

NLWJC - Kagan

Counsel - Box 023- Folder 007

Institute of American Indian Arts

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

24-Apr-1996 12:59pm

TO: Elena Kagan
FROM: Nick B. Kirkhorn
Office of Legislative Affairs
SUBJECT: Native American Arts Bill

This is a response to an e-mail you sent to Janet Murguia.

HR 3049, a bill to provide for the Continuity of the Board of Trustees of the Institute of American Indian and Alaska Native Culture and Arts Development, was passed by voice in the House on 4/23.

Please feel free to contact Janet or me if you have any questions.

*Elena -
Need to flag this for
Todd + do memo for Jack (or get doc
to ~~do~~ do me) to see whether
Jack wants to ~~ask~~
press for veto (I assume
yes, he will).
Kw*

*Kathy -
FYI. So much for
our veto threats.
Elena*

Memo to John Filley

THE WHITE HOUSE
WASHINGTON

DATE: 5-8-96

TO: EUSNA

FROM: White House Counsel JACK R.
2nd Floor, West Wing x6-2632

FYI

Appropriate Action

Let's Discuss

Per Our Conversation

Per Your Request

Please Return

Other

DELETED TO HIWY 5-8/8

THE WHITE HOUSE

WASHINGTON
May 6, 1996

MEMORANDUM FOR JOHN HILLEY

FROM: JACK QUINN

SUBJECT: H.R. 3049

The House passed H.R. 3049, a bill to provide for the Continuity of the Board of Trustees of the Institute of American Indian and Alaska Native Culture and Arts Development, by voice vote last week.

As you'll recall, the Office of Legal Counsel of the Justice Department believes strongly that the bill violates the Appointments Clause of the Constitution. The Administration's SAP stated that the Justice Department would recommend that the President veto the bill.

Whatever your office can do to prevent this bill from coming to the President in its current form would be appreciated.



**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001**

LRM NO: 3985

FILE NO: 2000

SPECIAL

4/4/96

LEGISLATIVE REFERRAL MEMORANDUMTotal Page(s): 7

TO: Legislative Liaison Officer - See Distribution below:

FROM: Ron PETERSON *Ron Peterson* (for) Assistant Director for Legislative ReferenceOMB CONTACT: Mike GOAD 395-7301 Legislative Assistant's line (for simple responses): 395-6194
C=US, A=TELEMAIL, P=GOV+EOP, O=OMB, OU1=LRD, S=GOAD, G=MICHAEL, I=L
goad_m@a1.eop.govSUBJECT: JUSTICE Proposed Report RE: HR3049, Board of Trustees of the Institute of
American Indian and Alaska Native Culture and Arts Development --
Continuation**DEADLINE: 10:00 A.M., Monday, April 08,1996**In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before
advising on its relationship to the program of the President.**Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go"
provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.**COMMENTS: The Department of Justice has requested that OMB clear its views letter on HR3049 so that
it may transmit the letter to the Speaker. If you do not respond by the deadline, we may
assume that your agency has no comment.

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U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 20, 1996

The Honorable Alice M. Rivlin
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Ms. Rivlin:

This memorandum provides the views of the Department of Justice on H.R. 3049, a bill "to amend section 1505 of the Higher Education Act of 1965, to provide for the continuity of the Board of Trustees of the Institute of American Indian and Alaska Native Culture and Arts Development." The bill raises serious constitutional concerns under the Appointments Clause of the U.S. Constitution.

Under current law, the Institute Board is composed of 13 voting members, appointed by the President with the advice and consent of the Senate and 6 non-voting members, including 2 Members of the House of Representatives appointed by the Speaker of the House and 2 Members of the Senate, appointed by the President pro tempore of the Senate. In order to maintain stability and continuity, the Board is empowered to recommend the continuation of a Board member on the Board. If the President does not nominate a replacement for such a Board member within 60 days of the expiration of that Board member's term, the Board member is "deemed" reappointed for another full six-year term.

H.R. 3049 would amend the statute to permit the Institute Board "to recommend another individual" to replace a retiring member, if the retiring member "does not consent to be reappointed." In the event the President fails to transmit to the Senate a nomination to fill a position of a member within 60 days from the date such member's term expires, and if the retiring member does not consent to reappointment, the individual recommended by the Board is "deemed to have been appointed for a full term to the Board with all the appropriate rights and responsibilities."

I.

