of section 10301(c) of title 49, United States Code, but may not be reappointed to fill that office for any term thereafter.

PAYMENTS FOR DIRECTED RAIL SERVICE

None of the funds provided in this Act shall be available for the execution of programs the obligations for which can reasonably be expected to exceed $1,000,000 for directed rail service authorized under 49 U.S.C. 11125 or any other legislation.

PANAMA CANAL COMMISSION

OPERATING EXPENSES

For operating expenses necessary for the Panama Canal Commission, including hire of passenger motor vehicles and aircraft; uniforms or allowances therefor, as authorized by law (5 U.S.C. 5901–5902); not to exceed $8,000 for official reception and representation expenses of the Board; oper-
DEPARTMENT OF TRANSPORTATION AND RELATED AGENCIES Appropriation BILL, 1985

JULY 17, 1984.—Ordered to be printed
Filed under authority of the order of the Senate of JUNE 29 (legislative day, JUNE 25), 1984

Mr. Andrews, from the Committee on Appropriations, submitted the following

REPORT
[To accompany S. 2852]

The Committee on Appropriations herewith reports an original bill (S. 2852) making appropriations for the Department of Transportation and related agencies for the fiscal year ending September 30, 1985, and for other purposes, and presents information relative to its recommendation.

AMOUNTS OF NEW BUDGET (OBLIGATIONAL AUTHORITY) FOR FISCAL YEAR 1985

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Office | Fiscal year 1985 budget request | House allowance | Committee recommendations
---|---|---|---
Compliance and Consumer Assistance | $14,356,000 | $14,550,000 | $13,230,500
Staff-years | (280) | (280) | (280)
Managing Director | $6,482,000 | $6,450,000 | $5,740,000
Staff-years | (95) | (95) | (95)
Total | $53,966,000 | $54,550,000 | $48,000,000
Staff-years | (587) | (598) | (594)

Commissioners and their offices.—The Committee's bill language reduces the number of Commissioners from seven to five starting in fiscal year 1985. The effect of this would reduce the budget request by approximately $1,000,000, to $3,976,000. In addition, the Committee expects further savings can be achieved by reducing the Chairman's office by 2 staff-years and each remaining Commissioner's staff by 1 staff-year and the satellite offices associated with the Chairman's position by 10 staff-years.

Secretary.—The Committee expects that the recommendation would require this Office to reduce staff-years by 10.

General Counsel.—This Office would experience a six person staff-year reduction. The Committee does not expect this reduction to impair the Commission's ability to conduct judicial review.

Proceedings.—The Committee is of the understanding that a major review is now under way within the Office of Proceedings and that there is potential for major reductions in that Office. The Committee recommendation would further reduce that Office to a level of 160 staff-years.

Hearings.—The Committee does not intend that further reductions be made in this Office. The Committee does not want to jeopardize the Commission's ability to handle oral arguments.

Special Counsel.—The Committee concurs with the House position which disallows the Commission's proposal to abolish the Office of Special Counsel. This Office services the public interest and is relied on heavily by small shippers, small rural communities, and public utility officials.

Transportation Analysis.—This Office, which was proposed for less of a proportionate reduction than other offices, is engaged in analysis and long-range planning. Though this Office might serve to inform the Congress and the public about the implications of deregulation and the current economic status of the various activities monitored by the Commission, it has rather served to promote further deregulation by administrative fiat. The Committee recommends that this Office be reduced an additional 11 staff positions.

Accounts.—The Committee has not recommended further reductions in this Office. It is concerned that the Commission have sufficient resources to discharge its continuing statutory responsibilities for economic regulation.