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THE ATTORNEY GENERAL
AND OTHER EXECUTIVE OFFICERS OF THE FEDERAL GOVERNMENT

IN RELATION TO

THEIR OFFICIAL DUTIES

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Foreword

The Attorney General has directed the Office of Legal Counsel to publish selected opinions on an annual basis for the convenience of the executive, legislative, and judicial branches of the Government, and for the convenience of the professional bar and general public.* Only opinions as to which the addressee has agreed to publication are included. The first two volumes of opinions cover the years 1977 and 1978. This third volume includes selected opinions issued during 1979.

*The Editor acknowledges the assistance of Joseph Foote, Esq., and Mary E. Cadette in preparing these opinions for publication.

Memorandum Opinions in This Volume

January 2, 1979

79-1 MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF ENERGY

Department of Energy—Civil Service Commission—Number of Supergrade Positions the Secretary of Energy May Fill Pursuant to the Department of Energy Organization Act (42 U.S.C. § 7101)

This responds to your request for our opinion concerning the authority of the Secretary of Energy (Secretary) under the Department of Energy Organization Act (DEOA) or (Act)[1] to fill 20 supergrade positions originally authorized by the Economic Stabilization Act of 1970 (ESA)[2] and carried forward by the Emergency Petroleum Allocation Act of 1973 (EPAA).[3] We conclude that the interpretation of the DEOA by the Civil Service Commission (CSC) is correct and that those positions are not available to the Secretary.

The 20 supergrade positions at issue were created by § 212(d) of the ESA[4] and carried forward by § 5(a) of the EPAA.[5] When the Federal Energy Administration of 1974 (FEAA) was enacted,[6] President Nixon delegated his authority under the EPAA to the Federal Energy Administration

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[1] Pub. L. No. 95-91, 91 Stat. 565 (1977), codified at 42 U.S.C. § 7101 *et seq.*

[2] Pub. L. No. 91-379, 84 Stat. 796 (1970), as amended by Pub. L. No. 91-558, Title II, § 201, 84 Stat. 1468 (1970), Pub. L. No. 92-8, § 2, 85 Stat. 13 (1971), Pub. L. No. 92-15, § 3, 85 Stat. 38 (1971), Pub. L. No. 92-210, § 2, 85 Stat. 743 (1971), Pub. L. No. 93-28, §§ 2-8, 87 Stat. 27 (1973), reprinted at 12 U.S.C. § 1904 note.

[3] 15 U.S.C. § 751 *et seq.*

[4] Pub. L. No. 92-210, § 212(d), 85 Stat. 743, 751 (1971), reads as follows:

> (1) In addition to the number of positions which may be placed in GS-16, 17, and 18, under section 5108 of title 5, United States Code, not to exceed twenty positions may be placed in GS-16, 17, and 18, to carry out the functions under this title.
>
> (2) The authority under this subsection shall be subject to the procedures prescribed under section 5108 of title 5, United States Code, and shall continue only for the duration of the exercise of functions under this title.

[5] 15 U.S.C. § 754(a)(1)(B).

[6] 15 U.S.C. § 761 *et seq.*

(FEA) Administrator.[7] The DEOA transferred all the functions of the FEA to the Secretary,[8] and saved all authority available to the President immediately prior to the effective date of the Act.[9] It is arguable that the authority for the 20 supergrades has never lapsed and presently resides in the Secretary. You contend that § 621(d) of the DEOA expressly preserves the § 212(d) authority by providing that the Secretary may fill 200 supergrade positions "in addition to the number of positions which may be placed at GS-16, GS-17 and GS-18 under section 5108 of title 5, United States Code, under existing law, or under this Act."[10]

Although your contention is not without force, our analysis of the statutory structure and purpose leads us to conclude as follows: (1) recognition of the 20 additional supergrade positions would be inconsistent with the Act and congressional intent; (2) the phrase "under existing law" in § 621(d) was not intended to refer to § 212(d) of the ESA; and thus (3) the authority provided by § 212(d) is not available to the Secretary.

Supergrade Positions Under DEOA

Section 621 of the Act gives the Secretary the authority to fill a total of 689 supergrade positions. Some must be filled pursuant to the civil service laws, others are exempt, and still others are initially exempt but will eventually be covered.[11] The CSC contends that the 689 positions represent the

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[7] Exec. Order No. 11790, § 2(a), 39 F.R. 23185 (1974).

[8] § 301(a), 42 U.S.C. § 7151(a).

[9] § 708, 42 U.S.C. § 7298.

[10] 42 U.S.C. § 7231(d).

[11] § 621, 42 U.S.C. § 7231, provides, in relevant part:

(b)(1) Subject to the limitations provided in paragraph (2) and to the extent the Secretary deems such action necessary to the discharge of his functions, he may appoint not more than three hundred eleven of the scientific, engineering, professional, and administrative personnel of the department without regard to the civil service laws, and may fix the compensation of such personnel not in excess of the maximum rate payable for GS-18 of the General Schedule under section 5332 of Title 5 [United States Code].

(2) The Secretary's authority under this subsection to appoint an individual to such a position without regard to the civil service laws shall cease

(A) when a person appointed, within four years after the effective date of this chapter,, to fill such position under paragraph (1) leaves such position, or

(B) on the day which is four years after such effective date, whichever is later.

(c)(1) Subject to the provisions of chapter 51 of Title 5 [United States Code], but notwithstanding the last two sentences of section 5108(a) of such title, the Secretary may place at GS-16, GS-17, and GS-18, not to exceed one hundred seventy-eight positions of the positions subject to the limitation of the first sentence of section 5108(a) of such title.

(2) Appointments under this subsection may be made without regard to the provisions of section 3324 of Title 5 [United States Code], relating to the approval by the Civil Service Commission of appointments under GS-16, GS-17, and GS-18 if the individual placed in such position is an individual who is transferred in connection with a transfer of functions under this chapter and who, immediately before the effective date of this chapter, held a position and duties comparable to those of such position.

(3) The Secretary's authority under this subsection with respect to any position shall cease when the person first appointed to fill such position leaves such position.

(Continued)

total number of supergrade positions presently available to the Secretary. The Department of Energy (DOE) asserts that § 621 is not exclusive and that the 689 figure is not an absolute limit. Resolution of this issue requires a detailed analysis of the history of § 621.

The provisions concerning supergrade positions underwent substantial change as the DEOA progressed through Congress. The Senate bill, S. 826, gave the Secretary the authority to fill 600 "scientific, engineering, professional, and administrative" supergrade positions without regard to civil service laws.[12] It further provided:

> In addition to the number of positions which may be placed in grades GS-16, 17, and 18 under section 5332 of title 5, United States Code, under existing law or this Act, not to exceed one hundred and fifty positions may be placed in grades GS-16, 17, and 18 to carry out functions under this Act. Positions established by this subsection shall be subject to standards and procedures under chapter 51 of title 5, United States Code.[13]

The bill, as passed by the Senate, vested the Secretary with the authority to fill 750 supergrade positions. It thus provided for approximately 75 more supergrade positions than were authorized for the agencies to be merged into DOE.[14] These extra positions, it was asserted, would allow for "room for growth" in the new department.[15] The provisions concerning supergrades received virtually no attention in Senate deliberations on the DEOA.

In the House, the supergrade positions were a major subject of discussion. H.R. 6804 as reported by the House Committee on Government

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(Continued)

(d) In addition to the number of positions which may be placed at GS-16, GS-17, and GS-18 under section 5108 of Title 5 [United States Code], under existing law, or under this chapter and to the extent the Secretary deems such action necessary to the discharge of his functions, he may appoint not more than two hundred of the scientific, engineering, professional, and administrative personnel without regard to the civil service laws and may fix the compensation of such personnel not in excess of the maximum rate payable for GS-18 of the General Schedule under section 5332 of Title 5 [United States Code].

[12] S. 826, 95th Cong., 1st sess. § 611 (1977).

[13] *Id.*, § 612(b).

[14] *See* Department of Energy Organization Act; Hearings on H.R. 4263 Before the Subcommittee on Legislation and National Security of the House Committee on Government Operations, 95th Cong., 1st sess. 83-84 (1977) (testimony of James R. Schlesinger); Federal Personnel for the Proposed Department of Energy: Hearings on H.R. 4263 Before the Subcommittee on Employee Ethics and Utilization of the House Committee on Post Office and Civil Service, 95th Cong., 1st sess. 3 (1977) (statement of Robert F. Allnutt, Acting Assistant Administrator for Administration, Energy Research and Development Administration (ERDA)). H.R. 4263 was the companion bill to S. 826.

Presumably, DOE would assert that under the Senate bill the Secretary was not limited to 750 supergrade positions because § 612(b) includes the phrase "in addition to the number of positions which may be placed * * * under existing law." However, we are satisfied that the original bill did intend to limit the total number of positions to 750 and that the phrase "under existing law" was not intended to increase the number.

[15] Hearings Before the Subcommittee on Employee Ethics, *supra*, note 14 at 16.

Operations gave the Secretary the authority to appoint, without regard to the civil service laws, "not more than the number of scientific, engineering, and professional supergrade personnel" then authorized for ERDA.[16] Furthermore, the Secretary could fill up to 105 supergrade positions "in addition to the number of positions which may be placed in grade 16, 17 and 18 of the General Schedule under section 5108 of title 5, United States Code, or under * * * the Act."[17]

By these provisions, the Government Operations Committee sought to transfer to the newly established DOE all the supergrade positions authorized for the agencies to be merged into DOE. The Committee carefully identified 689 extant supergrade positions:

Energy Research and Development Administration	-	511
Federal Energy Administration	-	105
Federal Power Commission	-	52
Department of the Interior	-	11
Other agencies	-	10
		689

H.R. 6804 carried over 511 scientific, engineering, and professional positions then authorized for ERDA and 105 positions then authorized for FEA. The Committee Report provided for the 105 FEA supergrade positions because they were "authorized pursuant to the provisions of the FEA Act which will terminate upon enactment of this legislation."[18] No mention was made of the remaining transferred positions since they were "presently authorized under civil service laws and will continue to be so after the positions are transferred to DOE."[19] Thus, unlike the Senate bill, the House bill, as originally reported, sought to limit the number of supergrade positions in DOE to those then existing in agencies to be merged into the new department: "The intent of the committee is to make no change in existing law regarding supergrade positions in the affected agencies, except to impose a ceiling at the current level of such positions connected with all transferred functions."[20]

The House Committee on Post Office and Civil Service proposed amendments to H.R. 6804 on the subject of the number of exempt supergrade positions, and it requested sequential referral of the bill after the Government Operations Committee refused to accept these amendments. The Civil Service Committee believed that H.R. 6804, as reported, would "dangerously dilute existing controls over a bureaucracy which is rapidly becoming uncontrollable;" it was "deeply concerned" about the provisions giving the Secretary authority to fill large numbers of

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[16] H.R. 6804, 95th Cong., 1st sess. § 607 (1977).
[17] *Id.*, § 608(b).
[18] H. Rept. 346, Part I, 95th Cong., 1st sess. 12, 28 (1977).
[19] *Id.*, at 12.
[20] *Id.*, at 12.

supergrade positions outside the purview of the civil service laws and establishing a special authority for 105 supergrades.[21] Accordingly, the Committee proposed amendments, later accepted by the House, giving the Secretary the authority to fill 350 supergrade positions subject to the civil service laws[22] and only 200 supergrade positions exempted from the civil service laws.[23] However, while the Committee changed the method of appointment, it did not seek to alter the total number of supergrades provided for by the Government Operations Committee:

> This committee understands that it is the intent of the Government Operations Committee to provide supergrade authorization in H.R. 6804 to an extent equivalent to that existing under present law. No new authorization, that is, authorization in excess of that provided under existing law, is intended.[24]

The Conference Committee adopted § 621 of the Act as a compromise between the House and Senate bills.[25] The Act provides for (1) 311 scientific, engineering, professional, and administrative supergrades,[26] (2) 178 supergrade positions to be allocated from CSC's pool under 5 U.S.C. 5108,[27] and 200 supergrade positions exempt from the civil service laws. While there is no stated reason for selecting these individual figures,[28] we believe that the Conference adopted the House's proposal and "[t]he conferees agreed to assign to DOE 689 supergrade positions which represent the same number of positions as are presently authorized for functions to be transferred to DOE."[29] Representative Schroeder, a conferee and member of the House Committee on Post Office and Civil Service, defended the conference report before the House, stating, "[W]e retained the House position and there will be no more supergrades in the new

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[21] H. Rept. 346, Part II, 95th Cong., 1st sess. 5 (1977).

[22] These supergrade positions would be allocated to the agency from the CSC pool of supergrade positions authorized for the Federal Government as a whole, pursuant to 5 U.S.C. 5108. Accordingly, the House adopted an amendment to § 5108 increasing the pool by 350. H.R. 6804, 95th Cong., 1st sess. § 714(c)(1977).

[23] While the amendments of the Committee on the Post Office and Civil Service only authorized the total of 550 exempt and nonexempt supergrade positions for DOE, the Committee noted that 73 additional positions were already allocated by CSC from its § 5108 pool to existing agencies and would be transferred to DOE. Furthermore, CSC could allocate additional supergrades to DOE to fill "professional engineering positions primarily concerned with research and development and professional positions in the physical and natural sciences and medicine" which are excepted from the overall pool limit. *See* 5 U.S.C. § 5108.

[24] H. Rept. 346, Part II, at 7. *See* 123 CONG. REC. H. 5280 (daily ed., June 2, 1977) (remarks of Representative Schroeder); *id.* at H. 5283 (remarks of Representative Gilman).

[25] The provisions concerning supergrade positions adopted by the Conference are substantially different from both the Senate and House bills. Indeed, Representative Bauman asserted that the Conference exceeded its mandate in devising the new provisions. 123 CONG. REC. H. 8250 (daily ed., Aug. 2, 1977).

[26] These positions would initially be filled without regard to the civil service laws but would be subject to the civil service laws as soon as the original appointee left office or after 4 years, whichever is later. § 621(b), 42 U.S.C. § 7231(b).

[27] To accommodate these new "pool" positions, § 710(b) of the Act added 489 positions to the § 5108 pool.

[28] The number 178 for § 621(c) appears to represent FEA's authorization (105) plus 73 supergrades assigned to agencies other than ERDA.

[29] S. Rept. 367, 95th Cong., 1st sess. 93 (1977).

agency than there are in all agencies that are consolidated into the Department of Energy * * * [I]t was very hard to get the Senate to yield to the House position of no new additional supergrades."[30]

We believe that Congress intended to give the Secretary the authority to fill only 689 supergrade positions in the new department—the number then authorized in the "other agencies that are being melded into the Department of Energy."[31] Representative Horton explained, "what we did when we got to the conference was to determine that there are now 689 authorized supergrades."[32]

The DOE argues that, while it is clear that § 621 was intended to authorize only 689 positions, that number was not an overall limit under the Act and was not intended to override additional sources of appointment authority. We disagree. It is clear that Congress intended to authorize in § 621 all the supergrade positions then authorized for the preexisting agencies and administrations. It calculated the number of authorized positions as 689.

Moreover, we believe that the 689 figure already includes the 20 supergrades at issue here; thus to read the Act as preserving § 212(d) would be to double-count these positions.

