



December 13, 2018

Acting Attorney General Matthew Whitaker
Attn: General Counsel, Justice Management Division
950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001

Dear Acting Attorney General Whitaker:

We are writing to call your attention to the fact that the U.S. Commission on Civil Rights (“USCCR”) is currently operating without any legal authority and has been doing so since October, 1996. Despite this, however, the Commission is continuing to operate and spend taxpayer money without the authority to do so. This is contrary to law. The Commission’s operations should be halted unless, and until, its existence is once again properly authorized by Congress. We request that you, as the nation’s top law enforcement official and chief legal advisor to the government, advise the Commission that it has no authority to continue its operations. The U.S. Treasury should also be advised that it has no authority to disburse appropriated funds to the Commission.

The Competitive Enterprise Institute also hereby petitions you for authorization to act as a third-party relator under D.C. Code § 16–3502 for a writ of quo warranto to challenge the USCCR Commissioners’ legal authority.

Under 42 U.S.C. § 1975d, the statutory authority for the USCCR ended more than 22 years ago. Specifically the Civil Rights Commission Amendments Act of 1994, Public Law 103-419, Section 6, signed into law on October 25, 1994 by President Clinton, stated that the Act creating the USCCR “shall terminate on September 30, 1996.” The Congressional Research Service has noted that the “authorization for the Commission has expired” and that “Congress has not passed legislation to reauthorize the Commission on Civil Rights since 1994.” Garrine P. Laney, *The U.S. Commission on Civil Rights: History, Funding, and Current Issues*, pg. 9, available at <http://research.policyarchive.org/20077.pdf>.

The Constitution requires that all offices be “established by law.” U.S. Const. art. II, § 2 cl. 2. But the offices of the USCCR are no longer established by law; to the contrary, they have been terminated by law. As such, the Commission is not only in violation of its own statutory authority, but also the Constitution itself.

The Commission's unauthorized status is totally different from the claims one often hears about agencies that have supposedly been unauthorized for years or even decades. For example, a 2016 *Politico* article stated that

The Federal Bureau of Investigation, the Drug Enforcement Agency, and the Bureau of Alcohol, Tobacco, Firearms and Explosives have not been reauthorized by Congress since 2009. The State Department hasn't been reauthorized since 2003. For the Federal Trade Commission and National Weather Service, it's 1998 and 1993, respectively. The Federal Election Commission has been operating with an expired authorization since way back in 1981.

Danny Vinik, *Meet your unauthorized federal government*, POLITICO (Feb. 3, 2016), <https://www.politico.com/agenda/story/2016/02/government-agencies-programs-unauthorized-000036-000037>. These agencies, however, are not entities whose organic authorizations have expired. Rather, they are simply entities whose authorizations for appropriations have expired. There are many such unauthorized appropriations, and the Congressional Budget Office reports on them annually. CBO, *Expired and Expiring Authorizations of Appropriations* (Jan. 12, 2018), <https://www.cbo.gov/publication/53444>. But as a Government Accountability Office report explains, there is a huge difference between the two types of laws. "Enabling or organic legislation is legislation that creates an agency, establishes a program, or prescribes a function". On the other hand, "[a]n authorization act is basically a directive to Congress itself, which Congress is free to follow or alter (up or down) in the subsequent appropriation act." GAO, *Principles of Federal Appropriations Law*, pg. 2-56, GAO-16-464SP (4th ed., 2016), <https://www.gao.gov/legal/appropriations-law-decisions/red-book>. While the CBO report lists hundreds of programs whose funding authorizations have expired, to our knowledge *the USCCR is the only agency operating with an expired enabling statute*. And that expired enabling statute covers not just a single agency program, but the *entire* agency.

