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ONE HUNDRED EIGHTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

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WASHINGTON, DC 20515-6115

Majority (202) 225-3641

Minority (202) 225-2927

April 21, 2023

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

Secretary Becerra,

The National Institutes of Health (NIH) has two vacant NIH Institute or Center (IC) director positions: one at the National Institute of Allergy and Infectious Diseases (NIAID), and the other at the Fogarty International Center.¹ Appointments to these vacant positions are critical.

However, there is no Senate-confirmed NIH Director to help make the appointments. The Principal Deputy Director of NIH, who is the senior official “performing the duties of the Director of the [NIH],”² does not have the inherent authority to appoint NIH Institute or Center directors. Further, such appointment authority could not be delegated to the Principal Deputy Director because Article II of the Constitution assigns the appointment authority of such officials to the HHS Secretary. Thus, under the circumstances, it would seem, as the HHS Secretary, you need to participate in making these appointments.

Constitutional considerations merit your involvement in the appointments of the vacant NIH IC director positions and reappointments of NIH IC directors, who serve five-year terms. There is a legal basis to believe NIH IC directors qualify as inferior officers of the United States under Article II of the Constitution since they exercise significant authority. If NIH IC directors are inferior officers, the HHS Secretary must have some involvement in their appointments to comply with the Appointments Clause of the Constitution. Last year, in response to our March

¹ For example, Dr. Anthony Fauci recently retired as Director of National Institute of Allergy and Infectious Diseases, and Dr. Roger Glass retired as the Director of the Fogarty International Center.

² NIH, The NIH Director, Biographical Sketch of Lawrence A. Tabak, D.D.S., Ph.D., <https://www.nih.gov/about-nih/who-we-are/nih-director/biographical-sketch-lawrence-a-tabak-dds-phd>

14, 2022, letter about the reappointments of NIH IC directors, HHS through NIH provided information indicating that in recent years the NIH Director appeared to be solely making the appointments and/or reappointments.

In light of these concerns, pursuant to Rules X and XI of the U.S. House of Representatives, please respond to the following questions by May 5, 2023:

1. Who is making the appointments for the NIH Institute or Center director positions that are vacant? If it is not the HHS Secretary, what is the legal basis for this official to make these appointments?
2. With regard to reappointments of NIH IC directors, what criteria is used for reappointments?
3. What was the role of the NIH Director in the reappointments since December 13, 2016? Did the NIH Director make the reappointment or the termination?
4. Did the HHS Secretary have any role in the reappointments? If so, please explain. Does the Secretary make any recommendations?
5. Per 42 USC § 284 (a)(2) (F), “[a]ppointments and reappointments under this subsection shall be made on the basis of ability and experience as it relates to the mission of the National Institutes of Health and its components, including compliance with any legal requirement that the Secretary or Director of National Institutes of Health determines relevant.” What information is used in the reappointments to determine ability and experience as relates to the NIH mission? Who decides on what information is used? Who decides on the appointments and reappointments? Please provide documentation showing that the reappointments were made on the basis of ability and experience.
6. Per 42 USC § 284(a)(2)(F), is there any legal requirement that you as the Secretary determined relevant to the reappointment of the IC directors at the NIH? If so, please list the requirement(s) and why they were determined relevant.
7. Per 42 USC § 284(a)(2)(F), is there any legal requirement that the Director of NIH determined relevant to the reappointment of the IC directors at the NIH? If so, please list the requirement(s) and why they were determined relevant.
8. Per 42 USC § 284(a)(2)(B), NIH Directors must be reappointed in accordance with standards applicable to the relevant appointment mechanism. What is the relevant appointment mechanism? What are the standards applicable to the relevant appointment mechanism?
9. Any internal guidance documents (policies, procedures, etc.) that address the appointment, reappointment, assessment, and termination of NIH IC Directors. If these

are evidence that the Secretary may affect the appointment, reappointment, or termination of IC Directors, this may serve to avoid a Constitutional problem.

10. Has the Secretary delegated the full authority to reappoint or terminate – and if so, pursuant to what authority?
11. For the reappointed NIH IC directors, please indicate for each director whether they received an increase in compensation as a result of the review.
12. Please provide the forms showing the reappointments of each of the NIH IC directors where applicable.
13. For each NIH IC director reappointed since December 13, 2016, please explain what role, if any, the Secretary played in the reappointment.
14. Why do HHS or NIH not make public announcements regarding reappointment of current IC Directors? Will public announcements be made going forward?

This letter serves as a formal request to preserve all existing and future records and materials in NIH's possession relating to the topics addressed in this letter. You should construe this preservation notice as an instruction to take all reasonable steps to prevent the destruction or alteration, whether intentionally or negligently, of all documents, communications, and other information, including electronic information and metadata, that are or may be responsive to this congressional inquiry. This instruction includes all electronic messages sent using official and personal accounts or devices, including records created using text messages, phone-based message applications, or encryption software.

An attachment to this letter provides additional instructions for responding to the committee's request. If you have any questions, please contact Alan Slobodin of the Majority Committee staff at (202) 225-3641.

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: Frank Pallone Jr., Ranking Member, Energy and Commerce Committee
Anna Eshoo, Ranking Member, Subcommittee on Health
Kathy Castor, Ranking Member, Subcommittee on Oversight and Investigations
Lawrence A. Tabak, D.D.S., PhD., Senior Official performing the duties of Director, National
Institutes of Health