As noted above, the EPAA carried forward § 212(d) of the ESA. One year after passage of the EPAA, Congress enacted the FEAA. That Act did not repeal the EPAA; and § 7(a) provided:

> In addition to the number of positions which may be placed in GS-16, 17, and 18 under existing law, not to exceed 91 positions may be placed in GS-16, 17, and 18 to carry out the functions under this chapter: *Provided,* That the total number of positions within the Administration in GS-16, 17, 18 shall not exceed 105 * * * . [15 U.S.C. § 766(a)(1).]

Presumably the 20 supergrade positions carried forward by the EPAA would be included in the phrase "under existing law."

When Congress tallied up the total number of supergrades, it counted FEA's share as 105. It appears to have included the 20 supergrade positions in the 105,[33] and it made no mention of, or provision for, § 212(d) of the ESA. Thus, either Congress treated § 212(d) of the ESA as merged into FEA's share or it transferred to the Secretary the portion of § 212(d) authority given to the FEA Administrator. In either case, to permit the Secretary to fill additional supergrade positions beyond the 689 authorized by § 621 would be to double-count at least a portion of the positions authorized by § 212(d) of the ESA.[34]

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[30] 123 CONG. REC. H. 8257 (daily ed., Aug. 2, 1977).

[31] *Id.*, at H. 5281 (daily ed., June 2, 1977).

[32] *Id.*, at H. 8262 (daily ed., Aug. 2, 1977).

[33] *See* Hearings, *supra,* at 626, note 14 (table compiled by Comptroller General indicating that 105 FEA positions to be transferred to DOE include the 20 authorized by the ESA).

[34] It may be argued that § 7(a) merely "held in abeyance" a portion of the authority to appoint the 20 supergrades (given the fact that the FEA Administrator could appoint 91 (Continued)

Further, we believe that the phrase "under existing laws" in § 621(d) was not intended to resurrect or recognize § 212(d) of ESA.

The relevant statutory language provides:

> In addition to the number of positions which may be placed at GS-16, GS-17, and GS-18 under section 5108 of Title 5, [United States Code] under *existing* law, or under this chapter and to the extent the Secretary deems such action necessary to the discharge of his functions, he may appoint not more than two hundred of the scientific, engineering, professional, and administrative personnel without regard to the civil service laws and may fix the compensation of such personnel not in excess of the maximum rate payable for GS-18 of the General Schedule under section 5332 of Title 5 [United States Code].[35] [Emphasis added.]

The language of § 621(d) is not readily susceptible to a satisfactory parsing and there are two possible interpretations of this subsection. On the one hand, the use of the word "under" in three subsequent phrases separated by commas may be interpreted to identify three sources of supergrade positions, namely, (1) section 5108, (2) "existing law," and (3) the provisions of the Act.

Alternatively, this subsection may be interpreted to contemplate only two sources of supergrade authority: (1) section 5108, and (2) the provisions of the Act, so that the phrase "under existing law" would refer to the number of supergrade positions authorized and allocated by CSC.[36] Under this interpretation, the Secretary would have the authority to appoint 200 supergrades in addition to those supergrade positions authorized elsewhere in the Act and any supergrade positions that CSC has already allocated or may allocate from its section 5108 pool.

Neither interpretation is entirely satisfactory. Under the first reading (urged by DOE), the phrase "under section 5108 of title 5, United States Code," is redundant because it would be clearly included in the phrase "under existing law." Under the second interpretation (urged by CSC),

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supergrades up to a limit of 105 positions overall) and that this restriction was lifted once the limit of 105 was terminated. This interpretation would, however, effectively authorize new supergrade positions—a result contrary to congressional intent. As indicated by the House Committee on Government Operations, its intent was to "impose a ceiling [on supergrade positions] at the current level." H. Rept. 346, part I, at 12. To the extent the full power to appoint under § 212(d) of the ESA was suspended by the FEAA, such a suspension was carried forward by the DEOA.

The probability that Congress considered § 212(d) of the ESA to have merged into § 7(a) of the FEAA may explain why the DEOA makes no mention of § 212(d), although it repeals § 7(a) of the FEAA and states that § 161(d) of the Atomic Energy Act (also relating to appointment of personnel) shall not apply to functions transferred under the DEOA. *See* § 709(a)(2), (c)(2).

[35] 42 U.S.C. § 7231(d) [Emphasis added.]

[36] It should be recalled that at the time of the passage of the Act, 73 supergrade positions had already been allocated by CSC from its § 5108 pool to functions that were to be transferred to DOE. *See* H. Rept. 346, Part II, at 7.

the phrase "under existing law" appears to add nothing to the phrase "under section 5108."[37]

We find the interpretation of the statute rendered by CSC more persuasive and we do not believe that the phrase "under existing law" was intended to collect unexpired or unrepealed grants of authority for supergrade positions. Accepting DOE's interpretation of the phrase and including the 20 supergrade positions authorized by § 212(d) of the ESA would be contrary to the intent of Congress to limit DOE to 689 positions. We believe that § 621(d) authorized the Secretary to fill up to 200 exempt supergrade positions in addition to the supergrade positions he may fill pursuant to other provisions of the Act or as are allocated to DOE by CSC.

We concur with CSC's statement that by authorizing 689 positions "Congress was well aware of all the laws under which energy functions were performed and that Congress' purpose was to merge and consolidate the laws and their functions into the newly created functions of DOE." Also, we believe that the number of authorized positions was not an absolute limit. At a request, additional positions may be allocated to DOE by CSC pursuant to 5 U.S.C. § 5108. However, at its commencement, the new department was authorized only 689 supergrade positions.

We do not believe that § 212(d) of the ESA survived the passage of DEOA.[38]

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

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[37] The legislative history is of little assistance in construing the language of § 621(d). The conference report does not explain the origin or meaning of the phrase.

The original Senate bill, S. 826, 95th Cong., 1st sess. § 612(b) (1977), used the phrase "under existing law" in the following context:

> In addition to the number of positions which may be placed in grades GS-16, 17, and 18 under section 5332 of title 5, United States Code, *under existing law* or this Act, not to exceed one hundred and fifty positions may be placed in grades GS-16, 17 and 18 to carry out functions under this Act. [Emphasis added.]

If the phrase were intended to identify additional supergrade positions, S. 826 would have to be read as authorizing at least 125 positions (from FEAA and ESA) beyond the 750 explicitly provided for. Yet it is clear that this accretion in supergrade positions was not intended by the bill. *See* S. Rept. 367, at 92-93 and note 14, *supra.* Rather, the phrase most probably refers to positions already authorized and allocated pursuant to 5 U.S.C. § 5108. *But see* § 7(a) of the FEAA (phrase "under existing law" in context similar to § 621(d) of DEOA appears to refer to other laws authorizing supergrade positions and not merely 5 U.S.C. § 5108).

[38] We are aware that implied repeals of specific statutory provisions are disfavored. *See, United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 168-69 (1976); *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 133-34 (1974). Although it is the duty of courts to strive to interpret statutory language to further coexistence of two potentially conflicting statutes, *see, Morton* v. *Mancari,* 417 U.S. 535, 551 (1974), we do not believe that the clear intent of Congress should be ignored in order to save an otherwise displaced statutory subsection. Furthermore, DEOA is a reorganization act that supplants a number of earlier statutes in the same field of law. It thus appears more analogous to a statute that substitutes for an earlier statute, *see, Posadas* v. *National City Bank,* 296 U.S. 497, 503 (1936) and *Plains Elec. Generation and Transmission Cooperations, Inc.* v. *Pueblo of Laguana,* 542 F. (2d) 1375 (10th Cir. 1976), than a general statute in one area of law that conflicts with a specific statute in another area of law. *See, Regional Rail Reorganization Act Cases, supra,* and *Morton* v. *Mancari, supra.*

79-2 MEMORANDUM OPINION FOR THE COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE

Immigration and Naturalization Service—Special Litigation Unit—Alleged Nazi War Criminals—Funds Available for the Operation of the Unit—Appropriation Act—Authorization Act

This responds to your request for the opinion of the Office of Legal Counsel concerning the availability of funds for the Immigration and Naturalization Service's (INS) Special Litigation Unit. This unit handles cases involving alleged Nazi war criminals. The Department of Justice Authorization Act, Pub. L. No. 95-624 § 2(9), 92 Stat. 3459, 3460, authorizes funding for INS of "$320,722,000, of which $2,052,000 shall be made available for the investigation and prosecution of denaturalization and deportation cases involving alleged Nazi war criminals." The earlier Department of Justice Appropriation Act of 1979, Pub. L. No. 95-431, 92 Stat. 1021, appropriates $299,350,000 for "salaries and expenses" of INS and does not specify any portion thereof for the Special Litigation Unit. As you point out, Congress passed the Authorization Act after the Appropriation Act with knowledge of the $21 million difference.

Your request raises three issues: first, whether the absence of a specific item for the Special Litigation Unit in the Appropriation Act and INS budget estimate restricts the availability of funds for the Unit; second, whether the Authorization Act permits or requires INS to devote $2,052,000 of available funds for the Unit; third, if INS is required or permitted to commit appropriated funds to the Unit, the roles, if any, of the Office of Management and Budget and the Department's Office of Management and Finance in the process. We conclude that INS is required to make $2,052,000 of the total funds already appropriated for INS available to the Unit. We have requested the views of the Assistant Attorney General for Administration before responding to the third question, since it involves a technical problem within the competence of his office.

The Appropriation Act authorizes a general, lump sum appropriation for INS with no restrictions or subdivisions. A long-standing rule of the Comptroller General is that an agency may use appropriated funds for the accomplishment of its mission unless another specific fund is created or the particular expenditure is prohibited. *See, e.g.*, 42 Comp. Gen. 708, 712 (1963); 29 Comp. Gen. 419, 421 (1950). The enforcement of the denaturalization and deportation laws against alleged Nazi war criminals is clearly

within the scope of INS's mission, and the Appropriation Act places no restriction on using funds for this purpose.[1] In the absence of other legislation, INS may therefore use appropriated funds to support its Special Litigation Unit.

The second question concerns the effect the subsequently passed Authorization Act has on INS's funding of the Unit. Section 2(9) of the Act expressly earmarks $2,052,000 of the authorized $320,722,000 for the Special Litigation Unit. The legislative history of the Act shows that Congress intended to require INS to allocate that amount out of whatever funds were appropriated. Before the House Judiciary Committee, you testified that INS intended to reprogram $1.6 million from its other activities to support a Special Litigation Unit of a given size.[2] The committee's report expressed dissatisfaction with the reprogramming method because it would necessitate the Unit "to compete for already scarce resources with other programs within INS."[3] Therefore, the report continued, the Authorization Act would earmark $2,052,000 for the Special Litigation Unit "to assure financing and maximum operational efforts" with a larger staff.[4] This report expressed a clear legislative intent to reserve $2,052,000 for the functions of the Special Litigation Unit out of whatever resources were available to INS.

Although the Authorization Act was passed after the Appropriation Act and although it authorized $21 million more for INS than originally appropriated, this alone does not indicate a contrary intent. As your memorandum points out, the conference report on the Authorization Act noted the difference between the amount authorized and that already appropriated, and it invited the Administration to request a supplemental appropriation to cover the difference.[5] The report attributed the increase to the need "to improve INS efforts to control the illegal alien problem, as well as to reduce the adjudication and naturalization backlogs in the various INS offices around the country."[6] The three areas in which the House had authorized additional positions than INS had requested or the Senate

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[1] We note that the Comptroller General has long held that "subdivisions of an appropriation contained in an agency's budget request or in committee reports are not legally binding on the department or agency concerned unless they are specified in the appropriation act itself." 55 Comp. Gen. 812, 819-20 (1976); *see also* 55 Comp. Gen. 307, 319-21 (1975); 17 Comp. Gen. 147, 150 (1937). Therefore, the lack of a specific item for the Special Litigation Unit in INS's budget request or the Appropriations Committee reports does not prevent it from expending funds for the Unit.

[2] INS intended to staff the unit with eight attorneys, three investigators, three paralegals, and three secretaries. Hearings Before the Committee on the Judiciary of the House of Representatives on Department of Justice Appropriation Authorizations, 95th Cong., 2d sess., at 71-72, 372.

[3] H. Rept. 95-1148, 95th Cong., 2d sess., at 13.

[4] H. Rept. 95-1148, 95th Cong., 2d sess., at 13. The report states that the increase will permit the Unit to have 10 attorneys, 8 investigators, 4 paralegals, and the necessary number of clericals. *Id.*

[5] H. Rept. 95-1777, 95th Cong., 2d sess., at 12.

[6] H. Rept. 95-1777, 95th Cong., 2d sess., at 12.

had authorized are antismuggling investigators, adjudication personnel, and naturalization processing personnel.[7] Unlike the Special Litigation Unit, funds for these positions were not earmarked specifically in the Authorization Act, and the House report points to the provision of additional resources in these areas rather than allocation of existing funds. Therefore the "additional positions" for which the conference report stated a supplemental appropriation would be necessary are not related to the Special Litigation Unit.

In summary, funds appropriated to INS in the Department of Justice Appropriation Act are available for the Special Litigation Unit. The intent of Congress in subsequently enacting § 2(9) of the Department of Justice Appropriation Authorization Act was to commit the use of $2,052,000 of the appropriated funds to that purpose.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

[7] *See* H. Rept. 95-1148, 95th Cong., 2d sess., at 7-12.

January 16, 1979

79-3 MEMORANDUM OPINION FOR THE ASSISTANT DIRECTOR, CRIMINAL INVESTIGATIVE DIVISION, FEDERAL BUREAU OF INVESTIGATION

Privacy Act (5 U.S.C. § 552a(c))—Federal Bureau of Investigation—Transmission of Information Collected by FBI to State or Local Law Enforcement Agencies

This is in response to your request for our opinion whether the Federal Bureau of Investigation's (FBI's) disclosure to a local or State law enforcement agency of personal information obtained from another law enforcement agency would be subject to the accounting requirements of the Privacy Act, 5 U.S.C. § 552a(c). This memorandum will address not only this question, but also the question whether the Privacy Act permits these disclosures at all.

As we have previously advised you, the FBI may legitimately acquire information from one State or local agency and pass it to a different State or local agency. *See* 28 U.S.C. § 534(a). We understand that the FBI's current practice is to retain a copy of the transferred records for 6 months in the field office that handled the liaison work. The copies of the documents are kept in one file jacket; they are not indexed, but are retrievable by the individual's name.

We believe that under the FBI's current practices, the handling and transfer of the documents in question would be subject to the requirements of the Privacy Act. This Act generally applies to a "system of records," defined in the Act as

> a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. [5 U.S.C. § 552a(5).]

Since the documents in question appear to constitute a "group of records," under the control of the FBI, and may be retrieved by resort

to the use of an individual's name, they would seem to come within this definition[1] and hence within the general requirements of the Privacy Act.

Before addressing your inquiry whether an accounting of the disclosure of such records is required under the Privacy Act, we believe it is first necessary to determine whether the Act allows a disclosure of these records at all. The Act generally prohibits Federal agencies from disclosing any information from a system of records without the consent of the subject individual, unless the disclosure falls within a specific exception.[2] 5 U.S.C. § 552a(b). The only relevant exception would be a disclosure "for a routine use." 5 U.S.C. § 552a(b)(3). Federal agencies may use this exception, however, only if the statutory definition of a "routine use" has been satisfied, *see* 5 U.S.C. § 552a(a)(7), and the procedural requirements for delineating and establishing a routine use are met. 5 U.S.C. § 552a(e)(4)(D) and (e)(11); Privacy Act Guidelines, 40 F.R. 28949, 28954 (1975).

