REMOVABILITY OF THE FEDERAL COORDINATOR FOR ALASKA
NATURAL GAS TRANSPORTATION PROJECTS

The Federal Coordinator for the Alaska Natural Gas Transportation Projects serves at the
pleasure of the President and thus may be removed at the President’s will.

October 23, 2009

MEMORANDUM OPINION FOR THE
PRINCIPAL DEPUTY COUNSEL TO THE PRESIDENT

This memorandum confirms oral advice about the removability of the Federal Coordinator for the Alaska Natural Gas Transportation Projects (“Federal Coordinator” or the “Coordinator”). Specifically, you asked us whether the statute establishing the Office of the Federal Coordinator, 15 U.S.C. § 720d (2006), restricts the President’s power to remove the Coordinator. As we previously explained in our oral advice and now explain in greater detail, we believe that the Federal Coordinator serves at the pleasure of the President and thus may be removed at the President’s will.

Critically, the Act does not set out any preconditions for the removal of the Federal Coordinator. As a general matter, “[i]n the absence of a specific provision to the contrary, the power of removal from office is incident to the power of appointment.” Keim v. United States, 177 U.S. 290, 293-94 (1900); cf. Armstrong v. Bush, 924 F.3d 282, 289 (D.C. Cir. 1991) (“When Congress decides purposefully to enact legislation restricting or regulating presidential action, it must make its intent clear.”). This “rule of constitutional and statutory construction” recognizes that “those in charge of and responsible for administering functions of government who select their executive subordinates, need in meeting their responsibility to have the power to remove those whom they appoint.” Myers v. United States, 272 U.S. 52, 119 (1926). These principles support the inference that an officer serves at the pleasure of the President where Congress has not plainly provided for it. See, e.g., The Constitutional Separation of Powers Between the President and Congress (“Separation of Powers”), 20 Op. O.L.C. 124, 170 (1996); see also id. at 172-73 (“[B]ecause the [officer]’s tenure is not protected by an explicit for-cause removal
limitation, . . . we therefore infer that the President has at least the formal power to remove the
[officer] at will.”); Removal of Holdover Officials Serving on the Federal Housing Finance
Removal”).

Because Congress did not explicitly provide tenure protection to the Federal Coordinator,
the President, consistent with the above settled principles, may remove her without cause.

The only two textual indications that are conceivably to the contrary—i.e., the
Coordinator’s fixed term, 15 U.S.C. § 720d(b)(1), and the “independence” of the Office, id.
§ 720d(a)—do not undermine the above conclusion. First, the Supreme Court has long held
fixed terms to impose a limit on service but not to imply tenure protection. Parsons v. United
States, 167 U.S. 324, 338-39 (1897) (President can remove United States Attorneys even during
their appointed four-year terms); see also Memorandum for J. Paul Oetken, Associate Counsel
to the President, from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel,
Re: Displacement of Recess Appointees in Tenure-Protected Positions (Sept. 1, 2000) (noting
that “statutory term is a limit, rather than a protection of

Second, that Congress established the Office of the Federal Coordinator as an
“independent office in the executive branch,” 15 U.S.C. § 720d(a), does not imply tenure
protection. As we observed with respect to similar language, “[a]ll that should be inferred from
the status of an “independent agency” is that the entity is not located within another department
or agency.” FHFB/RRB Removal at 4 n.5; see also Memorandum for the Attorney General from
Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, Removability
of Members of the Renegotiation Board (Feb. 24, 1961) (“The significance of th[e] . . . phrase
[i.e., “an independent establishment in the executive branch of the Government”] is uncertain,
but there is reason to believe that Congress intended to make the Board independent of the
Department of Defense and of other agencies in the executive branch, without necessarily
intending that it be independent of the President as head of the executive branch.”). Thus,
Congress granted the Federal Coordinator a measure of free-standing authority from other
executive agencies—not from the President. Indeed, although the statute grants limited authority
to the Coordinator to overrule certain terms and conditions set by other federal agencies in their
agreements related to the pipeline project, 15 U.S.C. § 720d(d)(2), it expressly subjects a critical

1 As reported out of the House Committee on Energy and Commerce, a competing bill explicitly provided
108-65 (2003). We do not see this provision as significant, however, since, as we have explained, there is no
requirement that a law contain an express at-will removal provision. Indeed, the Senate Report, noting that the
Coordinator serves at the President’s pleasure, is consistent with the general rule that an express at-will removal
provision need not be included in the enacted law in order to make the officer subject to the President’s plenary
removal authority.
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aspect of the Federal Coordinator's duties to Presidential oversight. *Id.* § 720d(e)(1) (requiring Coordinator to enter into a “joint surveillance and monitoring agreement” with the State of Alaska that shall be subject to the President’s approval).

The Supreme Court has recognized an exception to the above settled rule against inferring tenure protection in the face of Congressional silence. That case is inapplicable here. In *Wiener v. United States*, the Supreme Court upheld restrictions on the removal of members of the War Claims Commission because of “the intrinsic judicial character of [their] task.” 357 U.S. 349, 355-56 (1958); see also *Separation of Powers* at 170 (Executive Branch should not “infer the existence of a for-cause limit on presidential removal,” “except with respect to officers whose only functions are adjudicatory.”). Tasked by Congress with coordinating among various agencies and ensuring compliance with the Act, the Federal Coordinator performs quintessentially executive—not adjudicatory—functions. *Cf. Morrison v. Olson*, 487 U.S. 654, 691 (1988) (stating that an officer’s function is only one consideration in deciding whether an express statutory protection of tenure is constitutional). Although *Wiener* concerned officers with adjudicatory functions, we are aware that there is language in cases, often in dictum, suggesting that a for-cause removal restriction may be inferred even for officers whose duties are not wholly adjudicatory, such as the board members of “independent” regulatory commissions. *See Swan v. Clinton*, 100 F.3d 973, 982-83 (D.C. Cir. 1996) (Board of National Credit Union Administration); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993) (Federal Election Commission); *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988) (Securities and Exchange Commission); *cf. Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 680 (D.C. Cir. 2008) (recognizing for-cause removal restriction as to SEC Commissioners), *cert. granted*, 129 S. Ct. 2378 (2009) (No. 08-861). However, these multi-member boards, the appointments to which are typically subject to political balance requirements and staggered terms, do not remotely resemble the Office of the Federal Coordinator. Accordingly, we do not believe these cases addressing them provide support for departing from the general rule we have identified.

In sum, because Congress did not explicitly confer tenure protection upon the Federal Coordinator, the President may remove the incumbent officer at will.

/s/

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