Because voting members of the Board are employed within the federal government and carry significant authority, see, e.g., 20 U.S.C. § 4414, vacancies of voting members on the Board must be filled in accordance with the Appointments Clause. See Buckley v. Valeo, 424 U.S. 1, 126 (1976) (en banc); Hartwell v. United States, 73 U.S. (6 Wall.) 385, 393 (1868). The Appointments

Clause provides:

[The President,] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

"The Constitution for purposes of appointment . . . divides all its officers into two classes." United States v. Germaine, 99 U.S. 508, 509 (1879). "[P]rincipal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary." Buckley, 424 U.S. at 132. See also Morrison v. Olson, 487 U.S. 654, 670 (1988). Accordingly, if a voting member of the Institute Board is a principal officer, the only constitutionally permissible method of appointment is by the President, with Senate confirmation, and not by Board recommendation and presidential inaction as prescribed in the draft bill.

In Morrison v. Olson, 487 U.S. 654 (1988), the Supreme Court identified several factors that help to distinguish principal from inferior officers. Under these factors, the voting members of the Board are arguably principal officers for purposes of the Appointments Clause.

First, the Morrison Court noted that the officer there at issue -- an independent counsel -- was removable by the Attorney General, thus making her "to some degree 'inferior' in rank and authority." Id. at 655. Here, in contrast, no superior officer is assigned removal authority.¹ Moreover, because all voting members of the Board are vested with equal authority and organizationally no one stands between the Board and the President, the Board's voting members are not inferior in rank,

but current bill does this w/! 1) we app, so diff.

¹ Under 20 U.S.C. § 4412(d), Board members are removable only for cause. The statute and draft bill do not specify whether removal authority is vested in the Board's voting members or the President. Under either circumstance, however, no superior officer -- other than the President -- would appear to have removal authority.

unlike an independent counsel who is organizationally subordinate to the Attorney General.

Second, the Court in Morrison noted that the officer's duties were limited, particularly with respect to policymaking and administration. Id. at 671. Here, Congress created the Institute "to coordinate the Federal Government's effort to preserve, support, revitalize, and disseminate Indian art and culture and Native Hawaiian art and culture." 20 U.S.C. § 4401(7). The Institute functions under the direction and control of the Board of Trustees. 20 U.S.C. § 4411(a). For example, the Board members are empowered "to make agreements and contracts with persons, Indian tribes, and private or governmental entities," 20 U.S.C. § 4414(a)(2); "to enter into joint development ventures with public or private commercial or noncommercial entities for development of facilities" to further the mission of the Institute, id. at § 4414(a)(3); "to receive grants from, and enter into contracts and other arrangements with, Federal, State, or local governments, public and private agencies, organizations, institutions, and individuals," id. at § 4414(a)(10); "to use any funds or property received by the Institute to carry out the purpose of [the] chapter, including the authority to designate on an annual basis a portion, not to exceed 10 percent, of the funds appropriated pursuant to section 4451 of this title for investment," id. at § 4414(a)(13); and "to exercise all other lawful powers necessarily or reasonably related to the establishment of the Institute in order to carry out the provisions of this chapter and the exercise of the powers, purposes, functions, duties, and authorized activities of the Institute," id. at § 4414(a)(14). The Board, accordingly, appears to possess substantial policymaking and administrative authority to implement the goals of the Act.

Finally, the Court in Morrison emphasized that the office there at issue would be limited in tenure to the particular mission for which the officer was appointed, and further that that mission was limited in scope. 487 U.S. at 672. Although the terms of the voting members of the Institute Board are also limited, the length of those terms is substantial, see 20 U.S.C. § 4412(b)(1) (providing for six-year terms), and the terms are not limited to the completion of any particular mission. In addition, the scope of the Board's mission is not limited to a specific matter. Instead, it extends to all matters relating to American Indian and Alaska Native culture and art.

For these reasons, although the question is not free from doubt, we believe that the better view is that the voting members of the Institute Board are principal officers, who may only be appointed by the President with Senate confirmation.

Regs The critical question:
Is this just a
recommendation?

II.

Even if the voting members of the Board are not principal officers, however, the draft bill would still raise a number of substantial questions under the Appointments Clause.

First, even if the voting members are properly considered inferior officers under the Appointments Clause, they still must be appointed by the President, the head of a "Department," or a court of law. For purposes of the Appointments Clause, "Departments" plainly are not limited to those divisions of the executive branch represented in the President's cabinet. The Supreme Court, however, made clear in Freytag v. Commissioner, 501 U.S. 868, 885 (1991), that not "every part of the Executive Branch is a department." In Freytag, the Court concluded that even if the Tax Court were an independent agency within the Executive Branch, which the Court concluded it is not, the Tax Court would not be a "Department" for purposes of the Appointments Clause. The Court reasoned that according entities like the Tax Court, which do not resemble cabinet-type divisions, such status would unduly diffuse the appointment power and the corresponding political accountability. But see Freytag, 501 U.S. at 919 (Scalia, J., concurring) ("the term 'Departments' means all independent executive establishments"). Freytag thus calls into question whether the Institute, which, like the Tax Court, bears little resemblance to a cabinet-type division, is properly treated as a "Department" for purposes of the Appointments Clause.