We believe that disclosure in this situation would satisfy the definition of a "routine use." That term is defined as "the use of such record for a purpose which is compatible with the purpose for which it is collected," and the records in question are collected by the FBI for the purpose of disclosing them to the pertinent State or local agency. However, we believe that a serious legal question exists whether the FBI has established a "routine use" under the procedural requirements of the Act. Federal agencies that maintain a system of records are required to:

> * * *Publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include—
>
> (A) the name and location of the system;
>
> (B) the categories of individuals on whom records are maintained in the system;
>
> (C) the categories of records maintained in the system;
>
> (D) each routine use of the records contained in the system, including the categories of users and the purpose of such use.
>
> * * * * * * *
>
> * * *At least 30 days prior to publication of information under paragraph [4](D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information

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[1] While the records appear to be maintained only on an informal and temporary basis, the fact that the records are maintained in a file available to all for a period of 6 months precludes any determination on our part that the records do not come within the definition of a "system of records."

[2] Although the Privacy Act does not define the term "disclosure," it seems clear to us that, since the FBI's transmittal of the records to the State or local agency would impart to that agency information "which in itself has meaning and which was previously unknown to the [agency] to whom it is imparted," *Harper* v. *United States*, 423 F. Supp. 192, 197 (D.S.C. 1976), the FBI would be "disclosing" information within the meaning of the Act.

in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency. [5 U.S.C. § 552a(e)(4)(A)-(D), e(11).]

The delineation of the FBI central records system, 43 F.R. 44683 (1978), the only system which, as we are informed, is relevant at all to this type of information, contains no indication that the FBI, in the course of facilitating State or local investigations, maintains files of information on those who are the subject of those investigations.[3] Even though this system of records provides for a broad routine use,[4] we do not think that this broad provision can apply to records that are not encompassed in the description of the records in the system. Since no routine use has been established, and since no other exception would allow disclosure, it would appear to us that disclosure is prohibited by the Privacy Act.

The underlying purpose of these provisions support our conclusion. Congress intended the requirements of disclosure set forth above to enable individuals to determine whether Federal agencies hold information on them, H. Rept. 1416, 93rd Cong., 2d sess. 2, 15 (1974). Also, the aim was to inform the public of the proposed uses of the information. *Id.* at 15; Privacy Act Guidelines, 40 F.R. 28949, 28966 (1975). The failure to identify the information in question in any system of records undermines both of these goals, because the public would have no knowledge of the fact that the information is stored or of the uses to which it is put. Since Congress intended that the "routine use" exception would apply only if such conditions were met, H. Rept. 1416, 93d Cong., 2d sess. 16 (1974), we do not believe that this exception may justify a transfer of the pertinent information.

We suggest several ways to alleviate the problem. The first would be to identify these records in the FBI Central Records System so that the routine use provision for that system could apply to these records. Another solution would be avoiding a "system of records" format of organizing the information transferred to the States or localities. This could be done, first, by not retaining any copies of the information; in this way there would be no file of records, and hence no "system of records" would exist, and therefore the Privacy Act would not apply.[5] A simpler way may be not to handle the records at all, and let the information be transferred directly from one State agency to another.

This question whether the accounting requirements of the Privacy Act apply to transfers under the suggested plans would depend on which plan

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[3] The reference to "Domestic Police Cooperation," 43 F.R. 44684, does not, in our view, indicate that the FBI maintains such files.

[4] "Information from these files is disseminated to appropriate Federal, State, local and foreign agencies where the right and need to have access to this information exists." 43 F.R. 44693 (1978).

[5] The definition of "system of records" refers to "a *group* of any records" [emphasis added], and this would clearly suggest that a single record does not by itself constitute a system of records.

is adopted. If the FBI continues to maintain these files in a system of records, the accounting requirements in 5 U.S.C. § 552a(c) would apply to a disclosure of any record contained in that system. Since 5 U.S.C. § 552a(c) applies only to a "system of records," however, the requirements of that section would not apply if the FBI handles the information so as not to create a system of records.[6]

MARY C. LAWTON
Deputy Assistant Attorney General
Office of Legal Counsel

[6] It is to be noted that, pursuant to this memorandum the FBI published in the *Federal Register* (44 F.R. 58920 (1979)) a modified system notice for its central records system. The FBI described its temporary maintenance of records relevant to the domestic police cooperation program.

January 16, 1979

79-4 MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Constitutional Law—Constitution—Article V—The Amending Process—The Convention Method

This responds to your request for our views on several questions pertaining to the process of amending the Constitution by convention. We should note at the outset that, because no amending convention has ever been called, there is little history or law on the subject. Much of our discussion here is thus necessarily predicated not on history or judicial decisions, but on the views of legal scholars. A number of important questions have been identified in the scholarly writing[1] and we have endeavored to outline the most important of those. Most of these issues lack clear answers, and in the time available we have not undertaken to resolve all of them.

Article V of the Constitution reads:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress * * *.

The provision for State initiative was regarded by the Framers of the Constitution as an important safety valve to allow the States to correct Federal abuses of power or to propose amendments Congress refused to propose.

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[1] Much of the legal writing in this area was occasioned by two events: (1) the effort of a large number of States to call for a convention on the reapportionment issue; and (2) a bill introduced by Senator Ervin and passed by the Senate which provided for procedures necessary to effectuate the convention process.

In order to initiate the convention process, two-thirds of the States must submit applications to Congress. Before issuing its "call" for the convention, Congress must determine whether the requisite number of applications has been received. The authority to call the convention, we think, necessarily requires a determination that the basic conditions for a convention are met. However, once it has been determined that two-thirds of the States have submitted valid applications, Congress is generally thought to be obliged to call a convention.

Although Article V says nothing as to the organization of a convention, it is the general view that Congress may establish the convention's "ground rules"—*e.g.*, the time and place of meeting, the number of delegates, the basis of representation, etc. Since Article V contemplates a "Convention for *proposing* Amendments" [emphasis added], most authorities believe that the convention must be free to weigh and evaluate various alternatives and to frame its own proposed amendment. If that is so, Congress would not have the power to structure the precise wording of an amendment. Once drafted and approved by the convention, the proposed amendment must then be ratified, as Article V specifies, "by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress."

Several questions may arise with respect to the validity of State applications. The first is whether an application might lapse over time. In order that the applications demonstrate a national consensus, we believe, as does every authority known to us, that the States' applications must be reasonably contemporaneous. This view is supported by the decision in *Dillon* v. *Gloss*, 256 U.S. 368, 274-75 (1921), in which the Supreme Court spoke of a contemporaneous State consensus as necessary to support an amendment. While this case dealt with ratification by the States, it is generally agreed that notions of responsible timeliness should also be required in the application process. There are, however, widely divergent views as to what constitutes a "contemporaneous" period of time—suggestions range from a generation to 2 years. Congress will necessarily have to make a judgment in this area, taking into account the time necessary for the States to respond to an issue and perhaps other factors such as changed political, economic, or social conditions. Congress' focus here should be on the question whether, in fact, the applications fairly reflect the current judgment of the requisite number of States that a constitutional change is needed. It should be noted that the bill introduced several years ago by Senator Ervin, which passed the Senate but was never considered further, provided that all calls must have occurred within a 7-year period. For your information, the approximately 20 calls related to the Federal budget issue have come within the past 3 to 4 years.

A second question is whether State applications on different topics may (or must) be aggregated for purposes of determining whether two-thirds of the States seek a convention. The view of most, but not all, legal authorities

is that applications relating to different matters should not be counted together. In our opinion, this position is correct. Unless the applications deal with the same issue, it would seem that the fundamental prerequisite of calling a convention, *i.e.*, the existence of a national consensus that a constitutional change is desirable, is not satisfied. It is generally agreed that States may call for a general revision of the Constitution, but short of such a general undertaking, we think it would circumvent one of the central principles of the amendment process to allow the combining of calls on issues as disparate as reapportionment, abortion, or budgetary restraint, no one of which was deemed by two-thirds of the States as worthy of consideration. We have been advised that the recent flurry of applications have been variously stated as relating to limiting the Federal debt, balancing the Federal budget, or prohibiting deficit spending, matters that might or might not be regarded as proper subjects for a single call.

If this is a correct view of the law, the next question is how similar the States' applications must be in order for them to be aggregated. The various authorities agree that the applications need not be identical, but that it suffices if the States request a convention to address the same general problem or issue. The Congress, in deciding whether the requisite number of applications has been made, must necessarily determine whether this requirement is met.

Once Congress ascertains that a convention is appropriate, the next question is whether Congress may impose limitations on the convention's deliberations. There is substantial disagreement among the legal authorities on this question. Those who believe that the convention may not be limited, but may consider whatever issues it deems desirable, rely on the following arguments. The language referring to a "Convention for proposing Amendments" suggests that the convention may propose any amendment it sees fit to support. Since the Framers provided the convention process as a means to check Federal abuses, some argue that it would undermine this purpose to allow Congress to limit the convention's deliberations. In addition, some theorists assert that the States cannot be deemed to be authorized to limit an instrumentality created under the Constitution. In fact, some argue that a convention is a body endowed with all power residing in the people, and as such may not be limited by the States, the branches of the Federal Government, or even the Constitution.

The majority view, however, is that Congress may limit the convention's deliberations. The arguments for this proposition, at least on our consideration of them, appear to be persuasive. Since Article V allows a convention to be called only where there is a consensus among the States as to an area of proposed change, the convention should not be allowed to discuss issues as to which there is no demonstrated consensus. The history of Article V suggests that the convention process was intended to serve as a means of considering specific amendments. Since the States would still be free to initiate any amendment they wished, this view is entirely consistent with the underlying purpose of Article V. Some have also

argued that this view furthers the purpose of Article V, since the States may be less likely to call for conventions if they know that those conventions are free to propose changes beyond the proposed areas. Finally, contrary to the view of some commentators, it is contended that a convention is not a sovereign body, but rather only a body summoned pursuant to the terms and under the authority of Article V. The House of Delegates of the American Bar Association in its recent deliberations on the amendment process concluded that limitations on the convention would be appropriate.

The question whether the President may become involved in Congress' call for a convention is also a much-debated one. Those who believe the President must be involved in this process rely on Article I, section 7, of the Constitution, which requires any "Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives [is] necessary * * * shall be presented to the President" for approval. Since Congress' call for a convention must necessarily provide the "ground rules" of the convention, the call would have the force of law and thus might be seen as requiring Presidential approval under this provision. As you know, in our opinions on the "legislative veto" we have taken the view generally that the only way for Congress to "make law" is through Article I, section 7, and that the President must always have a veto function. The argument in favor of Presidential involvement would seem particularly strong if Congress, in the process of issuing a call, is required, as we suppose it is, to appropriate funds for the convention's operations; ordinarily, we would presume a role for the executive branch whenever funds are to be appropriated. The fact that the Supreme Court decided in *Hollingsworth* v. *Virginia*, 3 Dall. 378, 381 (1798), that the President "has nothing to do with the proposition, or adoption, of amendments to the constitution" has been discounted by these authorities on the ground the opinion offers no rationale and because the decision was rendered in the context of an amendment proposed by Congress.

Those who believe that the President may have no role in approving or vetoing Congress' call for a convention rely on the language in Article V that "the Congress" is to call a convention and on the Supreme Court's decision in *Hollingsworth* v. *Virginia*. In addition, these authorities argue that Presidential involvement may be contrary to the purpose underlying Article V. Such involvement would make the convention amendment process undergo a requirement not involved in the usual mode of amending the Constitution; it would also allow the President to block a process whose purpose is to allow the States some independence in the area of constitutional change. The requirement of Article I, section 7, these commentators contend, is inapplicable here since Congress does not judge the substance of the proposed amendments, but merely regulates matters necessary to the implementation of Article V. Finally, it is argued that Presidential involvement is unnecessary since, in light of the fact that the proposal is advanced by the States and must be referred to the convention,

there is little opportunity for meaningful review or to safeguard the Executive's powers.[2]

Role of the courts. In *Coleman* v. *Miller*, 307 U.S. 433 (1939), the Supreme Court held several aspects of the amendment process to be political questions and nonjusticiable. In our view, however, this decision cannot be taken to mean that all questions arising in the course of the amendment process will not be reviewed by the courts. In several decisions prior to *Coleman* the court had reviewed and resolved such questions. *See e.g., Dillon* v. *Gloss, supra; Hollingsworth* v. *Virginia, supra.* The fact that *Coleman* did not overrule these cases suggests that review on some questions is still available, particularly if the question does not involve an assessment of political, social, or economic factors, which were thought to preclude review in *Coleman.* In addition, decisions after *Coleman* suggest that the Court may be willing to review questions relating to the amendment process if there is neither a textually demonstrable commitment of their resolution to the Congress nor a lack of judicially discoverable standards by which to resolve the questions presented. *See, e.g., Baker* v. *Carr*, 369 U.S. 186 (1962). The decisions both before and after *Coleman* thus suggest that such issues as the imposition of limits on the convention's deliberations and the President's involvement in the process of amendment by convention may well be reviewable in the courts.

LARRY A. HAMMOND
Acting Assistant Attorney General
Office of Legal Counsel

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[2] You may recall that when the 95th Congress passed the Equal Rights Amendment extension bill, we concluded that a Presidential signature was *not* required but that the President might elect to sign the bill as a matter of discretion. He did elect to do so, but noted the legal conclusion that he was not required to pass on it since it involved a matter within the province of Congress under Article V.

January 17, 1979

79-5 MEMORANDUM OPINION FOR THE SECRETARY OF THE INTERIOR

Administrative Procedure—Rulemaking—Department of the Interior—*Ex Parte* Communications—Consultation with the Council of Economic Advisers—Surface Mining Control and Reclamation Act (30 U.S.C. § 1201 *et seq.*)

On September 18, 1978, the Office of Surface Mining Reclamation and Enforcement (OSM), acting pursuant to a delegation of authority from you as Secretary of the Interior under the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 445, 30 U.S.C. § 1201 *et seq.* (the 1977 Act), published a notice of a proposed rulemaking in the *Federal Register.* The notice (1) stated that the rulemaking was intended to establish "a nationwide permanent program for the regulation of surface and underground mining operations by the States and the Federal Government as required by" the 1977 Act; (2) set forth the text of proposed rules; (3) announced that public hearings on the rules would be held at certain designated places during October 1978; and (4) invited written or oral comments from the public for a 60-day period ending November 17, 1978.

During the comment period the Regulatory Analysis Review Group (RARG), at the direction of the President, reviewed the proposed rules and submitted a report containing a number of comments. The Council of Economic Advisers (CEA) is an active member of RARG, and it participated in the preparation of this report. After the close of the comment period, the Chairman of CEA and the Assistant to the President for Domestic Affairs and Policy were asked to consider several questions related to the proposed rules. This Office has been asked to consider whether—and pursuant to what limitations—CEA members and staffers may meet with you and members of your OSM staff to discuss in greater detail their concerns about several portions of the rules.

