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Congress has designated the CFTC as an “independent agency” does not, in and of itself, preclude the possibility that the President can remove commissioners at will, *see Constitutionality of Legislation Extending the Terms of Office of United States Parole Commissioners*, 18 Op. O.L.C. 166, 169-171 (1994), but there are precedents indicating that he may lack such removal power with respect to an agency such as the CFTC, and might instead be limited to removing a CFTC Commissioner only for good cause, *i.e.*, for “inefficiency, neglect of duty or malfeasance in office.” *See, e.g., SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988) (adopting a similar assumption as to the SEC); *Federal Election Comm’n v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993) (adopting a similar assumption with respect to the FEC). Assuming that is the case — or to the extent that the President would not otherwise have sufficient authority to superintend the Commission’s criminal prosecution authority — section 17 of the legislation would raise serious concerns.

In almost all cases, Federal law currently provides for the Department of Justice to prosecute Federal offenses. In *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court considered a rare exception to this general rule: The Court upheld a provision of the Ethics in Government Act (since expired) permitting prosecution of Government officials by an independent counsel who could be removed by the Attorney General only for “good cause.” The Court held that “the real [constitutional] question” in such a case “is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.” *Id.* at 691. In upholding the removal restriction in *Morrison* itself, the Court concluded that although “[i]t is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity,” *id.* at 695, the Act continued to provide the Executive branch with “sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties,” *id.* at 693.

The *Morrison* Court emphasized, for one thing, the limited and temporary scope of the independent counsel’s jurisdiction, *id.* at 691-93 — something that would not characterize the CFTC’s prosecution authority under the proposed legislation. In particular, the Ethics in Government Act was principally “restricted in applicability to certain federal officials suspected of certain serious federal crimes,” *id.* at 672, while H.R. 977 would give the CFTC much broader jurisdiction to prosecute private individuals and companies for violations of the Commodity Exchange Act. The Court also stressed that the Act “g[a]ve the Attorney General several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel.” *Id.* at 696. To be sure, the Court noted that “[m]ost importantly, the Attorney General retains the power to remove the counsel for ‘good cause,’ a power that we have

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already concluded provides the Executive with substantial ability to ensure that the laws are ‘faithfully executed’ by an independent counsel” — and that is a check the President likewise would have with respect to the prosecutorial power of the CFTC under the proposed legislation. However, the *Morrison* Court also noted that “[n]o independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General’s decision not to request appointment if he finds ‘no reasonable grounds to believe that further investigation is warranted’ is committed to his unreviewable discretion,” thereby giving the Executive “a degree of control over the power to initiate an investigation by the independent counsel.” *Id.* By contrast, under the current proposal, the CFTC’s prosecution decisions would not be cabined by an initial determination by the Attorney General, or by any other politically accountable official, that “reasonable grounds” exist for prosecution. To the contrary, by the plain terms of the bill, the CFTC’s authority would exist only in cases where the Attorney General had *declined* to prosecute. Nor would the CFTC’s jurisdiction be defined, as was that of the independent counsel, “with reference to the facts submitted by the Attorney General.” *Id.* And, importantly, the independent counsel in *Morrison* was required to “abide by Justice Department policy [on prosecutions] unless it [was] not ‘possible’ to do so.” *Id.* There is no such obligation in section 17 of the current bill; it would appear to permit the CFTC to ignore Justice Department policies and practices for any reason.

Accordingly, we think the bill presents a greater threat to the President’s ability “to perform his constitutionally assigned duties” than did the Ethics in Government Act at issue in *Morrison*. In addition, we think it is of special significance that although the Congress, for many decades, has established degrees of independence for agencies engaged in *civil* enforcement of various kinds, *see Morrison*, 487 U.S. at 692 n.31 (discussing civil enforcement authority of the Federal Trade Commission and the Consumer Product Safety Commission); *Blinder, Robinson*, 855 F.2d at 682 (upholding constitutionality of Securities and Exchange Commission enforcement authority), there is no similar historical pattern for the removal of political control over the function of criminal prosecution, with the notable exception of the independent counsel statute itself, which, as explained above, contained more robust means of Executive control than would the CFTC proposal. Therefore, the fact that the CFTC already enjoys the authority to prosecute *civil* actions in Federal court, *see* 7 U.S.C. § 13a-1, does not mean that the provision of a novel criminal prosecutorial authority for the CFTC would not raise distinct constitutional problems.

