



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

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The Honorable Eddie Bernice Johnson
Chairwoman
Committee on Science, Space, and Technology
U.S. House of Representatives
Washington, DC 20515

Dear Madam Chairwoman:

This letter presents the views of the Department of Justice ("Department") on H.R. 3607, "Fossil Energy Research and Development Act of 2019." Due to constitutional concerns with several provisions of this bill, we would recommend that those provisions be amended as described below.

Section 13 of the bill may raise constitutional concerns under the Appointments Clause. Subsections (a) through (c) of section 13 would vest substantial new authority in the Director of the National Energy Technology Laboratory, one of the national laboratories of the Department of Energy. *See* 42 U.S.C. § 15801(3)(I). This additional authority would include authority to hire certain personnel without regard to civil service laws, to fund discretionary research and development projects, and to oversee the Laboratory's human-resources operations. H.R. 3607, § 13(a)-(c). These powers indicate that the Director would qualify as an "Officer of the United States" under the Appointments Clause, but it is unclear to us whether the Director is appointed in compliance with the Clause.

The Appointments Clause requires that all "Officers of the United States" be appointed by the President with the advice and consent of the Senate, except for "inferior Officers," whose appointment Congress may vest "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. Officers of the United States are those who occupy "continuing' position[s] established by law" and exercise "significant authority pursuant to the laws of the United States." *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (quoting *United States v. Germaine*, 99 U.S. 508, 511 (1879), and *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)); *see also Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 73-74 (2007) ("*Officers of the United States*"). The Director of the National Energy Technology Laboratory likely qualifies as an officer, especially if his authority is supplemented by this bill. *See Designating an Acting Attorney General*, 42 Op. O.L.C. ___, at *23 & n.15 (Nov. 14, 2018) (describing a previous Director of the Laboratory, Grace Bochenek,

as an “officer[.]”). First, although there appears to be no statutory provision formally creating this office, the Director occupies a continuing position with powers and duties defined, at least in part, by federal law. *See, e.g.*, 42 U.S.C. § 16392(d) (directing the Secretary of Energy to authorize the director of each national laboratory to implement a Technology Infrastructure Program); *id.* § 16393(a)–(b) (directing the Secretary to require each director to designate a small business advocate and establish an assistance program for small businesses); *see also Officers of the United States*, 31 Op. O.L.C. at 118 (“whether an office has been established by law does not turn on whether Congress has formally created an ‘office’ by law”). Second, the Director’s authority to lead a national laboratory, particularly as this bill would supplement that authority, likely qualifies as “significant authority” for constitutional purposes. *See, e.g., Dep’t of Transp. v. Ass’n of Am. R.R.*, 135 S. Ct. 1225, 1235 (2015) (Alito, J., concurring) (positing that “those who run” governmental entities are officers).

As an Officer of the United States, the Appointments Clause requires that the Director be appointed by the President, a court of law, or a head of department. Furthermore, if the Director is not supervised by any federal officer other than the President, he would need to be appointed by the President with Senate confirmation. *See Edmond v. United States*, 520 U.S. 651, 662–63 (1997). It seems fair to assume that the Secretary of Energy supervises the Director, because the Secretary apparently designated the National Energy Technology Laboratory as the Department of Energy’s fifteenth laboratory in 1999, *see* <https://netl.doe.gov/about/history>, and the Department of Energy is “under the supervision and direction of the Secretary,” 42 U.S.C. § 7131. The Director thus need not be Senate-confirmed and could be appointed by the Secretary of Energy as the head of a department. We have been unable to determine, however, how the Director is appointed. No statute or regulation appears to govern the appointment process, and our independent research on the matter has been inconclusive. It is unclear who appointed the current Director, though the most recent *acting* Director was appointed by the Assistant Secretary for Fossil Energy, who is not a head of department. *See* Press Release, *Veteran Energy Research Leader Named Acting Director of NETL* (Mar. 1, 2018), <https://www.netl.doe.gov/node/3375>; *see also Germaine*, 99 U.S. at 511 (“inferior commissioners and bureau officers” within cabinet departments are not department heads). To resolve this concern, we recommend that the bill be revised to clarify that the Laboratory’s Director shall be appointed and subject to removal by the Secretary of Energy.

In addition, section 13(d)(3) of the bill would violate the Constitution’s Recommendations Clause. This provision would require the Secretary of Energy to submit a report to two congressional committees containing “recommendations for . . . legislative changes to provide the National Energy Technology Laboratory the necessary tools and resources to advance its research mission.” This requirement to provide Congress with proposed “legislative changes” would interfere with the President’s constitutional authority to recommend to Congress only “such measures as he shall judge necessary and expedient.” U.S. Const. art. II, § 3; *see also Application of the Recommendations Clause to Section 802 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003*, 40 Op. O.L.C. ___ (Aug. 25, 2016). To remedy this defect, we recommend inserting “, if any,” after “legislative changes” in section 13(d)(3).

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Thank you for the opportunity to present our views. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in black ink that reads "Stephen E. Boyd" followed by a vertical line and the letters "FOR".

Stephen E. Boyd
Assistant Attorney General

cc: The Honorable Frank Lucas
Ranking Member

The Honorable Lisa Murkowski
Chairman
Committee on Energy and Natural Resources
United States Senate

The Honorable Joe Manchin III
Ranking Member
Committee on Energy and Natural Resources
United States Senate