The questions we have been asked are, first, whether there is any statutory or constitutional prohibition against consultations between the Department of the Interior (Interior) and CEA; second, provided that

consultations are appropriate, what are the necessary procedures to insure compliance with the requirements imposed by recent decisions of the U.S. Court of Appeals for the District of Columbia Circuit.

For the following reasons, we conclude that no prohibition against communications within the executive branch after the close of the comment period exists; that nothing in the relevant statutes or in the decisions of the D.C. Circuit Court suggests that full and detailed consultations between parties charged with promulgating the rules and the President's advisers are barred. The rulings of the D.C. Circuit Court, however, suggest that it may be inappropriate for interested persons outside the executive branch to conduct *ex parte* communications with the Secretary and his staff. If that is so, we believe that the D.C. Circuit Court would disapprove of CEA or other advisers to the President serving as a conduit for such *ex parte* communications. In order to prevent CEA from serving as a conduit, we recommended the procedure outlined in detail in the attached letter from this Office to CEA of December 28, 1978. We have concluded that by adhering to these procedural steps, as we understand Interior and CEA have done, there has been proper compliance with the law as it has developed in the D.C. Circuit Court.

I. Procedure

We understand that each of the following procedural steps has now been implemented:

(1) The CEA staff has compiled a record of all the oral and written communications with private persons interested in the proposed rules. This catalog outlines the content of all the communications as accurately and fully as possible. For the sake of completeness, it also includes recollections of CEA conversations with other executive branch agencies.

(2) Following receipt and review of this material, OSM made it available to the public in the document room at the Department of the Interior. At the same time OSM published a statement in the *Federal Register* of January 4, 1979, acknowledging and explaining the reason for this addition to the administrative record. The statement also announced the reopening of the record to allow comments on factual material contained in the submission. A period of 18 days will be permitted in which appropriate comments may be submitted by the public. At the close of that period OSM will review and analyze these comments. To assure the widest public availability of the CEA documents, copies of the complete packet have been delivered to every Regional Office of your Department. An effort was also made to contact directly State governments likely to have an interest in reviewing this material.

(3) Once the compilation was made publicly available and the notice was forwarded to the *Federal Register* for publication, the CEA Chairman and/or his staff conferred with OSM on particular portions of the proposed rules. First meeting was

in January 1979, and there have been a few brief subsequent communications.

(4) Although no changes were made in the proposed rules as a result of these consultations, if any communications made during this consultation process did become in part the basis for the Secretary's final decision concerning the rulemaking, their relationship to that decision would be fully spelled out with the promulgation of the final rule. The record may not be further reopened prior to the final decision unless you propose to rely on information not included in the record and subjected to reasonable public comment in advance of your final decision.

(5) During the period of consultation, the participants were asked to refrain from communicating with other persons interested in the rulemaking, including other executive branch officials, if those officials have either directly or indirectly had contacts with non-Government persons having an interest in the rulemaking.

II. Participation by CEA in the Decisionmaking Process

The first question is whether either the Constitution or relevant statutes prevent the President's economic advisers from conferring with you. The basic constitutional presumption favors communication and consultation within the executive branch in the process of formulating rules and procedures. While some matters may be of quasi-adjudicatory nature, to which communication with the decisionmaker would seem improper, in the much larger category of executive actions barriers to free communication between and among the President's advisers should not be lightly assumed. The President is charged under Article II, section 3, of the Constitution to insure that the laws are faithfully executed. In *Myers* v. *United States*, 272 U.S. 52, 135 (1926), the Supreme Court stated:

> The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the constitution evidently contemplated in vesting general executive power in the President alone. Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control.[1]

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[1] We note that other language in *Myers* makes unclear whether the mode of supervision contemplated by the Court in the language quoted in the text above was limited to the power of removal or whether that supervision could take less drastic forms, such as consultation. *See* 272 U.S. at 135.

We believe that, albeit dictum, this language is a correct statement of the principle that Congress, in delegating rulemaking authority to department heads, who are subject to the President's removal power under Article II, section 2, class 2, of the Constitution, must be assumed to have recognized the inherent power of the President to supervise the exercise of that authority. We also believe that this supervisory power of the President, and the duty of the department heads to report to the President concerning the discharge of their offices,[2] carry with it the constitutional right of the President to receive and give advice to his subordinates relating to the discharge of their duties. *See, e.g., United States* v. *Nixon*, 418 U.S. 683 (1974).

The only substantial issue is, in our view, whether Congress has attempted, by statute, to limit or otherwise regulate participation (in the decisionmaking process) by the Chairman or any other Federal official not within Interior. We think the answer to this question is an unqualified negative.

Before discussing those statutes that could arguably place some limits on the Chairman's participation, we would observe that Congress has demonstrated a full awareness of the means by which it may attempt to regulate interagency review of proposed rules. For example, in § 305(a) of the Clean Air Act Amendments of 1977, 42 U.S.C. § 2607(d)(4)(B)(ii), Congress specifically required that written comments by agencies participating in interagency review of rules be placed on the record of the rulemaking conducted by the Administrator of the Environmental Protection Agency. That provision also recognizes that such written comments may be made at any point in the process, both prior to the publication of the notice of rulemaking and after the close of the public comment period.

It is particularly significant that neither the language of 305(a) nor its legislative history suggests in any way that Congress was enlarging, or needed to enlarge, an affirmative power of the President to conduct such interagency review.[3] Furthermore, we believe that Congress' refusal to extend the requirement of § 305(a) to oral communications was a recognition of the right of the President and his subordinates to communicate in confidence their views on issues raised by rulemaking governed by that provision.

The question whether the relevant statutes, here § 4 of the Administrative Procedure Act, 5 U.S.C. § 553, and § 501 of the 1977 Act, 30 U.S.C. § 1251, in any way limit the authority to conduct interagency review of the rule at issue may be disposed of readily. Nothing in the language of the statutes or their legislative history suggests an intent to limit or otherwise to regulate the interagency review that has been accorded this rule. Furthermore, we believe that the Supreme Court's recent decision in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense*

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[2] Constitution of the United States, Art. II, § 2, cl. 1.

[3] *See* H. Rept. 294, 95th Cong., 1st sess., 319-20 (1977); H. Rept. 564, 95th Cong., 1st sess., 177-78 (1977).

Council, Inc., 435 U.S. 519, 547 (1978), indicates that § 553 is an affirmative grant of power to agencies to devise procedures most congenial to the rulemaking conducted by them. Thus, we think it clear that a procedure adopted by an agency to secure the views of other interested agencies on specific rules is within the ambit of the power conferred by § 553. We therefore turn to the question whether the procedures set forth in part I above are a reasonable exercise of that power.[4]

III. The D.C. Circuit Court Cases

In two cases, *Home Box Office, Inc.* v. *FCC*, 567 F. (2d) 9 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1977), and *U.S. Lines, Inc.* v. *Federal Maritime Commission*, 584 F. (2d) 519 (D.C. Cir. 1978), panels of the D.C. Circuit Court of Appeals have indicated that so-called *ex parte* communications between persons interested in an "informal" rulemaking and the rulemaking agency must be generally disclosed on the record. Those cases also indicate that, at least where such contracts may have substantially influenced or provided a basis for the rule finally adopted, their substance must have been subjected to adversary comment by other interested persons.

Although the Supreme Court's decision in *Vermont Yankee*, as well as decisions by other panels of the D.C. Circuit Court,[5] cast considerable doubt on the correctness and applicability of these court-fashioned *ex parte* rules in the present context, we believe that the procedures in Part I satisfy *Home Box Office* and *U.S. Lines*. The procedures were drafted with these two cases in mind and they reflect our best efforts to satisfy the several requirements of the cases. First, they place in the administrative record the substance of all so-called *ex parte* communications between private persons and the Chairman and his staff since the notice of proposed rulemaking was published. Every document that CEA received and reviewed has been transmitted to OSM and the substantive details of every telephone conversation have been disclosed. Thus, in our view, there is no longer any reasonable likelihood that in meeting and discussing the proposed rules CEA will be transmitting any off-the-record *ex parte* information. Secondly, the procedures devised here give to any interested person the right to comment on those communications for a reasonable period

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[4] We are advised that no departmental regulations in effect from September 18, 1978 to the present would in any way conflict with the procedures set forth in Part I. On August 10, 1978, a document entitled "Public Participation in Decisionmaking—Interim Guidelines and Invitation for Comment," was published in the *Federal Register*, 43 F.R. 35754-57, outlining your proposed policy regarding public participation in rulemaking. Nothing in those guidelines appears to be inconsistent with the procedures set forth in Part I. Nor would this procedure appear to conflict with the notice of procedures for public participation issued by your Department on June 12, 1978, establishing the policy for public participation at the prenotice state of this rule, 43 F.R. 25881-82 (June 15, 1978), or the proposal of the rule itself, 43 F.R. 41661 *et seq.* (Sept. 18, 1978).

[5] *See, Action for Children's Television* v. *FCC*, 564 F. (2d) 458 (D.C. Cir. 1977); *Hercules, Inc.* v. *EPA*, 598 F. (2d) 91 (1978).

of time. The reopening of the record for this limited purpose has been undertaken to insure that any information communicated by CEA that was made a part of the record has been subjected to the fullest and fairest scrutiny.[6] In fact, we have been advised both by CEA and by OSM staff that the predominance of material released was already in the record developed during the comment period. Indeed, most of the information, insofar as CEA found it to be relevant, was included in the RARG Report which, as you know, was incorporated into the record during the comment period and was itself subjected to considerable public scrutiny.

The only question that remains under *Home Box Office* and *U.S Lines* is whether those cases require that the meetings and communications between your staff and CEA must themselves be placed in the public record. Neither case dealt with intra-executive branch communications; in both the *ex parte* contacts were made by interested persons outside the decision-making process. Moreover, we think the purposes underlying the holdings in these cases are fully served by a requirement that all contacts with persons outside the Government be disclosed. It was not the purpose of the court to alter the ordinary way in which decisions are made by those charged with promulgating rules. Just as there is no bar in those opinions against confidential consultation between the Secretary and his assistants, we find no bar to communications from others within the executive branch so long, of course, as the communications are not the vehicle for the indirect transmission of off-the-record, *ex parte* information from interested persons outside the Government. For the reasons outlined in our discussion of the role of the Chief Executive in overseeing the rulemaking process, we would be most reluctant to infer a prohibition or other restraint against a full exchange of views among the President's advisers. To the contrary, Congress has frequently demonstrated sensitivity to the need to preserve open lines of communication for the exchange of views and to improve the deliberative process within the executive branch. Exemption (b)(5) in the Freedom of Information Act, 5 U.S.C. § 552 (b)(5), stands as the clearest evidence of Congress' continuing acknowledgment of the practice of confidential communications.

Finally, we should reiterate that to permit confidential communications

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[6] Reopening the record for the restricted purpose of allowing comment on the CEA disclosure document is somehow unfair to other interested persons who might wish to make additional comments after the 60-day formal comment period closed. Indeed, we understand that a number of comments have been received by OSM after the close of the comment period but that it has declined to review and consider them. We believe that a limited reopening is appropriate in this case. The purpose of the reopening is quite simply to assure closest compliance with these D.C. Circuit Court decisions while allowing executive branch officials to fulfill their responsibilities. As the disclosure documents prepared by CEA demonstrate, this procedure was not intended to provide, nor will it have the effect of providing, a means of funnelling tardy industry or other interested persons' comments to the agency decision-maker. Virtually all the comments received by CEA were made during the public comment period and are already in the record. Given these facts, we think it reasonable to reopen without launching anew the rulemaking process.

between Interior and the President's economic advisers will not frustrate the basic requirements of the Administrative Procedure Act and of the 1977 Surface Mining Act that the foundation and rationale for ultimate rulemaking determinations be spelled out and be subject to close public and judicial scrutiny. To whatever extent your views are premised upon economic or other considerations arising in the course of your discussions with CEA, those considerations must (1) have their origin somewhere in the record you have developed over the last few months, and (2) be articulated in your final rule. These requirements having been met, and the other procedures satisfied, we see no substantial basis for a claim that the rules themselves are arbitrary or capricious, or that the rulemaking process has been otherwise flawed.

LARRY A. HAMMOND
Acting Assistant Attorney General
Office of Legal Counsel

Attachment

December 28, 1978

Mr. Peter G. Gould
Special Assistant to the Chairman
Council of Economic Advisers
Executive Office Building
Washington, D.C. 20506

Dear Peter:

This letter is to confirm the conversations we have had over the last several days with respect to the Council of Economic Advisers' (CEA's) participation in the Office of Surface Mining's (OSM's) regulations. The following items have been discussed fully with Leo Krulitz and, more recently, with Bill Eichbaum, at the Department of Interior. We have also reviewed this matter carefully with Jim Moorman and his staff in our Land and Natural Resources Division. It is our view that the following procedures are fully compatible with the relevant statutes and case law with respect to the informal rulemaking process:

(1) CEA staff members are in the process of preparing a catalogue of all oral and written communications they may have had with parties interested in OSM's proposed strip mining regulations. It is understood that the compilation of these contacts will reflect, as completely as reasonably possible, the content of all such communications. This Office will assist you in assuring that this material is set forth in as complete and accurate a form as reasonably possible. Hopefully, we will be able to transmit this material to OSM on Tuesday morning, January 2, 1979.

(2) Knowledgeable people at OSM will review this compilation as soon as it is received and will ascertain what portions, if any, of the material constitute new matter not already set forth on the record of this rulemaking proceeding. Of course, staff people at CEA should be able materially to assist in this process, since you also have a comprehensive knowledge of the record.

(3) As soon as reasonably possible following the receipt and review of this material, OSM will make it available to the public in the document room at the Department of the Interior. At the same time OSM will have published in the Federal Register a

statement acknowledging and explaining the reason for the supplementation of the record in this respect. The statement will also announce the reopening of the record to allow comments on whatever new factual material may be contained in this submission. A period of ten days will be permitted in which appropriate comments may be submitted by interested parties. At the close of that comment period OSM will review and analyze these comments in the same manner in which it has in the past analyzed comments accumulated during the public notice and comment period.

(4) It is the judgment of this Office that once this compilation of third-party communications has been made publicly available and the notice has been transmitted to the Federal Register for publication it will then be appropriate for the Chairman and staff personnel at CEA to participate in the decisionmaking process in whatever fashion is most productive. We understand that you envision one or more meetings to discuss particular portions of the proposed rules. Those meetings need not be conducted on the record. I have advised, however, that you maintain a record of the agenda items discussed with OSM so that, if necessary, we can identify at a later time those portions of the regulations that were the subject of your communications.

(5) To the extent that your meetings and communications become in part the basis for the Secretary of Interior's final decision, of course, the substantive basis for that decision will be spelled out on the record. It will not be necessary for the Secretary to allow any additional reopening of the record at this later stage unless, through some failing in the procedure we have developed, the Secretary's ultimate judgment is based indirectly on third-party communications that were not included in the record and subjected to reasonable comment.

(6) During this period of consultation between CEA and OSM the Chairman and CEA staff members will refrain from having any further communications with parties interested in these proposed regulations. In order most carefully to assure the propriety of this process we have also advised you to refrain from having communications with other executive branch officials if those officials have, themselves, had contacts with outside parties with respect to these regulations.

