



Memorandum

December 11, 2002

TO: Senate Committee on Governmental Affairs

FROM: Jack Maskell
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SUBJECT: Supervising Ethics Agency for Purposes of Ethics in Government Act Disclosures for Members of the National Commission on Terrorist Attacks Upon the United States

This memorandum is submitted in response to the Committee's request for a discussion of which agency or entity of the Federal Government is the "supervising ethics agency," for purposes of Ethics in Government Act financial disclosures, for the members and employees of the National Commission on Terrorist Attacks Upon the United States. The resolution of this question involves looking at three distinct questions: (1) In what branch of Government has the Commission been established? (2) Who is the supervising ethics agency, for purposes of Ethics in Government Act disclosures, for commissions, entities and agencies created in the branch of Government in which the Commission has been established? and (3) Are the Commissioners appointed to the Commission (and other officers and employees employed by the Commission) considered, for purpose of the Ethics in Government Act, officers or employees of the agency or commission, and thus, in the branch of Government in which the commission or agency is established, or are they in some other branch of Government, dependant upon and by virtue of their appointment to the Commission by a particular officer of the United States? Please be advised that the underlying information in this memorandum will be provided to other congressional offices upon their request for an analysis of the same issues.

1. **Branch of Government.** The National Commission on Terrorist Attacks Upon the United States was established and created in title VI of the Intelligence Authorization Act for Fiscal Year 2003.¹ The legislation expressly states that the Commission is an establishment "in the legislative branch."² Even with this express designation in law passed by the Congress and signed by the President that the Commission is "in the legislative branch," it might be argued, and has been contended, that a mere "designation" by law of which branch of Government an entity is placed is not necessarily binding, and may depend

¹ H.R. 4628 (107th Congress), Public Law 107-306, Nov. 27, 2002; 116 Stat. 2383.

² P.L. 107-306, (H.R. 4628, 107th Congress), Section 601: "There is established in the legislative branch the National Commission on Terrorist Attacks Upon the United States"

rather on the nature, functions and duties of the particular commission, agency or entity.³ Even if this is the case, the Commission in question clearly falls within those entities of a legislative character, that is, it has no significant executive functions such as law enforcement or regulation, but rather is constituted only to conduct fact-finding, investigation, recommendation and reporting; it reports directly to the Congress as well as to the President; and the majority of the members are appointed by Members of the legislature.⁴ As noted in an Office of Legal Counsel opinion on another commission, even where the majority of members were appointed by the President, such a commission would be in the legislative branch because the “Commission performs only ‘investigative and informative’ functions that could be undertaken by a congressional committee and that are removed from the administration and enforcement of public law.”⁵ Such entities with these particular characteristics, even where no statutory designations of a branch of Government are made, are consistently interpreted to be legislative branch entities.⁶ In a memorandum dealing with the National Gambling Impact Study Commission, the Office of Legal Counsel noted that the Commission, with three presidential appointees, was “not within the executive branch,” as the Commission was dominated by congressional appointees and the Commission carried out “only information gathering and advisory functions,” and, quoting an earlier opinion, stated that “[u]nder the Department’s precedents, we regard such commissions as outside the executive branch.”⁷ There are, of course, no constitutional problems of separation of powers or of the Appointments Clause where the President appoints an official to a legislative branch agency where the duties are by definition substantially investigative and informative.⁸

2. Supervising Ethics Office. For purposes of the Ethics in Government Act, the Senate Select Committee on Ethics is the “supervising ethics office” for “officers and employees of the Senate,” and for “other officers or employees of the legislative branch” who are designated to file with the Senate, that is, those in an other “legislative agency or commission” not employed directly in the House or Senate who are required to file financial

³ U.S. Department of Justice, Office of Legal Counsel, Memorandum for the General Counsels of the Federal Government, from Walter Dellinger, [hereinafter Dellinger Memo] 56-57 (May 7, 1996).

⁴ P.L. 107-306, (H.R. 4628, 107th Congress), Sections 602, 603, 604.

⁵ 13 Op. O.L.C. 285, 286 (1989), Commission on Railroad Retirement Reform.

⁶ 13 Op. O.L.C. 285, *supra*, Commission on Railroad Retirement Reform; U.S. Department of Justice, Office of Legal Counsel, Memorandum for Samuel Morris, Acting General Counsel, General Services Administration, January 26, 1999, *re* National Gambling Impact Study Commission [hereinafter Gambling Commission Memo], at 2.

⁷ Gambling Commission Memo, *supra* at 2, and n.2.