Second, if the Institute is treated as a "Department" for purposes of the Appointments Clause, and Board members are treated as inferior officers, it is still unclear whether the Board may appoint its own members to fill certain vacancies. It is unsettled whether "the Appointments Clause envisions appointment of some inferior officers by other inferior officers." Weiss v. United States, 114 S.Ct. 752, 768 (1994) (Souter, J., concurring) (suggesting, but not deciding, that such appointments may sometimes be proper), and it is difficult to maintain that a Board appointee would be an inferior officer while also maintaining that the Board, when acting as a whole, has some greater constitutional status.

Third, treatment of the Institute as a "Department" which Congress can vest with authority to appoint inferior officers arguably exacerbates a constitutional problem that may already exist in the statute. In FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993), cert. dismissed, 115 S. Ct. 537 (1994), the Court of Appeals for the D.C. Circuit held that a congressional agent may not sit as a member of a commission that exercises executive functions, even if those agents are non-voting. Here, four non-voting members of the Board are members of Congress, and they are "entitled to attend all meetings of the

Board and to provide advice to the Board on any matter relating to the Institute." 20 U.S.C. § 4412(a)(3). Treatment of the Institute as an Executive Department, and treatment of the Board as the "Head" of that Department with certain appointment powers, arguably heightens the problem presented by the presence of these congressional representatives on the Board.

III.

Finally, the draft bill reimposes a provision of the existing statute that is constitutionally suspect. Specifically, the bill provides that "[i]f the President has not transmitted to the Senate a nomination to fill the position of a member . . . within 60 days from the date that the member's term expires" and "if a member consents to reappointment, the member shall be deemed to have been reappointed for another full [six-year] term to the Board, with all the appropriate rights and responsibilities." Section 1(2)(A). To the extent such a "reappointment" constitutes an "appointment" for purposes of the Appointments Clause, the same questions raised above would apply.

In 1994, this Department reaffirmed our traditional view that legislation extending the term of an officer subject to removal at will does not violate the Appointments Clause. See Legislation Extending the Terms of Office of United States Parole Commissioners (July 15, 1994) (publication forthcoming in 18 Op. O.L.C. (1994)), disavowing Reappointment of United States Parole Commissioners, 11 Op. O.L.C. 173 (1987). Moreover, in In re Benny, 812 F.2d 1133 (9th Cir. 1987), the Ninth Circuit held that a statutory extension of tenure "becomes similar to an appointment" only "when it extends the office for a very long time." Id. at 1141; see also In re Investment Bankers, Inc., 4 F.3d 1556, 1562 (10th Cir. 1993), cert. denied, 114 S. Ct. 1061 (1994) (agreeing with Benny and noting that the contrary Appointments Clause argument "has been rejected by every court that has considered it"). Here, in contrast to our Parole Commission opinion and the Benny case, the appointee is not removable at will and is entitled to serve for "a very long time" (i.e. 6 years). Under these circumstances, we believe a strong case can be made that "reappointment" is functionally indistinguishable from "appointment," and is thus subject to the same potential constitutional defects discussed above.

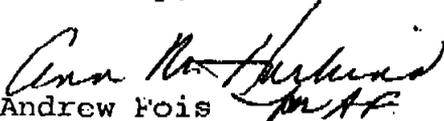
Oh he,
wasn't
edges -

if the prob
is already

There!!!

Thank you for the opportunity to express our views on this legislation. If we can be of further assistance, please do not hesitate to contact this office.

Sincerely,


Andrew Fois
Assistant Attorney General

THE WHITE HOUSE
WASHINGTON

Kathy -

Can you call me about this. The bill is scheduled for ~~the~~ vote Tuesday as part of Corrections Day. Both the R's & the D's have signed-off. It will prob. pass by voice vote. The

question is whether we issue an oppose SAP, knowing the vote will be overwhelmingly for the bill (a vote is unlikely)

or whether we simply issue no SAP (as we have done on a # of Corrections Day bills). Thanks

Mike Fitz
(5-1247)

April 18, 1996
(House)

H.R. 3049 - Institute for American Indian and
Alaska Native Culture and Arts Development Act
(Reps. Goodling (R) PA and Kildee (D) MI)

The Administration opposes House passage of H.R. 3049 because the bill raises serious constitutional concerns under the Appointments Clause. H.R. 3049 would permit individuals, who the President has not nominated, to become members of the Institute's Board of Trustees. This appointment scheme would intrude upon the President's authority to appoint officers of the Executive Branch, and vest the Institute's policy making and administrative authority in individuals who have neither been appointed nor confirmed.