As I have stated above, it is our view that these several steps carefully pursued will assure the legality of the informal rulemaking proceeding. We have begun the drafting of and will complete early next week a legal opinion discussing the several bases for this conclusion.

Sincerely,

LARRY A. HAMMOND
Acting Assistant Attorney General
Office of Legal Counsel

cc: Mr. William Eichbaum
Office of the Solicitor
Department of the Interior

January 17, 1979

79-6 MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

The President—Interpretation of 18 U.S.C. § 603 as Applicable to Activities in the White House

This responds to your memorandum of November 30 requesting our opinion concerning the application of 18 U.S.C. § 603 to activities in the White House involving the President.[1] Your inquiry arises in connection with a pending investigation of the allegation that during the course of an August 10, 1978 luncheon for about 20 Democratic Party donors and fund-raisers that took place in the Family Dining Room of the White House, the President solicited contributions for a political purpose within the meaning of that criminal statute. This investigation is being conducted in accordance with Title VI of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824. Pursuant to § 601 of that Act, 28 U.S.C. § 592, where an allegation of criminal misconduct is made with regard to persons holding certain high official positions in Government, including the Presidency, the Attorney General is charged with conducting a preliminary investigation of the matter. If he determines that the matter warrants further investigation or if he has not determined within 90 days of receiving the information "that the matter is so unsubstantiated as not to warrant further investigation or prosecution," he is required to apply to a special division of the U.S. Court of Appeals for the District of Columbia for the appointment of a special prosecutor. If the Attorney General concludes that the matter is "unsubstantiated," he must file a memorandum to that effect with the

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[1] Although your initial inquiry concerned the application of § 603 to both the President and the Vice President, we understand that only its application to the President is now at issue, and have framed our discussion accordingly. In general, however, the analysis here set forth would apply to both the President and the Vice President.

Editor's Note: The Special Prosecutor Division of the U.S. Court of Appeals for the District of Columbia Circuit granted leave to the Attorney General to disclose, in the public interest, his report of February 1, 1979, on the above matter. The report is appended to this opinion.

court. In taking the required action, the Attorney General is not to determine whether the allegations constitute a prosecutable offense or whether an indictment should be sought. No constitutional question is therefore raised as to whether a sitting President may be indicted, an issue seen by the Watergate Special Prosecutor in 1974 as an open one.[2]

To assist you in making your recommendations to the Attorney General, you have asked us to address the questions of statutory construction presented by 18 U.S.C. § 603 in this context. Two specific issues are involved: (1) whether a room in the White House reserved for the use of the President is a room "occupied * * * by any person mentioned in section 602 [of title 18]"; and (2) whether a room such as the Family Dining Room is one "occupied in the discharge of official duties." We believe that the answer to the first of these questions is in the affirmative. The answer to the second, a much more difficult issue, depends upon the circumstances of the particular case. We have also summarized the competing views on a third question of statutory interpretation raised by § 603, *i.e.*, whether solicitation of a private person, rather than a Federal officer or employee, was intended to come within the terms of the Act. In light of our resolution of the second issue, we have not, however, reexamined the Department's past position on the third question.[3]

I. The Statute

Section 603 provides as follows:

> Whoever, in any room or building occupied in the discharge of official duties by any person mentioned in section 602 of this title, or in any naval yard, fort, or arsenal, solicits or receives any contribution of money or other thing of value for any political purpose, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

The word "whoever" is broadly inclusive, replacing a reference to "no person" contained in § 603 as originally enacted in 1883.[4] There is no indication that the 1948 enactment of title 18 into positive law, 62 Stat. 683, which changed the word "whoever" (defined by 18 U.S.C. § 591 as interchangeable with the word "person") was intended to limit the sweep of the initial, all-encompassing reference. Judicial construction of the original provision shortly after its enactment established that private citizens, as well as Government officers and employees, fell within the scope of its prohibition. *See, United States* v. *Newton,* 20 D.C. (9 Mackey) 226

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[2] *See*, Reply Brief for the United States, at 24–34, in *United States* v. *Nixon*, 418 U.S. 683 (1974).

[3] We have not considered a fourth critical question, which turns primarily on matters of fact, *i.e.*, whether a solicitation within the terms of the statute has occurred.

[4] Act of January 16, 1883, cl. 27, 22 Stat. 403, 407, as amended. This Act is commonly referred to as the Pendleton Civil Service Act.

(1891).[5] This construction is in accord with Congress' apparent intent that § 603 apply to all persons.[6]

While the broad prohibition in § 603 is thus to be observed, its application is more narrowly limited to "any room or building occupied" by certain persons for certain purposes. The phrase "any room or building" is relatively straightforward. Since both "room" and "building" are mentioned, it appears that Federal occupation of a single room in otherwise non-Federal premises would not bring the whole of those premises within the area encompassed by the statutory prohibition. On the other hand, the inclusion of a reference to buildings and not simply rooms indicates that common areas such as corridors, and not simply offices in actual use, fall within the scope of the statute.[7] The meaning of the phrases "person mentioned in section 602 of this title"[8] and "occupied in the discharge of official duties" is less clear.

II. The Persons Mentioned

The bar on solicitation imposed by § 603 applies only in rooms and buildings occupied by persons mentioned in Section 602 of title 18. Section 602 provides:

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[5] There, the court rejected the defendant's assertion that, to fall within the terms of the statute, the person soliciting had to have been "either an employee of the Government of the United States, or one of the officers named in [the original versions of 18 U.S.C. §§ 602, 606, or 607]." Instead, the court said, Congress could prescribe rules of conduct "to be observed not only by officers and employees of the Government who shall occupy [the specified] places for the time being, but also by the citizen who may for any purpose be allowed to go into these places." 20 D.C. at 231. Relying on the plain language of § 603, the court concluded that the provision should be read as forbidding persons outside the Government from engaging in the forbidden activities in Government buildings. *See also*, *United States* v. *Burleson*, 127 F. Supp. 400, 402 (E.D. Tenn. 1954) ("Section 603 prohibits solicitation or receipt by anybody of contributions in a Government building, or building occupied in whole or in part by Government employees, or persons compensated by money derived from the Treasury of the United States").

[6] *See, e.g.*, 14 CONG. REC. 622 (1882) (Senator Coke) (§ 603 "applicable to all persons"); *id.* at 636 (Senator Hawley) ("forbidding any person in the world").

[7] It should be noted that § 603 was revised in 1948 to prohibit solicitation or receipt of any contribution for any political purpose "from any such person," *i.e.*, from any person mentioned in § 602. The change was intended "to make it clear that the section [would] not embrace State employees in its provisions [albeit that] [s]ome Federal agencies are located in State buildings occupied by State employees." *See* 62 Stat. 722; *see also* H. Rept. 304, 80th Cong., 1st sess. A51 (1947). Earlier draft versions of the criminal code revision did not accomplish such a change and the reasons for its introduction in the later versions are not explained. Compare H. Rept. 152, 79th Cong., 1st sess. A47 (1945), with H. Rept. 152, Pt. 2, 79th Cong., 2d. sess. A46 (1946). In 1951 these additional words were stricken because they had not been contained in the version of § 603 adopted as part of the 1909 criminal code revision. *See* S. Rept. 1020, 82d Cong., 1st sess. (1951), reprinted at 1951 U.S. Code Cong. & Adm. 2578, 2584. This narrowing of the class of potential victims and then return to the statute's original scope does not reveal any intention to alter the dimensions of the zone in which such conduct toward a specified victim class was to be prohibited.

[8] As originally enacted both § 603 and § 606 referred to persons "mentioned in this act" rather than to persons "mentioned in section 602." The current language of reference was adopted as part of the 1948 Criminal Code revision, 62 Stat. 722. This change appears to have no great significance, other than to focus the current inquiry more narrowly on § 602 rather than, in addition, upon other sections of the Pendleton Act.

> Whoever, being a Senator or Representative in, or Delegate or Resident Commissioner to, or a candidate for Congress, or individual elected as, Senator, Representative, Delegate, or Resident Commissioner, or an officer or employee of the United States or any department or agency thereof, or a person receiving any salary or compensation for services from money derived from the Treasury of the United States, directly or indirectly solicits, receives, or is in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person, shall be fined not more than $5,000 or imprisoned not more than three years or both.

The language of § 602 can be construed in a variety of ways. The specific mention of Senators, Representatives, and Delegates without a similar express reference to the President and Vice President might be interpreted to mean that these high-ranking officers were not meant to be included within the scope of the statute.[9] We believe, however, that the inclusion of specific references to legislative officers may more plausibly be explained by congressional intent to override a decision of the Attorney General that Senators and Representatives did not fall within the scope of an earlier provision, enacted in 1876, upon which § 602 was closely modeled.[10] It might also be argued that the language "any person receiving any salary or compensation for services from money derived from the Treasury of the United States * * *" extends on its face to anyone, including the President, who is paid from Treasury funds.[11] This phrase could, on the other hand, be said to serve a distinct purpose in reaching Government

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[9] The Vice President is often regarded as an officer of the legislative branch by virtue of his responsibilities as President of the Senate. The failure to include a reference to the Vice President along with Senators, Representatives, and Delegates might therefore be said to raise the implication that neither he nor the President in whose stead he may be called to serve were meant to fall within the scope of § 602. The unique nature of the Vice Presidency was relied upon by Acting Attorney General Laurence Silberman in a 1974 opinion that the language "officer or employee of the executive branch" in 18 U.S.C. § 208 did not encompass the Vice President. *See* letter to Howard N. Cannon, Chairman, Committee on Rules and Administration, U.S. Senate (Sept. 20, 1974). Reliance was also placed on the statutory scheme requiring an officer having a financial interest to disqualify himself, a prospect not reasonably intended to extend to the President and, it may be inferred, to the Vice President; the waiver arrangement included in the statute which assumes the existence of an "official responsible for appointment;" and specific legislative history expressing the view that legislation in the area of conflicts of interest should treat the President and Vice President in a unique fashion. None of these considerations exists in the present case.

[10] 17 Op. Att'y Gen. 419 (1882).

[11] Section 602, as originally enacted, did not list persons receiving salary or compensation derived from the Treasury of the United States among the class of persons forbidden from soliciting or receiving contributions but only among the class of persons who could not be solicited. This arrangement was altered in 1925 as a result of the Federal Corrupt Practices Act of 1925, 43 Stat. 1073. The amendment to § 602 was offered on the floor of the House without any detailed explanation of the drafters' intent. *See* 65 CONG. REC. 10329 (1924) (Representative Cable).

contractors and other such persons not included within the section's "officer or employee" language, rather than expanding the class of covered "officers" to include the President if it would not otherwise do so. Finally, it might be contended that the word "officers" is used in a narrow constitutional sense to denominate persons appointed by the President or heads of departments whose positions satisfy the traditional requirements of office described in the *Germaine* case,[12] and not elected officers such as the President and Vice President. It has, however, been recognized that the critical consideration in determining the meaning of the word "officer" is not compliance with the *Germaine* standards alone, but rather the intent of Congress.[13] That intent, in this case, is most clearly revealed by the debate on the 1883 Pendleton Act.

Significantly, as was often mentioned in the debate, the problem of "political assessments"—the demand for and collection from Government employees of a percentage of their salary to support the reigning political party and its campaign activities—had been addressed in 1876 by means of an amendment to an appropriation bill, which forbade "all executive officers or employees of the United States not appointed by the President with the advice and consent of the Senate * * * [from] requesting, giving to, or receiving from any other officer or employee of the Government, any money * * * for political purposes."[14] This 1876 provision is, however, not the only relevant precursor to the 1883 legislation. In 1867 a provision which, on pain of dismissal, prohibited any "officer or employee of the Government" from requiring "any workingman in any navy yard to contribute or pay any money for political purposes" was passed as a rider to an appropriation bill.[15] The legislative history of this provision suggests that it was meant to address abuses by such high-ranking officials as the Secretary of the Navy.[16] It therefore seems clear that where Congress intended to limit the sweep of legislation of this sort, it did so expressly, as was the case in 1876. Despite the precedent provided by the 1876 provision, however, most of the proposed bills on the subject of political assessments[17] and § 602 as finally enacted contained no similar express indication that all executive officials were not to be included within its scope. Indeed, on at least one occasion, Senator Pendleton, in an impassioned speech, decried just that sort of technical distinction between

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[12] *United States* v. *Germaine*, 99 U.S. 508 (1878).

[13] 40 Op. Att'y Gen. 294, 297 (1943); *Steele* v. *United States, No. 2*, 267 U.S. 505, 507 (1925); *United States* v. *Hendee*, 124 U.S. 309 (1888).

[14] Act of August 15, 1876, ch. 287, 19 Stat. 143, 169. As originally enacted, this provision provided that violators would be deemed guilty of a misdemeanor and fined $500; they would also be discharged. This provision is now codified at 5 U.S.C. § 7323; a violation is no longer deemed a misdemeanor and only the penalty of removal has been retained.

[15] Act of March 3, 1867, c. 172, 14 Stat. 489, 492.

[16] *See* CONG. GLOBE, 39th Cong., 2d sess. 1948 (1867) (Senator Wilson).

[17] *But see* 14 CONG. REC. 21 (1882) (Springer proposal to amend 1876 provision to prohibit any Member of Congress, Presidential appointee "or other person" from engaging in the solicitation of Federal employees on pain of criminal fine, but not removal from office).

Presidential appointees and other Federal officers.[18] The congressional intent that those officers formerly excluded from the scope of the provision were henceforth to be included within the class of persons governed by the terms of § 602 and its compansion provisions thus seems rather clear.

It does not necessarily follow, however, that the President himself, and not simply Presidential appointees, were similarly intended to be brought within the reach of these new provisions. One brief statement made by Senator Edmunds, reporting a bill developed by the Judiciary Committee in response to a resolution requesting that committee to consider the problem of political assessments, is particularly noteworthy:

> I am instructed by the [Judiciary] Committee * * * to report an original bill which I send to the Chair to be placed upon the Calendar. And I am authorized by the Committee to make this statement that in the draft of the bill it is not the purpose of the Committee to create any implication as to the right of the legislative power to restrain the President in regard to the matters in question. [14 CONG. REC. 600 (1882).]

This oblique statement could signify that Congress did not intend to bring the President within the scope of 18 U.S.C. § 602, § 603, § 606, or § 607, provisions which in large part were modeled upon the Judiciary Committee bill.[19] It is, on the other hand, evident that Congress was particularly sensitive to the important constitutional issue raised by any attempt to limit the President's discretion with regard to the removal of his appointees as would have been the case under § 3 of the bill, the prohibition on removal now found in 18 U.S.C. § 606.[20] Seen in this light, Senator Edmunds' statement has completely contrary implications, suggesting that a committee disclaimer was necessary since the President was indeed regarded as an executive officer of the United States whose politically motivated discharge of a direct subordinate was seen to fall within the scope of the bill.

Support for the latter interpretation and, we believe, critical evidence suggesting that the President falls within the class of persons governed by the bill, is found in a subsequent discussion of § 606, which, in a fashion similar to § 603, refers to "officers or employees of the United States

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[18] *See* 13 CONG. REC. 5331-5332 (1882).

[19] 14 CONG. REC. 643 (1882) (Senator Maxey).