However, even if the CFTC did not enjoy any degree of independence from Executive control, and if, therefore, there were no constitutional problem, the Department of Justice nevertheless would strongly oppose the provision on policy grounds. First, section 516 of title 28 gives the Attorney General exclusive authority over Federal litigation, including criminal

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prosecution, unless other statutes expressly provide otherwise. The proliferation of prosecution authority in other agencies could risk interference with the Attorney General's role as the Nation's chief prosecutor.

Second, the Department of Justice is best suited to prosecute crimes in the Federal system. The Department of Justice has the necessary expertise and the well-established rigorous professional and ethical guidelines (inculcated through its training programs, the U.S. ATTORNEY'S MANUAL, PRINCIPLES OF FEDERAL PROSECUTION, PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS, and other guidelines) to ensure the highest levels of representation in Federal courts throughout the Nation, as well as consistency in the prosecution of Federal crime.

Third, creation of a new prosecutorial authority in the CFTC would require the development of new charging policies and a new litigation infrastructure, including grand juries, to do what the Department of Justice already is charged to do. Indeed, there is a legal need to separate civil and criminal prosecutive processes, and the CFTC would have a difficult time accomplishing this within its own agency.

Fourth, enactment of section 17 would set a dangerous precedent in the proliferation of prosecutors in agencies that are currently adapted to execute only the civil enforcement authority they generally already have.


Fifth, section 17 would be a limited authority: It would authorize CFTC prosecution only where "the Attorney General has declined to do so." But this limitation does not address our concerns; it exacerbates them. The Department of Justice might decline to prosecute a case for sound policy or tactical reasons (as opposed to declinations rooted in the management of its resources), or, most importantly, because the Attorney General has determined that there is not proof beyond a reasonable doubt that a Federal offense has been committed. Section 17 would allow the CFTC to override the Department's policy and legal judgments by bringing its own criminal cases. This is alarming. If the merits of a case do not meet the standards of the Department of Justice's PRINCIPLES OF FEDERAL PROSECUTION, it should not be prosecuted by *anyone*. Further, we note that every prosecution by CFTC lawyers would begin with the presumption, known to the court and to the defense counsel, that the case was considered inappropriate for prosecution by the Department of Justice.

Finally, if there is concern that not enough CFTC or financial fraud cases are being prosecuted, we believe that the CFTC can — within its existing authority — develop additional cases for referral to the Department of Justice for prosecution.

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Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that, from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,



M. Faith Burton
Acting Assistant Attorney General

cc: The Honorable Lamar S. Smith
Ranking Minority Member
Committee on the Judiciary

The Honorable Spencer Bachus
Ranking Minority Member
Committee on Financial Services

The Honorable Frank Lucas
Ranking Minority Member
Committee on Agriculture



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

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The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Barney Frank
Chairman
Committee on Financial Services
U.S. House of Representatives
Washington D.C. 20515

The Honorable Collin C. Peterson
Chairman
Committee on Agriculture
U.S. House of Representatives
Washington, D.C. 20515

Dear Messrs. Chairmen:

This letter presents the views of the Department of Justice on H.R. 977, the "Derivatives Markets Transparency and Accountability Act of 2009." Section 17 of the bill would authorize the Commodities Futures Trading Commission ("CFTC") to prosecute criminal cases relating to violations of the Commodity Exchange Act where "the Attorney General has declined to do so." For the reasons that follow, we strongly oppose this provision.

First, this provision raises serious constitutional concerns because of the nature of the CFTC. Congress has established the CFTC as an "independent agency of the United States Government," composed of five Commissioners appointed by the President with the advice and consent of the Senate, who are to serve five-year terms. *See* 7 U.S.C. § 2(a)(2)(A). The fact that