The Honorable Xavier Becerra  
Secretary  
U.S. Department of Health and Human Services  
200 Independence Avenue, S.W.  
Washington, D.C. 20201

Secretary Becerra,

Pursuant to Rules X and XI of the U.S. House of Representatives, the committee is continuing its investigation into whether appointments and reappointments of National Institutes of Health (NIH) Institute and Center Directors (IC Directors) comply with the Constitution and other legal requirements, most notably the 21st Century Cures Act. Our concerns were outlined in our April 21, 2023, letter to you.

We write today because we are concerned that you may be continuing on an unconstitutional appointment process in an effort to avoid accountability for your previous failure to properly reappoint the 14 IC Directors in December 2021.

On August 2, 2023, the NIH issued a press release announcing the appointment of Dr. Jeanne Marrazzo as director of the National Institute of Allergy and Infectious Diseases (NIAID) and that she would oversee NIAID’s $6.3 billion budget. The press release stated that Dr. Lawrence Tabak, the Acting Director for the NIH, named her to this position. The press release included no statement from you or any indication that you had a role in her appointment.

HHS has acknowledged the Secretary must appoint NIH IC directors. The May 5, 2023, response letter from Health and Human Services (HHS) Assistant Secretary Melanie Egorin stated the HHS Secretary is the approving official for NIH IC director appointments and the NIH director is the recommending official. Her letter unequivocally states: “NIH IC Directors are recommended for appointment by the NIH Director and approved for appointment by the Secretary of the Department of Health and Human Services (HHS).” Further, you signed affidavits of reappointment with prospective effect of certain NIH IC directors in June 2023. Your affidavits expressly invoked the Appointments Clause, which tacitly acknowledges that the IC Directors are inferior officers of the United States.
Since the May 5, 2023, letter, HHS has changed its position and now claims that the NIH Director can appoint IC Directors. This position is legally without merit. We believe it reflects an attempt to justify your previous failure to appoint the Directors. Moreover, even if such appointments were legally permissible, it appears that then-NIH Director Francis Collins never reappointed the IC Directors after their terms expired in December 2021. Eighteen months after we first inquired about the appointments, HHS and NIH have thus far failed to produce any documents indicating that Dr. Collins made the reappointments. Further, even under HHS’s changed position, Dr. Tabak, as the Acting NIH Director, lacks the authority to make Dr. Marrazzo’s appointment, if in fact he made the appointment.

Our concerns that the reappointments never occurred have only grown more acute following your testimony before the Committee’s Subcommittee on Oversight and Investigations on July 26, 2023:

Chair Rogers: Who reappointed the IC directors when their terms expired in December of 2021? Yes or no, are you claiming then that NIH Director Francis Collins signed the appointment paperwork?

Secretary Becerra: Madam Chair, as we have said to you, whether in letter or orally, the appointments we have made are valid. We stand by those appointments. If you read the statute, it's very … clear the director shall be appointed … by the Secretary, acting through the director of the National Institute of Health.

Chair Rogers: …[I]s there a form in NIH or at HHS with Director Collins’s signature reappointing Anthony Fauci and the rest of the IC directors? And if so, why will you not provide it to us?

Secretary Becerra: Madam Chair, there is ample evidence of the process that we use. It is valid under law. The appointments we have made, we stand by them.

Chair Rogers: So, Mr. Secretary, is there a form? Is there a letter? Can you provide us any documentation that Dr. Collins appointed -- reappointed these IC directors?

Secretary Becerra: Although we have already provided you with a lot of information, I'm more than willing to have my team … follow up with you on that particular question.

If these documents exist, your continued refusal to produce them is inexplicable given the potential ramifications for federal biomedical research funding.
The failure to appoint this number of inferior officers of the United States is unprecedented. It jeopardizes the legal validity of more than $25 billion in federal biomedical research grants made in 2022 alone. The 21st Century Cures Act requires NIH IC Directors to “review and make the final decision with respect” to all competitive grant awards issued by their Institute or Center. Thus, the final award decision rests with NIH IC Directors. Supreme Court precedent strongly suggests that the remedy for the failure to correctly reappoint the IC Directors would be to invalidate any decision made by the Directors that is challenged in court.¹

Since the enactment of the 21st Cures Act in 2016, it is our understanding that the HHS Secretary in the previous administration personally approved the appointments of NIH IC directors. This precedent, the clear commands of the U.S. Constitution’s Appointments Clause along with your affidavits of prospective reappointments and HHS correspondence indicate you are required to appoint all NIH IC Directors, including Dr. Jeanne Marrazzo to be the Director of NIAID.

Please provide a copy of the appointment document for Dr. Jeanne Marrazzo to be the Director of NIAID by no later than August 23, 2023.

Sincerely,

Cathy McMorris Rodgers
Chair
Energy and Commerce Committee

Brett Guthrie
Chair
Subcommittee on Health

H. Morgan Griffith
Chair
Subcommittee on Oversight and Investigations

CC: The Honorable Frank Pallone, Ranking Member
    The Honorable Anna Eshoo, Ranking Member, Subcommittee on Health
    The Honorable Kathy Castor, Ranking Member, Subcommittee on Oversight and Investigations

¹Lucia v. Sec. & Exch. Comm’n, 138 S. Ct. 2044 (2018) (holding SEC ALJs are “Officers” subject to the Appointments Clause and that claimants are entitled to an independent decision issued by a different ALJ if a timely challenged ALJ decision is “tainted” by a pre-ratification ALJ decision); see also Cody v. Kijikazi, No. 21-3553, 2022 U.S. App. LEXIS 25355 (9th Cir. Sept. 8, 2022) (“An Appointments Clause violation is thus no mere technicality or quaint formality—it weakens our constitutional design. An appointment too far removed from the President or the head of an executive agency may, for example, erode political accountability”).