* * * * *

(Do Not Distribute Outside the Executive Office of the President)

This Statement of Administration Policy (SAP) was developed by the Legislative Reference Division (Goad), in consultation with NRD (), BASD (), BRCD (), GC (), the Departments of the Interior () and Justice (), the National Economic Council (), and White House Legislative Affairs ().

On March 14th, the Economics and Educational Opportunities Committee ordered the bill reported (voice vote).

There is no companion bill.

Administration Position to Date

The Administration has neither testified nor reported on the bill. [The Department of Justice, in an April [] report to the Speaker, opposed the bill.]

Major Provisions of H.R. 3049

The Institute's Board of Trustees is composed of 13 voting members, appointed by the President and confirmed by the Senate, and six non-voting members, including four Members of Congress. Under current law, the Board may recommend to the President that a member, whose term is set to expire, serve another full term. If the President does not nominate another individual within 60

OMB/RDI

ID:202-395-5691

APR 18'96

17:40 No.028 P.05

2

days of the expiration of the member's term, the member is considered reappointed for another full six-year term.

H.R. 3049 would permit the Board to recommend an individual to replace a member whose term is set to expire. In the event the President fails to transmit to the Senate a nomination to fill the position within 60 days from the date the retiring member's term expires, and if the member whose term is expiring does not consent to reappointment, the individual recommended by the Board is considered to have been appointed.

Pay-As-You-Go Scoring

NRD (), BASD (), and BRCD () advise that, because H.R. 3049 would not affect direct spending or receipts, the bill is not subject to the pay-as-you-go requirements of the Omnibus Budget Reconciliation Act of 1990. CBO concurs (final).

LEGISLATIVE REFERENCE DIVISION
April 18, 1996 - 3:00 P.M.

Kelley

April 18, 1996
(House)

Institute for American Indian and Alaska Native Culture
Arts Development Act
(Reps. Goodling (R) PA and Kildee (D) MI)

The Administration opposes House passage of H.R. 3049 because the bill raises serious constitutional concerns under the Appointments Clause. H.R. 3049 would permit individuals, who the President has not nominated, to become members of the Institute's Board of Trustees. This appointment scheme would intrude upon the President's authority to appoint officers of the Executive Branch, and vest the Institute's policy making and administrative authority in individuals who have neither been appointed nor confirmed. If the bill is ~~passed~~ ^{passed} in its present form,

The Attorney Gen'l & the Council to the P with would recommend a veto.

Alice DuBois
or Miles
(CAG)

OMB/RDI

ID:202-395-5691

APR 18 '96

17:38 No.028 P.01

OPTIONAL FORM 99 (7-96)

FAX TRANSMITTAL		# of pages 5
To: Mike F.	From: Mike G.	
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111

Union Calendar No. 239

104TH CONGRESS
2D SESSION

H. R. 3049

[Report No. 104-505]

To amend section 1505 of the Higher Education Act of 1965 to provide for the continuity of the Board of Trustees of the Institute of American Indian and Alaska Native Culture and Arts Development.

IN THE HOUSE OF REPRESENTATIVES

MARCH 7, 1996

Mr. GOODLING (for himself and Mr. KRATZER) introduced the following bill; which was referred to the Committee on Economic and Educational Opportunities

MARCH 28, 1996

Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

A BILL

To amend section 1505 of the Higher Education Act of 1965 to provide for the continuity of the Board of Trustees of the Institute of American Indian and Alaska Native Culture and Arts Development.

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

2

1 **SECTION 1. CONTINUITY OF BOARD.**

2 Section 1505(i) of the Higher Education Amend-
3 ments of 1986 (20 U.S.C. 4412(i)) is amended—

4 (1) in paragraph (1), by inserting before the pe-
5 riod at the end of the first sentence the following:
6 "or to recommend another individual if the member
7 does not consent to be reappointed"; and

8 (2) by striking paragraph (2) and inserting the
9 following:

10 "(2) If the President has not transmitted to the
11 Senate a nomination to fill the position of a member
12 covered by such a recommendation within 60 days
13 from the date that the member's term expires—

14 "(A) if the member consents to reappoint-
15 ment, the member shall be deemed to have been
16 reappointed for another full term to the Board,
17 with all the appropriate rights and responsibil-
18 ities; or

19 "(B) if the member does not consent to re-
20 appointment, an individual recommended by the
21 Board under paragraph (1) shall be deemed to
22 have been appointed for a full term to the
23 Board with all the appropriate rights and
24 responsibilities."

Union Calendar No. 239

104TH CONGRESS
2D SESSION

H. R. 3049

[Report No. 104-505]

A BILL

To amend section 1505 of the Higher Education Act of 1965 to provide for the continuity of the Board of Trustees of the Institute of American Indian and Alaska Native Culture and Arts Development.

MARCH 28, 1996

Committed to the Committee of the Whole House on the State of the Union and ordered to be printed