[20] The power of Congress to limit the President's power of appointment and removal was often debated in connection with the related debate on Senator Pendleton's Civil Service bill. *See, e.g.*, 14 CONG. REC. 608 (1882) (Senator Van Wyck). Continuing disagreement regarding this power may well have caused the Judiciary Committee to request Senator Edmunds to make such a disclaimer.

mentioned in Section 602."[21] Senator Hawley, who offered the amendment to the Pendleton Civil Service bill which in large part incorporated the Judiciary Committee's proposal for a separate bill addressing the problem of political assessments, described a correction he had made in the language of his proposal as follows:

> [T]his clause, "by reason of any vote such officer or employé has given or withheld, or may purpose to give or withhold, at any political election," has been striken out. On a moment's thought it was seen that that came in conflict with what is universally admitted to be the right of a Chief Executive to make appointments in a certain branch of controlling offices in accordance with his own political faith. That he has a right to do, and he could not conduct the Government without it * * *. That would have forbidden, as the draft originally stood by an oversight, the President of the United States from changing his attorney-general from one party to another, or changing a foreign minister, or perhaps even changing a cabinet minister. So that part is withdrawn, and it now only forbids employés collecting from each other, and forbids persons going into the Government rooms and offices and there collecting money for political purposes. That is clearly a thing we have a right to do. Then it forbids degrading or discharging a man for giving or not giving money. All three of these things are clearly within our legitimate function. [14 CONG. REC. 622 (1882).]

It is clear, therefore, that he intended the President to be included among the "officers" governed by the bill. While narrowing the scope of § 606 to limit its sweeping bar on removal for what in essence would simply be political affiliation as evidenced by an officer's past voting record, Senator Hawley left untouched the prohibition on removal for failure to provide political support in the form of monetary contributions. He thus in large measure eliminated the kind of constitutional concern that may have been the basis for the Judiciary Committee's earlier disclaimer. While a similar question concerning the application of § 606 to the President was subsequently raised by Senator Jones at the close of debate on the political assessments bill,[22] no response was deemed necessary, probably because

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[21] Section 606 provides:

> Whoever, being one of the officers or employees of the United States mentioned in section 602 of this title, discharges, or promotes, or degrades, or in any manner changes the official rank or compensation of any other officer or employee, or promises or threatens so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

[22] *See* 14 CONG. REC. 670 (1882):

> With respect to the third section of the bill [18 U.S.C. § 606], I should like to ask the Senator from Vermont if the word 'officer' as used here can be held to include the President of the United States? Because if so it would present to my mind a very serious and embarrassing objection to this part of the bill * * *.

(Continued)

the Jones statement failed to take into account the significant degree to which the Hawley correction had narrowed the scope of the § 606 prohibition on removal.

Additional statements in the course of debate evidencing a concern that the President, too, had been involved in political assessment abuses provide further evidence in support of the view that the President was not thought to be outside the intended scope of the 1883 political assessment legislation.[23] So, too, do general statements that the actions of "every officer and employé of the Government who can be thought of" and "any of the officers of the Government of any rank or degree" were to be restricted pursuant to those provisions.[24] These broad statements are particularly noteworthy in a context where Congress could reasonably conclude that all schemes involving any Government official's efforts to coerce a subordinate to contribute funds to a political cause constituted an abuse of power, a violation of the rights of the subordinate, and, a consideration not insignificant in their eyes, a patently inequitable method for diverting funds appropriated for employee salaries into partisan hands. Such policy considerations undoubtedly apply even more strongly to persons closer to the pinnacle of the Government hierarchy where power is most significantly concentrated and the potential for coercion correspondingly great. Particularly where only criminal penalties were provided rather than provision made for discharge or removal of an offending official, policy reasons for prohibiting such abuses of power by the President as much as by any other Government official are clearly present.

A number of arguments based on the language of § 602 and certain statements contained in the legislative history of the Pendleton Act might be cited in support of the view that the President does not come within the class of persons mentioned in that provision. However, the better view, in our judgment, is that the President does, indeed, fall within the terms of that provision.

III. Discharge of Official Duties

Notwithstanding the application of § 603 to rooms reserved for the use

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(Continued)

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> However anxious I may be in common with those around me to reach legitimate civil-service reform, I shall not throw myself in the path of the Constitution to do it. If the officer who controls the executive power of this Government has the right under the Constitution to remove, it would be a most serious question if an issue should be made between the inferior employé and that high official as to the causes of removal * * *.

[23] *See, e.g.*, 13 CONG. REC. 5331 (1882) (Senator Conger); *id.* at 5339 (Senator Hale). *See also, id.* at 4859 (Representative Kasson) (assuming that President was covered by proposed amendment referring to "any Executive officer or employee of the United States").

[24] 14 CONG. REC. 636 (1882) (Senator Hawley). *But see, id.* at 641 (Senator Sherman) (describing a proposed amendment framed in terms of "executive officers" as embracing "every employé of the Government, from postmasters down * * *" but apparently doing so with the intent to show that such persons were within the scope of the amendment, not that others were excluded therefrom).

of the President generally, an issue is nevertheless presented whether rooms in the White House are "occupied in the discharge of official duties."

Significantly, the statute is not framed in terms of property owned or held by the United States; it rather adopts a functional test, focusing on areas used by Federal personnel while they are conducting the Government's business.[25] At the same time, however, no indication is given whether the word "occupied" is intended to refer only to those areas in actual use, to those areas within the zone of normal use, or both.

The legislative history specifically addressing the meaning of this phrase is limited. "Public buildings" were regarded as within the scope of the statute;[26] privately held residences such as lodging houses were not.[27] More insight can, however, be gained by consideration of the overall statutory scheme.

The four companion provisions passed in 1883 constitute a carefully crafted system of overlapping prohibitions designed to eliminate the abusive practice of political assessments. The enactment was intended (1) to eliminate pressures for political contributions relating to Federal employment both on and off the job (by banning solicitation and receipt of contributions and gifts between Federal officers and employees—18 U.S.C. §§ 602 and 607), and (2) to make unlawful all political pressures on the job (by banning solicitation on the job site by any person for any political purpose or intimidation with regard to job tenure, rank or compensation—18 U.S.C. § 603 and 606).[28] In order to accomplish the latter purpose, § 603 went beyond a prohibition of actual physical disruption of the work process,[29] and beyond a less all-encompassing bar on solicitation of Federal employees themselves[30] to prohibit any sort of solicitation or receipt on work premises by or from any person. It sought, in effect, to create for Federal workers a neutral job site free from political solicitation.

This arrangement has dual significance. It is apparent that Congress

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[25] Congress' action in adopting § 603 was characterized as an exercise of its power to control Government property in a business rather than in a political sense. *See* 14 CONG. REC. 623 (1882) (Senator Coke); *id.* at 669 (Senator Edmunds).

[26] *See, id.* at 625 (Senator Williams); *id.* at 636 (Senator Hawley); *id.* at 640, 670 (Senator Jones).

[27] *See, id.* at 622 (Senator Jones).

[28] Senator Harrison described the proposed scheme as an attempt to "remove from all those in the official service of the United States any other influence or control in their giving than that which may operate upon a private individual." *Id.* at 639.

[29] *See, e.g., United States* v. *Thayer*, 209 U.S. 39, 42 (1908) "It appears to us no more open to doubt that the statute prohibits solicitation by written as well as spoken words * * *. The purpose is wider than that of a notice prohibiting book peddling in a building. It is not, even primarily, to save employés from interruption or annoyance in their business. It is to check a political abuse * * *."

[30] *See* 14 CONG. REC. 638 (1882) (Senator Hawley) ("no human being could, inside of Uncle Sam's buildings or grounds, solicit in any way anybody for a single cent"). *See also* note 7, *supra*, discussing the 1948 and 1951 amendments which altered the scope of § 603 in this regard.

intended § 603 to serve as a mechanism that would remove all possibility of political solicitations being addressed to Federal employees during the course of their employment. It therefore follows that Federal premises should be regarded as "occupied" both where at a particular time an employee is actually engaged in work in a particular area and, more generally, where a group of employees routinely utilize larger areas in the course of their regularly assigned responsibilities.[31] Similarly, in order for the statutory bar to be effective, it seems only reasonable that, along with actual office or work space, common areas such as cafeterias and rest rooms provided on the Federal premises for use during short breaks from the performance of official duties should be seen to fall within the terms of the statute.[32] Finally, it is clear that the mere subjective intent that a particular conversation or transaction conducted on Federal premises be regarded as private cannot have the effect of taking an area in which it occurs outside the zone of "occup[ation] in the discharge of official duties."

At the same time, it is apparent that in developing this statutory scheme, Congress intended to distinguish between Federal employees' public and private lives. A significant portion of the Senate debate on the political assessment portion of the Pendleton Act and related companion legislation was devoted to proposals to extend § 603 and § 606 to cover employee contributions for any political purpose which might be made outside the job site anywhere in the District of Columbia, or in other enclaves within exclusive Federal jurisdiction,[33] and to bar any solicitation sent through the mails to any Federal officer for any political purpose.[34] These proposals,

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[31] There is at least one suggestion in the legislative history of § 603 that solicitation during a private meeting with a clerk not engaged in official duties at a time when all other clerks normally occupying a public building had left for the day would not fall within the scope of the statute. *See* 14 CONG. REC. 669 (1882) (Senator Morgan). In citing this example the speaker apparently assumed that the clerk's office was neither actually occupied in the discharge of official duties nor included in an area more generally being utilized by Government employees acting in the course of their employment. Depending on the circumstances, however, reliance on this example may no longer be warranted, for even where an individual employee is not himself engaged in official business, some substantial portion of the premises in which an after-hours meeting might take place may in instances be "occupied in the discharge of official duties" by security guards or maintenance and cleaning personnel. While it might still be contended that an after-hours meeting in a part of a public building not generally patrolled by security guards or occupied by cleaning personnel would not fall within the terms of the statute, at least where the employee who has arranged the meeting is not actually engaged in the performance of official duties, and while other statements in the course of legislative debate and judicial decision may suggest a contrary result, *see* notes 5 and 30, *supra*, we need not reach that question here.

[32] Such areas are, for example, regarded as occupied in the discharge of official duties for purposes of the workers' compensation laws. *See, e.g.*, 82 Am. Jur. 2d, *Workmen's Compensation* §§ 271–272, at 57–59 (1976).

[33] *See* 14 CONG. REC. 621–630 (1882) (Slater amendment prohibiting solicitation or receipt for any political purpose); *id.* at 639–642 (Vest amendment similar to Slater amendment); *id.* at 644 (George amendment broadening § 603 to include "the District of Columbia, or any room or building occupied * * *"); *id.* at 666–667 (Beck substitute prohibiting any contribution for any political purpose); *id.* at 667–670 (Morgan amendment prohibiting contribution for political purpose to Senators, Representatives, or Delegates or any person within the exclusive jurisdiction of the United States).

[34] *Id.* at 650 (George amendment); *id.* at 670 (Groome amendment).

however, were not accepted, and the initial distinction between on-the-job and off-the-job restrictions was carefully preserved. Although the debate on proposed amendments was not specifically couched in First Amendment terms, the Supreme Court in *United States* v. *Thayer, supra,* at 42, observed that "[t]he limits of the Act, presumably, were due to what was considered the reasonable and possibly the constitutional freedom of citizens, whether officeholders or not, when in private life * * *."[35] In keeping with the provision's plain language and this evidence of congressional intent to distinguish between Federal employees' public and private lives, it therefore seems appropriate to interpret the phrase "in the discharge of official duties" as limiting solicitation in premises held or used by Federal personnel, but only to the extent that their presence there is work-related.

Thus, a distinctly different case is presented where certain premises are held by the Federal Government for the purpose of a personal residence rather than as a business office or other similar work site. There is, of course, a connection between the occupancy of such premises and the status of an individual, such as the President, as a Federal officer. If an area is specifically designated to serve at all times purely as a private residence, however, it can hardly be said to be occupied "in the discharge of official duties." Instead, it represents a haven, akin to the private lodging mentioned in the course of congressional debate on § 603, to which that provision was not intended to apply. Such a distinction was recognized in the Criminal Division's 1978 determination that private residences of Foreign Service employees that are either owned or rented by the U.S. Government, and schools, commissaries, recreational facilities, and the like that are operated by employee associations with governmental financial assistance do not fall within the terms of § 603.[36] Areas within the discrete private residence area included in the White House mansion, although not physically detached from areas formally given over to official office space or to areas used for ceremonial functions, may therefore reasonably be seen to fall outside the reach of the statute.[37] Areas routinely used in connection with the discharge of official duties by persons

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[35] This statement was made in the course of a discussion in which the Court dismissed defendant's argument that the Senate's rejection of the Groome amendment (which would have prohibited all mail solicitations of Federal employees for political purposes) evidenced an intention not to treat any mail solicitation as within the scope of § 603. *See also, Ex parte Curtis*, 106 U.S. 371 (1882), upholding the 1876 act's narrow limitation on solicitation of Government employees by Government officials while not prohibiting all political contributions.

[36] Letter from Benjamin R. Civiletti, Assistant Attorney General, Criminal Division, to K.E. Malmborg, Assistant Legal Advisor for Administration, Department of State (March 17, 1978).

[37] Although the private residence area may be serviced by Government personnel who provide certain sorts of personal, maintenance, or security services, we do not believe that their presence would convert an area that is otherwise a private residence into one occupied "in the discharge of official duties."

other than the President's family (*e.g.*, the White House mess) would not, however, be similarly excluded.

A more difficult question is posed with regard to political solicitations occurring in rooms which are not located within the purely private residential portion of the White House and which may be used either for personal functions by the President and his family or for official business. As noted above, rooms ancillary to offices or other such work space which are used by employees in connection with their work would ordinarily be regarded as falling within the terms of § 603. In most cases, therefore, it would be appropriate to treat both areas actually being used in the discharge of official duties and those more than occasionally used for such purposes as within the zone of occupation for purposes of § 603. This application of the statute gives effect to Congress' intent that no haven be available on Federal premises from which political solicitations could be addressed to Government workers acting in the discharge of their official duties.

An attempt might similarly be made generally to classify areas within the mansion portion of the White House outside of the strictly private family residence as predominantly used for official or personal purposes. On the one hand, rooms on the first floor of the mansion which are used by the President for official functions, such as the entertainment of foreign dignitaries and Members of Congress, can in a certain sense be said to be occupied by the President in the discharge of his official duties as Head of State and Chief Executive. Participation in ceremonial dinners and attendance at other gatherings in furtherance of the conduct of the President's constitutional duties are ordinarily regarded as essential parts of the President's job. Under this approach, therefore, if White House rooms are normally used for official functions, they would be viewed as "occupied in the discharge of official duties" within the terms of 18 U.S.C. § 603, even though they are used for social functions.

On the other hand, it could be said that the President's role as host, even during official functions, is a private one akin to that of an individual offering hospitality to his friends and business associates in his own home. Where the predominant use of a room is for entertainment by a single person serving in such a capacity, it is by nature personal and should be seen to come within the residence exception previously described. This view might be bolstered by the common sense perception that where a room is utilized for purposes of entertainment of this sort there can be no doubt that it represents a departure from the more traditional work site Congress intended by the enactment of § 603 to protect from politicization. The clear purpose of Congress in protecting Federal employees from political pressure in connection with their jobs would not seem reasonably to extend to controlling conduct or persons attending such gatherings which do not in most cases involve significant numbers of Federal employees and which, although in one sense "official," do not involve what is generally recorded as the transaction of the Government's "business."