⁸ On interbranch appointments generally, *note* discussion in *Morrison v. Olson*, 487 U.S. 654, 670 - 677 (1988). *See*, specifically Dellinger Memo, *supra* at 23, 53-54. The President does appoint certain officers or employees in the legislative branch, not just on commissions, but also to permanent agencies of Congress. Even where the President appoints officers in the legislative branch, such as in the Library of Congress or the General Accounting Office, and even where there may be some functions which might be characterized as executive or administrative, there is considered to be no constitutional problem where “the powers currently exercised ... may be deemed constitutionally harmless ... [and] in aid of the legislative process.” *Id.* at 53.

disclosure reports with the Secretary of the Senate pursuant to 5 U.S.C. appendix § 103(h).⁹ The law at 5 U.S.C. appendix § 103(h) explains that persons who are “employed by an agency or commission established in the legislative branch after the enactment date of the Ethics Reform Act of 1989,” when the statute creating such agency or commission does not expressly provide where a disclosure report is to be filed, must file with the Secretary of the Senate “for agencies and commissions established in even numbered calendar years” (and with the Clerk of the House when created in odd numbered calendar years).¹⁰ Since the Commission in question was created “in the legislative branch” of Government on November 27, 2002, the relevant “supervising ethics office” is clearly the Senate Select Committee on Ethics.

3. Appointees as Members of Commission in the Legislative Branch. Officers and employees who are appointed to a commission in the legislative branch of Government, and who are in positions meeting the threshold amounts of compensation and time employed in the Government, are required to file disclosure reports by virtue of their position of employment in “an agency or commission established in the legislative branch.”¹¹ Under the Ethics in Government Act, persons entering the Government must file an entrance report under § 101(a) for those in positions described in § 101(f). The law at § 101(f) describes several different kinds of covered positions including the President (§ 101(f)(1)), the Vice President (§ 101(f)(2)), “each officer or employee in the executive branch” in a position compensated over a certain amount (§ 101(f)(3)), each consultant and advisor appointed pursuant to 5 U.S.C. § 3109 (§ 101(f)(4)), each Member of Congress (§ 101(f)(9)), and, under § 101(f)(10), “an officer or employee of Congress as defined under section 109(13).” The provision at § 109(13) describes, in turn, three categories of persons who are meant to be covered as an employee in the legislative branch, that is: (1) those in positions meeting the threshold pay level, who work for at least 60 days in a calendar year, and who are compensated by the Chief Administrative Officer [CAO] of the House or the Secretary of the Senate (§ 109(13)(A)); (2) those in positions in “the legislative branch” meeting the threshold salary level, who work for the Government for at least 60 days, and whose pay is *not* necessarily directly disbursed by the Secretary of the Senate or the CAO of the House (§ 109(13)(B)(i)); and (3) those who do not meet the pay threshold but who work on the personal staff of a Member of Congress as a principal staff assistant, when they are designated by the Member to report when no persons in the Member’s office are compensated above the threshold amount (§ 109(13)(B)(ii)).¹² The term “legislative branch” is expressly defined in the disclosure law to mean several specified agencies and “any other agency, entity, office, or commission established in the legislative branch.”¹³

⁹ 5 U.S.C. appendix § 109(18)(A); *see* 5 U.S.C. appendix § 109(11)(I); 5 U.S.C. appendix § 103(h).

¹⁰ 5 U.S.C. appendix § 103(h)(1)(A)(ii)(II).

¹¹ 5 U.S.C. appendix § 103(h). *See* 5 U.S.C. appendix § 101(a) (entrance reports) applying to those who must file under § 101(f), including at § 101(f)(10) those in covered positions in the legislative branch defined at § 109(13) and § 109(11)(I).

¹² *See* original designation of covered legislative branch employees in P.L. 95-521, Section 101(e), 92 Stat. 1824, and coverage intent, S. Rpt. No. 95-170, 95th Congress, 1st Sess. 110 (1977); and the inclusion of such positions when the disclosure provisions for the three branches of Government were combined into one title, in 1989, P.L. 101-194, Title II, and P.L. 101-280, 104 Stat. 149, May 4, 1990, *see* 1990 *U.S. Code and Admin. News*, 101st Cong., 2d Sess. 169, 171.

¹³ 5 U.S.C. appendix § 109(11)(I).

There has been raised an argument that even if the Commission is “in the legislative branch” and thus its “supervisory ethics office” is the Senate Select Committee on Ethics, and even if its officers and employees who meet the threshold salary and time requirements must file disclosure reports as “officer[s] or employee[s] of the Congress” as defined in § 109(13) and 109(11), that the Commission member appointed by the President is not an officer or employee in the legislative branch, but rather is (apparently) an executive branch officer or employee subject to the ethics supervision of the White House. Persons who are not otherwise federal officials (that is, from the private sector) who are appointed by the President to a commission “in the legislative branch” are generally deemed officers or employees “in the legislative branch,” and are not officers or employees in the executive branch for purposes of ethics and financial disclosure provisions.¹⁴ The Justice Department explained that members on a commission, which it found to be in the legislative branch, are in the legislative branch of Government subject to legislative branch ethics supervision, and no exception was made for those four commissioners appointed to this legislative branch commission by the President: “The Commission on Railroad Retirement Reform is not an agency in the executive branch for purposes of determining what obligations members of the Commission may have under the laws governing conflicts of interest and financial disclosure.”¹⁵ The Commission in that case was found to be a “legislative branch” agency, and thus its members, including the President’s appointees, were covered by the disclosure rules as applied to the legislative branch to such an extent that “the Office of Legal Counsel is without authority to advise the Commission regarding the obligations of its members”¹⁶ Similarly, in 1999 the Justice Department found that the National Gambling Study Impact Commission was a legislative branch agency and that, consequently, the members of the Commission, including three presidential appointees, were in the legislative branch and were *not* subject to ethics and conflict of interest laws applicable only to officers and employees of the executive branch or the independent agencies, specifically 18 U.S.C. § 208.¹⁷ No exception or distinction applying this statute to the three members of that commission appointed by the President was made in that memorandum.¹⁸

