

Withdrawn/Redacted Material

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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Memorandum	Authority to Replace Political Appointees [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/09/2025 JLS] - To: Douglas Fehr - From: Kathie Ann Whipple	2	02/12/2001	

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Political Appointees - Authority to Remove

FRC ID:

9693

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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Withdrawn/Redacted Material **SUPERSEDED**

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United States
**Office of
Personnel Management**



U.S. OFFICE OF PERSONNEL MANAGEMENT

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MEMORANDUM FOR DOUGLAS G. FEHRER
SENIOR ADVISOR, HUMAN
RESOURCE PROGRAMS

FROM: KATHIE ANN WHIPPLE
ACTING GENERAL COUNSEL

SUBJECT: AUTHORITY TO REPLACE POLITICAL
APPOINTEES

FEB 12 2001

You requested that the Office of the General Counsel (OGC) review a number of currently occupied positions in the Executive branch. This review was to assist in determinations of whether the non-career incumbents of those positions have any legal entitlement to remain in their positions, subsequent to the inauguration of President George W. Bush, on January 20, 2001.¹

A number of factors need to be considered in a determination of whether the incumbents of the various positions can legally be required immediately to submit their resignations or be asked to vacate their positions. In some cases, the plain language of the statute that created the position can provide the appropriate answer. For example, the statutes creating a number of the positions at issue require a Presidential appointment with Senate confirmation, and set forth a specific time-based term of office. In some of those situations, the creating legislation clearly allows the President to remove an incumbent only for cause, such as neglect of duties or malfeasance. In those situations, the incumbent is not required to resign or vacate his or her office.

In other situations, the legislation sets forth a term of office, but is silent as to a specific basis for the President to remove the incumbent. It is a long-standing judicial interpretation that, absent a specific statutory provision to the contrary; the power of removal from office is incident to the power to appoint to such position. See Carlucci v. Doe, 488 U.S. 93 (1988); Keim v. United States, 177 U.S. 290, 293 (1900). The Supreme Court has held that a term limit does not

¹ The list of titles that OGC reviewed includes statutorily created positions, as well as subordinate positions created by various agencies, boards or commissions. From the information available to OGC, all the incumbents are non-career, although a final determination should be made about possible career status for some of these employees

always provide removal protection in situations involving traditional executive branch officials appointed by the President. See Parsons v. United States, 167 U.S. 324, 338-39 (1897) (President can remove U.S. Attorneys even during their appointed four year terms).²

In many of the situations we reviewed, the positions under consideration were not directly created by statute. Rather, the positions were subordinate offices within Executive Branch entities, including some independent or regulatory agencies. The ultimate determination of the authority to request and enforce the resignation of incumbents in those positions often rests on the status of the head of the entity. That, in turn, can depend on the statutory authority for the entity head, whether in a permanent or "acting" status.

The determinations we have reached as to any particular incumbent are not intended, and should not be considered, to support the proposition that the incumbent is **required** to resign or be removed. That determination is one of policy and would be dependent on factors outside the parameters of our review.

The positions we have reviewed were included because they appeared in information compiled by the Office of Executive Resources Management. There may well be additional positions and entities that need to be reviewed. It is also important to note that individual determinations may ultimately hinge on nuances in legislative histories or Executive Branch custom or prior determinations. Because of the time constraints we faced in reviewing the positions listed below, we have not undertaken exhaustive reviews of legislative histories or reviewed what actions were taken during prior Presidential transitions. It may, at some point, be advantageous to perform such reviews as to particular positions in which the Administration has an interest. In addition, in any particular case, it could be beneficial to ascertain whether the legal counsel of the entity in which the specific position is employed has reviewed the status and issued any opinions that could be pertinent.

² Several of the incumbents considered in our review have cited a letter from John Podesta, Chief of Staff to former President Clinton to Cabinet and Agency Heads, as authority for why they do not have to submit their resignations. That letter, dated November 29, 2000 states, *inter alia*, that "presidential appointees who are serving term appointments" and "non-career SES and Schedule C appointees at independent and regulatory agencies headed by term appointees..." are not required to submit letters of resignation at the time of the letter. Although it is unclear whether those instructions were meant to support a legal or policy basis for certain officials not resigning, the memo is no longer operative. Any decisions involving the employment of the officials at issue are subject to current policy positions, as long as they are consistent with the legal rights of the incumbents, as described more fully in this memorandum.