Given the quite peculiar nature of the White House and the unique

responsibilities of the Presidency, it is our view that a third approach is more appropriate. Necessarily some rooms in the White House may serve in turn as space adjunct to the private residence area and as space adjunct to the areas used for business or ceremonial purposes. Such rooms cannot be properly classified as either "personal" or "official" on any permanent basis. The historical fact is that a single set of rooms has been made available and has been utilized by this and past Presidents, at times in a personal caspacity, and at times for official purposes. Even though such rooms are *sui generis* and cannot reasonably be classified on a permanent basis as fundamentally residential or nonresidential in character, the reasoning described above regarding the application of § 603 would nevertheless apply. We see no reason why the exemption for private residential space discussed previously should not apply to a room that assumes that character only on a part-time or temporary basis when used for a personal or political gathering. In order, however, for Congress' intent that the bar created by § 603 effectively prohibit any sort of political solicitation during the course of Federal employment, more than a subjective intent to use such a room for private purposes is necessary. If it is to be said with any certainty that actions on premises that might either be regarded as occupied for official or for private purposes do not fall within the scope of § 603, evidence of some sort of objective advance determination concerning the nature of their use would in most cases be required. Information regarding past practice with respect to particular rooms, arrangements for reservation and use of such areas, and handling of attendant costs for budgetary and accounting purposes may prove helpful in this regard. Budgetary considerations may be particularly significant, for where the President has determined that a room has been used for official purposes so as to warrant coverage of costs with public funds it would seem that he has implicitly recognized that such a meeting was conducted in the discharge of official duties.

In our judgment, consideration of these criteria as they apply to the facts as we understand them suggests that the August 10 meeting probably falls outside the scope of § 603. We are informed that according to the Federal Bureau of Investigation (FBI) report the Family Dining Room has in the past generally been used for official occasions involving a small number of guests where use of the State Dining Room would be inappropriate. While a separate private family dining room has, since 1961, existed on the second floor of the White House in the President's personal residence, we understand that the Family Dining Room has on occasion been used by President Carter for purely personal purposes: although predominantly used for official functions, it evidently has not been exclusively so. It also appears that the meeting was not expressly scheduled by the Presidential Diarist, a factor that while not providing objective evidence that the meeting in advance was regarded as a private function, at least suggests that it was not regarded as formal official function. Finally, and most significantly, the FBI report indicates that the costs of the

meeting were absorbed by the Democratic National Committee, clear evidence that it was not regarded as an official function. Although further information on past practices would undoubtedly prove helpful in confirming this tentative view, we believe that the private residence exception implicit in § 603's reference to occupation "in the discharge of official duties" would properly be seen to apply in this case.

IV. Target of Solicitation

A third question not expressly raised in your November memorandum should also be noted in light of the facts here presented: whether an offense is stated under § 603 even if the target of an alleged solicitation is not a Federal officer or employee. Compelling arguments can be marshalled on either side of this issue.

The legislative history discussed above indicates that Congress' purpose in enacting § 603 was to protect Federal officers and employees from on-the-job solicitations. The statute, however, is not on its face limited to Federal officials. The wider sweep of the provision, banning all solicitations on Federal premises, including those involving two private citizens, could be seen as an attempt by Congress to insure the integrity of Government property. It might also be explained as an effort to remove even indirect pressure on Government employees resulting from the presence of solicitors on the premises. Neither rationale figures prominently in the congressional debate, however. It might then be concluded that § 603 should only be applied where its central purpose of protecting Federal employees would be served. Under this interpretation, the solicitation of a private citizen by a Federal officer or employee would not constitute an offense chargeable under the statute.

The opposing view that solicitations of both Federal personnel and private citizens fall within the scope of § 603 finds support in the unqualified statutory language. This sweeping language is in marked contrast to § 603's companion provisions, 18 U.S.C. §§ 602, 606, and 607, which expressly require that the person solicited be a Federal employee. It is therefore reasonable to assume that the choice not similarly to limit § 603 was a deliberate one. Moreover, it is noteworthy that, as previously discussed,[38] § 603 was amended in 1948 to prohibit solicitation "for any political purpose from any such person [*i.e.*, "any person mentioned in section 602" of title 18]," but was changed once again in 1951 to delete the added language. The justification for the initial change was to clarify that political activities involving State employees were not to be encompassed by this provision simply because Federal agencies were located in State buildings. The later change returned the section to its original form in what appeared to be a decision that its scope not be so limited. Congress' determination that repeal of the 1948 amendment was necessary suggests

[38] *See* note 7, *supra.*

that the 1948 change had either erroneously gone too far in its attempt to clarify existing law by narrowing the class of potential solicitation targets, or that Congress intended to broaden the application of § 603 to include more than those persons mentioned in § 602. In either event, this recent history of congressional amendment can be said to confirm the view that solicitations of private citizens fall within the scope of § 603.

Issue was joined with regard to these competing interpretations of § 603 in 1974 when the view that solicitations of private persons were not included within the scope of this provision was advocated by the Watergate Special Prosecutor's office. The contrary view—that § 603 was applicable regardless of the status of the person solicited—was voiced by the Criminal Division. In early 1975 the Office of Legal Counsel adopted the view of the Criminal Division, and the Office of Legislative Affairs has recently reaffirmed that position in letters to Senators Cannon and Hatfield, dated October 21, 1977 and February 24, 1978, respectively, which summarized the Department's position with regard to the application of § 603 and related statutes. Although this question of statutory interpretation is a close one, we need not reexamine it here in light of our determination in Part III above that, on the facts presented, the Family Dining Room was being used for private purposes rather than in the discharge of official duties within the terms of § 603.

In applying § 603 of title 18 to activities in the White House involving the President, two key questions are posed: (1) whether a room in the White House reserved for the President is a room "occupied * * * by any person mentioned in section 602 [of title 18];" and (2) whether a room such as the Family Dining Room is one "occupied in the discharge of official duties." Based on our examination of the pertinent legislative history, we believe that the President is included within the terms of § 602 and that rooms occupied by the President in the discharge of official duties are therefore encompassed by the prohibition on solicitation found in § 603. A distinct question is raised, however, as to whether rooms in the White House residence area that are predominantly used for purposes of entertainment, including entertainment for official purposes, are similarly included within the scope of § 603. The issue is a difficult one; however, we believe that not only rooms in the private residence portion of the White House but also rooms used for personal entertaining where there is a history of such use and where, as in this case, the cost of such use is not charged against an account appropriating funds for official functions, should not be regarded as an area "occupied in the discharge of official duties" for purposes of § 603.

A third question is also raised under the facts as we understand them: whether solicitation of a private person rather than a Federal officer or employee was intended to fall within the scope of the statute. We have summarized the competing views on this issue, including the Department's past position that solicitations of private persons are offenses within the terms of § 603. We have not, however, had to reexamine this position in

light of our view that the events alleged did not occur in a room "occupied in the discharge of official duties."

Finally, we should note a critical threshold issue which we have not here addressed: whether a "solicitation" within the terms of the statute in fact occurred. The limited facts contained in the FBI report suggest that an express request for contributions may not have been made; the problem of what may constitute a solicitation is therefore raised. A particularly narrow construction of this term may be appropriate where First Amendment interests are at stake; however, a further investigation of the facts would be necessary before any definite judgment on this point could be reached.

John Harmon has asked that you be advised that although I am signing this memorandum in his absence, members of our staff and I have discussed this matter with him and the views here expressed are his.

LARRY A. HAMMOND
Acting Assistant Attorney General
Office of Legal Counsel

APPENDIX
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT
SPECIAL PROSECUTOR DIVISION

Filed: February 1, 1979—10:33 p.m.—George A. Fisher, Clerk

In Re Report of the Attorney General	:
Pursuant to 28 U.S.C. § 592(b),	:
No. 79-2	:

MOTION OF THE ATTORNEY GENERAL FOR LEAVE TO DISCLOSE REPORT PURSUANT TO 28 U.S.C. 592(d)(2)

Pursuant to 28 U.S.C. § 592(d)(2), I hereby seek leave from the Division of the Court for permission to disclose the "Report of the Attorney General Pursuant to 28 U.S.C. § 592(b)," No. 79-2 filed in this Court on February 1, 1979. This report concerns a preliminary investigation of an allegation involving the President under the special prosecutor provisions of the Ethics in Government Act of 1978, 28 U.S.C. § 591. Moreover, the circumstances of the White House luncheon on August 10, 1978 have already been the subject of a new article, and continued public comment is foreseeable. In these circumstances, I believe it is in the public interest for the Court to grant leave to me to make public this memorandum as provided in 28 U.S.C. § 592(d)(2).

Respectfully submitted,

GRIFFIN B. BELL
Attorney General of the United States

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT
SPECIAL PROSECUTOR DIVISION

79-2 REPORT OF THE ATTORNEY GENERAL :
PURSUANT TO 28 U.S.C. § 592(b) :
SUBJECTS: PRESIDENT JIMMY CARTER :
VICE PRESIDENT :
WALTER MONDALE :
DEPUTY ASSISTANT TO :
THE PRESIDENT FOR :
POLITICAL LIAISON :
JOEL MCCLEARY :

In accordance with Section 592(b) of Title 28, United States Code, as added by the Ethics in Government Act of 1978, Public Law 95-521, I, Griffin B. Bell, Attorney General of the United States make the following report concerning the receipt by the Department of Justice of information regarding alleged criminal violations by the President; the Vice President; and the Deputy Assistant to the President for Political Liaison, Joel McCleary.

1. *Allegation.* On November 3, 1978, the Federal Bureau of Investigation received an allegation from an informant that on August 10, 1978, the President and Vice President had attended a luncheon in the White House to which were invited approximately 20 prominent business people who had contributed money on past occasions to the Democratic Party. The purpose of the luncheon was allegedly to apprise these former contributors that the Democratic Party had a remaining $1.5 million debt and that their contributions were needed in order to eliminate the debt. According to the source, solicitation or receipt of funds might have occurred at the luncheon in violation of 18 U.S.C. § 603.

The informant said that further information would appear in *New York* magazine during the month of November. On November 13, 1978, a two page article was published in the magazine stating that an unpublicized White House luncheon had been held on August 10, 1978, and that,

although "[t]here doesn't appear to have been any . . . solicitation by any government official at the luncheon session," contributions totaling $100,000 and $25,000 respectively were recorded on reports filed with the Federal Election Commission as having been received by the Democratic National Committee on the day of the luncheon from individuals identified as having attended. A copy of the *New York* magazine article is attached as an appendix hereto.

2. *Statute Involved.* 18 U.S.C. § 603 prohibits the solicitation or receipt of political contributions in any area occupied by any person described in 18 U.S.C. § 602 in the conduct of official duties.[1] 18 U.S.C. § 603 was originally enacted in 1883 as part of the Pendleton Civil Service Act. There are only four known criminal prosecutions under Section 603, and only one in the last seventy years. *United States* v. *Newton,* 20 D.C. (9 Mackey) 226 (1891); *United States* v. *Thayer,* 154 F. 508 (N.D. Tex. 1907), *rev'd,* 209 U.S. 39 (1908); *United States* v. *Smith,* 163 F. 926 (M.D. Ala. 1908); *United States* v. *Burleson,* 127 F. Supp. 400 (E.D. Tenn. 1954).

3. *Investigation.* Because the allegation and magazine article indicated the possibility that 18 U.S.C. § 603 might have been violated, the Department of Justice, pursuant to 28 U.S.C. § 592(a), conducted a preliminary investigation of the matter. Through interviews conducted by the Federal Bureau of Investigation, the following information was developed:

a) A luncheon was held in the White House on August 10, 1978, attended by 11 business people, 2 union officials, several Democratic National Committee officers and White House staff, Senator Kennedy, President Carter, and, for a brief time, Mrs. Carter.[2]

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[1] 18 U.S.C. § 603 reads:

> Whoever, in any room or building occupied in the discharge of official duties by any person mentioned in section 602 of this title, or in any navy yard, fort, or arsenal, solicits or receives any contribution of money or other thing of value for any political purpose, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

18 U.S.C. § 602, mentioned in Section 603, reads:

> Whoever, being a Senator or Representative in, or Delegate or Resident Commissioner to, or a candidate for Congress, or individual elected as, Senator, Representative, Delegate, or Resident Commissioner, or an officer or employee of the United States or any department or agency thereof, or a person receiving any salary or compensation for services from money derived from the Treasury of the United States, directly or indirectly solicits, receives, or is in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person, shall be fined not more than $5,000 or imprisoned not more than three years or both.

[2] According to White House records, the following individuals attended the luncheon: The President; John Amos, American Family Life Insurance Company, Columbus, Georgia; S. Harrison Dogole, Chief Executive Officer, Globe Security Systems, Inc., Philadelphia, Pennsylvania; Armand Hammer, Chairman and Chief Executive Officer, Occidental Petroleum Corporation, Los Angeles, California; Mrs. Armand Hammer; Morris D. Jaffe, Builder and Developer, San Antonio, Texas; Edward M. Kennedy, Senator (Massachusetts); (Continued)

b) The luncheon was held in a small room known as the Family Dining Room on the first floor of the Executive Mansion, behind the State Dining Room. The Democratic National Committee reimbursed the White House $414.87 for the cost of the luncheon.

c) The luncheon was arranged by John White, Chairman of the Democratic National Committee, and Evan Dobelle, Treasurer of the Democratic National Committee. According to White, Dobelle, and others, its purpose was to thank the participants for their contributions in eliminating the debt of the Democratic National Committee. White stated that each of the individuals invited had either contributed or pledged to contribute prior to the luncheon. According to Charles Manatt, Finance Chairman of the Democratic National Committee, it was hoped that the luncheon would induce the business people in attendance to continue their support for the Democratic Party.

d) The President met in the Oval Office with Lew Wasserman, Richard O'Neill, and Manatt for a few minutes prior to the luncheon and accompanied them to the Family Dining Room.

e) The President was present for the first hour of the luncheon and made brief remarks thanking those in attendance for their support of the Democratic Party. Joel McCleary, Deputy Assistant to the President for Political Liaison, was apparently present throughout the luncheon.[3] There is no evidence that the President or McCleary solicited or received any money during the luncheon.

f) Eleven of the individuals who attended the luncheon, and Michael Cardozo, Senior Associate Counsel to the President, have been interviewed either in person or telephonically by the

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(Continued)
Henry L. Lacayo, Director, National Community Action Projects, UAW, AFL-CIO, Detroit, Michigan; John G. McMillian, Chairman, Chief Executive Officer, President, Northwest Energy Company, Salt Lake City, Utah; Richard J. O'Neill, Santa Ana, California; Jeno F. Palucci, Chairman, Jeno's Incorporated, Duluth, Minnesota; Walter Shorenstein, Chairman of the Board, Milton-Meyer & Company, San Francisco, California; Rosemary Tomich, owner, Siesta Cattle Company, Chino, California; Glenn E. Watts, President, Communication Workers of America, AFL-CIO, Washington, D.C.; Lew A. Wasserman, Chairman of the Board and Chief Executive Officer, Music Corporation of America, Los Angeles, California; Evan S. Dobelle, Treasurer, Democratic National Committee, Washington, D.C.; Mrs. Evan Dobelle, Chief of Protocol, Department of State, Washington, D.C.; Charles T. Manatt, Partner, Manatt, Phelps, Rothenberg, & Tunney, Los Angeles, California, and Finance Chairman, Democratic National Committee; John C. White, Chairman, Democratic National Committee, Washington, D.C.; Mrs. John White; Joel McCleary, Deputy Assistant to the President for Political Liaison, The White House, Washington, D.C.