The most recent appropriations bill, enacted this past March, allocated money to the Commission but it did not reauthorize it. It stated: "For necessary expenses of the Commission on Civil Rights . . . \$9,700,000 . . . Provided further, That none of the funds appropriated in this paragraph shall be used for any activity or expense that is not explicitly authorized by section 3 of the Civil Rights Commission Act of 1983 (42 U.S.C. 1975a)." Consolidated Appropriations Act, 2018, Public Law No: 115-141, pg. 86. But 42 U.S.C. § 1975a has been terminated pursuant to 42 U.S.C. § 1975d, and so no person has authority to spend any of the appropriated money. As the Supreme Court has held, "payments of money from the Federal Treasury are limited to those authorized by statute." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 416 (1990). In 1992, the Comptroller General considered whether an earlier appropriation extended the Commission over a two-month gap in its authorized existence. The Comptroller General decided that it did, because that appropriation contained no provision that made it contingent on any authorization

given by the substantive law. 71 Comp. Gen. 378.¹ The current situation is different because the appropriation explicitly makes use of the funds contingent on the authorization of the substantive law.

In 1996, the House of Representatives considered extending the USCCR, but ended up declining to do so. According to the report issued by the Committee on the Judiciary, House Report No. 104-846 (1996), there were major problems at the Commission, including what it described as “numerous allegations of mismanagement and waste” and allegations that “the Commission used its subpoena authority in a manner that ‘chilled’ the First Amendment-protected activities of individuals.” *Id.* at 2. The Judiciary Committee believed these problems required, among other things, limiting the Commission’s ability to issue subpoenas and allowing the Commissioners to remove the staff director. *Id.* Even with these proposed changes, however, the House failed to approve extending the authorization of the Commission. Civil Rights Commission Act of 1996, H.R.3874, 104th Cong. (1996), <https://www.congress.gov/bill/104th-congress/house-bill/3874>. Regardless of the current validity of these charges, this is a matter for Congress to evaluate. To date, Congress has declined to extend the authorization of the Commission.

The *quo warranto* proceeding for which CEI requests your authorization is one way in which the unauthorized existence of the USCCR can be remedied. The U.S. Supreme Court has noted that U.S. Attorneys General are “expected by themselves or those they authorize to institute *quo warranto* proceedings against usurpers in the same way that they are expected to institute proceedings against any other violator of the law.” *Newman v. U.S. of Am. ex rel. Frizzell*, 238 U.S. 537, 547 (1915). The Court explained that “there might be many cases which, though justifying *quo warranto* proceedings, were not of such general importance as to require the Attorney General to take charge of the litigation.” *Id.* at 544. For this reason, the proceeding was allowed “*at the relation of any person desiring to prosecute the same.*” *Id.* (emphasis in original). This is what we seek—your authorization to bring this action, which the statute allows for any person desiring to challenge the legal authority of someone who claims to be an Officer

¹ Unlike the current appropriations bill, the act the Comptroller General considered did not require that the appropriated funds could only be used for explicitly authorized activities. But even with the 1991 act’s language, the Comptroller General’s opinion has dubious relevance today. For one thing, it involved a momentary lapse in the Commission’s authorization (two months, to be exact), rather than the Commission’s 22-year (and counting) lack of authorization today. Moreover, even on its own terms the opinion is questionable, given the strong presumption that appropriation bills do not change substantive law. As the Supreme Court held in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190–91 (1978), “[w]hen voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need.”

of the United States. The Commissioners would not be removed unless the court agrees that they do not lawfully hold the offices they claim.

We do not seek to stop the operations of the USCCR because of some disagreement with its work. Our complaint is based solely on the fact that Congress has allowed the Commission's authority to expire, and that this expiration has continued in force for over 22 years. If Congress wishes the Commission to continue to exist, it can easily do so by reauthorizing it. Such reauthorization would do more than simply retain the status quo; it would demonstrate that agencies are creations of Congress, and that time limits on authorizing statutes have meaning; they cannot simply be ignored.

For the same reason, the U.S. Treasury's continued disbursement of funds to an unauthorized agency violates 31 U.S.C § 1301(a). As the Comptroller General himself noted in his 1992 opinion, "once a termination or sunset provision becomes effective, the agency ceases to exist and no new obligations may be incurred after the termination date as a charge against the agency's appropriation." 71 Comp. Gen. 378 (1992); *see also* 14 Comp. Gen. 490 (1934) ("After the expiration of the statutory life of [a commission] the former disbursing officer of that commission may not disburse any of the funds but lawful obligations previously incurred").

We ask that you, as the nation's top law enforcement officer, step in to remedy this issue. And we offer to serve as a third-party relator in a quo warranto proceeding if that is the route you choose to take.

Sincerely,

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