There are commissions which have been created which are expressly made up of persons from different agencies, departments and branches of Government.¹⁹ In that case it would be most likely that an official representing a particular branch or department of Government on such a “hybrid” commission would still remain subject to the rules, regulations and supervision of that branch and agency in which the official holds office, regardless of where that hybrid commission may be placed in the Government structure. However, in the legislation in question creating the Terrorism Commission, the President is *not* instructed by the legislation to appoint, and is not appointing, an executive branch

¹⁴ 13 Op O.L.C. 285, *supra*.

¹⁵ *Id.* at 285.

¹⁶ *Id.* at 285. A brief survey of *published* Office of Legal Counsel Opinions has not revealed decisions to the contrary concerning the application of ethics and financial disclosure provisions and presidential appointments of otherwise non-federal-employee persons to commissions which are found to be “in the legislative branch.”

¹⁷ Gambling Commission Memo, *supra*.

¹⁸ *Id.*

¹⁹ *Note*, Dellinger Memo discussing “commissions composed of members or appointees from more than one branch of the government,” citing *Mistretta v. United States*, 488 U.S. 361, 412 (1989), and *Buckley v. Valeo*, 424 U.S. 1 (1976).

official or someone “representing” the executive branch, the White House, or an executive department or agency on the Commission. In fact, the legislation specifically requires that all persons appointed to this legislative branch Commission are not already federal officers or employees,²⁰ and thus there could not be a person who is already an executive branch employee appointed to the Commission. Furthermore, there is no designation in the law for certain members to be representatives of or members of any other branch of Government. One is thus a federal employee (most likely a “special Government employee”) by virtue of one’s appointment to the Commission *in* the legislative branch, and for financial disclosure purposes, is supervised, as expressly provided in the Ethics in Government Act, by the appropriate legislative branch supervisory ethics office, in this case, the Senate Select Committee on Ethics. As the supervisory ethics office, the Senate Select Committee makes certain administrative determinations under the law for those in agencies and commissions under its jurisdiction, and may grant waiver requests for certain information disclosed to the Committee not to be made public.²¹

There is, of course, as discussed above, no general constitutional bar to allowing the President in legislation such as this to appoint a person as an officer or employee in a legislative branch agency,²² subject to ethics supervision by the supervisory ethics office in the Senate or House, and this has been done in several cases of study commissions, and even for permanent agencies such as the Library of Congress and the General Accounting Office, whose officials file with the House and Senate, respectively.²³ While subject to Senate Select Committee on Ethics supervision upon appointment to the Terrorism Commission in the legislative branch, it does not mean that the White House would be or should be without input, by way of advice and vetting procedures, into such issues as potential conflicts of interest, troubling private domestic or foreign entanglements, and possible steps to alleviate any potential conflicts of interest for or appearances of possible outside influences upon its appointee.

²⁰ P.L. 107-306, (H.R. 4628, 107th Congress), Section 603(b)(2).

²¹ *Note, e.g.* 5 U.S.C. appendix §§ 101(g)(1) (extensions), 101(h) (60-day determination), 101(i)(waivers), 103(g) (development of forms for reports), 105 and 106 (custody, access and review of reports).

²² As noted, the chairman of the Commission in question, as well as the Commission itself, does not exercise “significant authority” under the laws of the United States, but rather exercises powers which are “essentially of an investigative and informative nature.” *See, Buckley, supra* at 137; Dellinger Memo, *supra* at 46.

²³ 5 U.S.C. appendix § 103(h)(1)(A)(i) and (ii). The Librarian of Congress, appointed by the President (2 U.S.C. § 136), files annual reports with the Clerk of the House under the supervision of the House Committee on Standards of Official Conduct, and the Comptroller General, appointed by the President (31 U.S.C. § 703), files annual reports with the Secretary of the Senate under the supervision of the Senate Select Committee on Ethics. Such supervision may, in turn, be delegated back to the legislative agencies themselves. The initial reports of such officers, however, it should be noted, are different in that their positions are “advise and consent” positions. *See* 5 U.S.C. appendix, § 101(b). It may be noted also that the President appoints federal judges in the judicial branch as well, and their annual financial disclosure reports are under judicial branch supervision. 5 U.S.C. appendix § 101(f)(11).