[3] McCleary is an individual covered under 28 U.S.C. § 591(b)(3), as an "individual working in the Executive Office of the President and compensated at a rate not less than the annual rate of basic pay provided for level IV of the Executive Schedule under Section 5315 of Title 5."

Federal Bureau of Investigation.[4] Each of these people stated that no solicitation of funds occurred at the luncheon. Several witnesses stated that the President confined his remarks to thanking the guests for their past support to the Democratic Party and their efforts in helping to retire the 1968 Robert Kennedy and Hubert Humphrey campaign debts. Senator Kennedy also spoke on the same theme with respect to his brother. No one stated that the President requested or even discussed future contributions. Several participants stated that they heard no discussion whatever of money or future contributions at any time during the luncheon. According to Evan Dobelle, there was one short interchange at the luncheon between White and Dobelle about the size of the remaining Party debt, after which an unidentified person stated that they should get together to see how it could be retired. There is no indication that this interchange involved the President. Several of those interviewed related that after the President left the luncheon, one guest offered to pledge a contribution but was stopped by another participant who told him such matters could not be discussed at the luncheon. According to McCleary, some other people "talked about money" after this incident but he could not recall who.

g) Two of the three persons present at the Oval Office meeting with the President were asked about the discussion and stated that no solicitation or receipt of funds occurred at that meeting. There is no evidence to the contrary. Solicitation or receipt of funds at that meeting was not part of the allegation.

h) Records of the Federal Election Commission indicated that on August 10, 1978, Richard O'Neill donated $25,000 and Lew Wasserman donated $100,000 toward the retirement of the debt of the Democratic National Committee. According to Evan Dobelle, O'Neill's contribution was received during a meeting at Democratic National Committee headquarters and Wasserman's contribution was received at the Madison Hotel. FEC records also disclose that on August 22, 1978, Walter Shorenstein donated $5,000 and on August 24, 1978, John McMillian donated $25,000 toward retirement of the debt of the Democratic National Committee.

i) According to Michael Berman, Counsel to the Vice President, the Vice President was on vacation in Canada from August 7 to August 13, 1978, and was not present at the luncheon.

4. *Analysis and Conclusions.* Section 591(a) of title 28 of the United

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[4] Those interviewed were Evan Dobelle, Mrs. Evan Dobelle, John White, Joel McCleary, Charles Manatt, Lew Wasserman, Glenn Watts, Rosemary Tomich, John McMillian, Armand Hammer, and Richard O'Neill.

States Code directs the Attorney General to conduct an investigation upon receipt of specific information that any person covered by the Act has committed a violation of federal criminal law. Section 592(c)(1) further directs the Attorney General to apply to this court for the appointment of a special prosecutor if the Attorney General, "upon completion of the preliminary investigation, finds that the matter warrants further investigation or prosecution."

As in all other cases, it is the responsibility of the Attorney General in instances of allegations of criminal conduct against persons covered by the Act, first, to determine the elements of the offense proscribed by the criminal statute at issue and, second, to determine whether the alleged facts would constitute the elements of the offense. Finally, it is my responsibility, as Attorney General, after a preliminary investigation and after an analysis of the evidence of the elements of the offense, to determine whether the case is of sufficient merit to warrant further investigation or whether "the matter is so unsubstantiated that no further investigation or prosecution is warranted." 28 U.S.C. § 592(b)(1).

It is my determination that there is no evidence in this case of conduct by the President, Vice President, or Mr. McCleary which constitutes a violation of 18 U.S.C. § 603. The case is without merit.

The operative facts have been established and no inconsistent evidence was produced by the investigation. The evidence does not support any reasonable inference that the President, the Vice President, or Mr. McCleary was involved in any request for or delivery of campaign contributions at the White House. The Vice President was not in Washington, D.C. on August 10, 1978. There is no evidence that the President or Mr. McCleary, who of all those attending the luncheon are the only ones covered by the special prosecutor provision, made any statement or solicitation or in any other way personally solicited any campaign contributions.[5] This is not surprising since, as Mr. McCleary stated, "the organizers were not looking for money at the luncheon." That the organizers had no such intent is corroborated by the action of one participant when another guest raised the subject of pledging a contribution; he interrupted the other guest and cautioned that they were not to discuss contributions at the luncheon.

The only conduct proscribed in the statute is making a request for political contributions or receiving delivery of such contributions in federal offices. Section 603 is a *malum prohibitum* statute which makes

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[5] For purposes of this memorandum, I am assuming, without deciding, either that the White House as a whole is a "building occupied in the discharge of official duties by [a] person mentioned in section 602," or that the Family Dining Room is a "room * * * occupied in the discharge of official duties by [a] person mentioned in section 602." Among the several sub-issues that might have to be addressed in order to decide those questions is that of whether the President is a "person mentioned in section 602." I am specifically not deciding that issue at this time.

an activity illegal in certain places although it would be legal if conducted elsewhere. The activity is solicitation or receipt of political contributions.

There is no evidence that any money was received in the White House on August 10, 1978. Likewise, there is no evidence that money was solicited at the luncheon. While money was solicited or received before or after the luncheon at places other than the White House,[6] there is no evidence that any solicitation took place in the White House. Indeed, it appears that the organizers of the luncheon deliberately structured the affair so as to avoid any violation of law. The evidence does support an inference that the luncheon was intended, at least in part, to entertain former contributors with the hope or expectation that they would, in the future, continue their financial support. Such activity, absent a solicitation or receipt on premises covered by the statute, is not prohibited by Section 603.[7]

This reading of the solicitation provision of Section 603 is fully supported by the history of the statute. There is no case law on this point. This statute derives from the 1883 Pendleton Civil Service Act which was designed primarily to eliminate solicitation of campaign funds from federal employees at their work place. The goal was to protect these employees from what were essentially political assessments and to protect the integrity of federal office space. The activity in question here, a social gathering of past and potential contributors who are not federal employees in a White House dining room, falls outside the concern of the statute.

The Department of Justice is unaware of any instance in the ninety-six years since the statute was passed in which a prosecution was undertaken for the type of activity here at issue. The only reported prosecutions to indicate the form of solicitation covered under the statute have involved explicit written requests for money. See *United States* v. *Newton, supra; United States* v. *Thayer, supra; United States* v. *Smith, supra.*

Moreover, when presented with factual situations involving isolated, non-egregious incidents of actual, explicit solicitations or receipts in federal buildings, the Department has consistently found them without prosecutive merit under Section 603. Thus, even assuming a much broader interpretation of the activity proscribed by Section 603, a prosecution of this matter would be legally unsound, unfair, and without merit.

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[6] There is no allegation or evidence that the President or Mr. McCleary personally solicited or received a contribution before or after the luncheon on August 10, 1978.

[7] It is entirely legal under Section 603 to solicit outside a protected area. Therefore, to determine whether a Section 603 violation occurred one must look to the behavior actually occurring in the protected area to see if that behavior violated Section 603. Any broader interpretation of Section 603 would make it felonious to invite former contributors to State dinners or other formal functions at the White House or Capitol with the unspoken hope that the former contributors continue their support. The subjective hope or expectation that an individual might contribute money because he or she was invited to a social function at a federal building is clearly outside the coverage of Section 603 unless this hope or expectation is coupled with an actual solicitation or receipt in a protected area. We are not deciding at this time what the meaning of "solicitation" might be in the context of other statutes which are inapplicable here.

To contemplate the possibility of a prosecution on the established facts of this case, one would have to conclude that merely by attending the luncheon or expressing thanks for past contributions, the President or Mr. McCleary should be seen in the eyes of the law as actually having made a solicitation for future contributions and committing a felony. Such a view is untenable.

In sum, there is no factual substantiation of any solicitation or receipt by the President, the Vice President, or Mr. McCleary at the White House on August 10, 1978. There is no evidence of conduct on their part that would fall within the scope and purpose of the statute. Moreover, there is no indication from the preliminary investigation that further investigation could reasonably be expected to disclose evidence of a violation which could warrant prosecution under this statute. The case is without merit.

Therefore, I hereby notify the Court pursuant to 18 U.S.C. § 592(b) that I find the matter is so unsubstantiated that no further investigation or prosecution is warranted, and that no special prosecutor should be appointed.

Respectfully submitted,
GRIFFIN B. BELL
Attorney General of the United States

January 22, 1979

79-7 MEMORANDUM OPINION FOR THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

Federal Bureau of Investigation—Disclosure of Criminal Record—Admission to the Bar

This responds to your request for our opinion whether the Florida Board of Bar Examiners is authorized to receive criminal history record information maintained by the Federal Bureau of Investigation (FBI) for the purpose of investigating the character of applicants for admission to the bar. We understand that there is no Florida statute that authorizes criminal history record exchanges between the Board and the FBI. The Board is established by rule of the Florida Supreme Court under that court's inherent judicial authority to regulate admission to the bar.[1] By rule of the court, the Board is authorized to investigate the character and fitness of applicants for admission.[2] The Board's own rules require that applicants submit fingerprints.[3] On the basis of these facts, we concur in your conclusion that neither § 201 of the Act of October 25, 1972, 86 Stat. 1115, 28 U.S.C. § 534 note, nor 28 CFR § 20.33(a)(1), authorizes the FBI to provide the Board the criminal history record information for the purpose of determining the fitness of bar applicants.

Under 28 CFR § 20.33(a)(1), the FBI may make criminal record history information available to "criminal justice agencies for criminal justice purposes." The Commissioner of the Florida Department of Law Enforcement argues that the Board of Bar Examiners is a "criminal justice agency," as defined by 28 CFR § 20.3(c), and is therefore authorized to receive that information. We need not decide this point. The "administration of criminal justice," as defined by 28 CFR § 20.3(d), includes only

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[1] *See* Fla. Stat. Ann. § 454.021; Rules of the Florida Supreme Court Relating to Admissions to the Bar, Art. 1, § 2; *see generally, Barr* v. *Watts*, 70 So. 2d 347, 350 (1953).

[2] Rules of the Florida Supreme Court Relating to Admissions to the Bar, Art. 2, § 12.

[3] Rules of the Florida Board of Examiners, Rule II, §10(4).

the detection and prosecution of crimes, the administration of pretrial release, and the operation of a correctional system. It does not include the licensing of attorneys to practice law. *See generally, Menard* v. *Mitchell*, 328 F. Supp. 718, 726–27 (D.D.C. 1971, *aff'd in part, rev'd in part on other grounds sub nom. Menard* v. *Saxbe*, 498 F. (2d) 1017 (D.C. Cir. 1974)). Regardless of whether the Board is a criminal justice agency, 28 CFR § 20.33(a)(1) does not authorize it to receive criminal record history information for the purpose of determining the character of applicants to the bar.

Under § 201 of the Act, as implemented by 28 CFR § 20.33(a)(3), the FBI may provide criminal record history information to a State for employment or licensing purposes only if "authorized by State statute." Section 201 was enacted in response to the *Menard* decision. It held that the FBI lacked authority under then existing law to disseminate criminal history information outside the Federal Government for employment or licensing purposes. It also stated that statutes governing the dissemination of criminal history information must be strictly construed to avoid serious constitutional issues. The express restrictive language of § 201, when read in the light of *Menard*, requires a narrow interpretation of State authority to receive criminal history information from the FBI for employment or licensing use.

Accordingly, this Office has construed § 201 to permit a State board of bar examiners to obtain criminal history information from the FBI only when a statute expressly authorized it to fingerprint applicants or to exchange criminal history information with other agencies. As your memorandum points out, we have specifically concluded that court or administrative rules based on general authority to regulate admission to the bar do not meet the requirements of § 201. The facts in this case are identical to those in our prior opinion on the subject.

The State has argued that the rules of the Florida Supreme Court requiring bar applicants to be fingerprinted are the full equivalent of a statute because that court has authority superior to the legislature in this area. However, the Florida court has held that the legislature has "concurrent" power to regulate bar admissions. *See, Barr* v. *Watts*, 70 So.2d 347, 350 (1953). It is therefore questionable as a matter of Florida law whether the legislature lacks power to enact a statute requiring fingerprinting. More importantly, the language of § 201 is explicit. Had Congress wished to permit dissemination authorized by judicial or administrative rule, it could easily have done so by having the section read "by law" instead of "by statute." In the light of the *Menard* decision, this choice of language must be given effect.

MARY C. LAWTON
Deputy Assistant Attorney General
Office of Legal Counsel

January 24, 1979

79-8 MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION, OFFICE OF MANAGEMENT AND FINANCE

Federal Grant and Cooperative Agreement Act of 1977 (41 U.S.C. § 501 *et seq.*)—Application to the Department of Justice—Drug Enforcement Administration—21 U.S.C. § 872(a)(2)

This is in response to your request for our opinion concerning the application of the Federal Grant and Cooperative Agreement Act of 1977 (FGCAA), Public Law No. 95-224, 29 Stat. 3, 41 U.S.C. § 501 *et seq.*, to the components of the Department of Justice. Your request raises two general issues: first, the effect of the Act on the general authority of the Department of Justice to enter into contracts, grants, or cooperative agreements, and second, the extent to which the Attorney General has delegated authority derived from the Act and to the components of the Department. It then raises the particular question whether the Act and Department regulations authorize the Drug Enforcement Administration (DEA) to enter grant agreements with State and local governments under 21 U.S.C. § 873(a).

We understand that DEA intends to provide State and local governments with "seed money" to establish investigative units that will concentrate on particular types of violations. DEA has suggested that it is authorized to provide such assistance as a cooperative arrangement under 21 U.S.C. § 873(a)(2) and that § 7(a) of the FGCAA permits it to use a form grant agreement in doing so. We conclude that DEA lacks authority to provide assistance under 21 U.S.C. § 873(a)(2) by grant, notwithstanding the FGCAA. We have also concluded, however, that 21 U.S.C. § 872(a)(2) and the FGCAA authorize DEA to fund experimental enforcement projects by State or local agencies through either a grant or a cooperative agreement.

As a preliminary matter, we note that the FGCAA applies to "executive

agencies," which it defines as the executive departments, independent establishments, and wholly owned Government corporations.[1] Thus, the Act applies to the Department of Justice as an entity. With exceptions not relevant here, the functions of the Department are vested in the Attorney General, subject to delegation.[2] Therefore, the powers and duties under the Act are conferred upon the Attorney General.

The Act declares in effect, that three types of legal instruments can embody the relationship between a Federal executive agency and the recipient of Federal assistance or a procurement contract: the contract, the grant agreement, and the cooperative agreement.[3] Sections 4–6 of the Act, 41 U.S.C. § 503–505, define the type of relationship between an agency and the recipient in which each instrument will be used. Section 7(a) of the Act, 41 U.S.C. § 506(a), authorizes the agencies to enter into the type of agreement that is appropriate to the agency's underlying relationship with the recipient. The text and legislative history of the Act demonstrate that it does not change the substantive authority of agencies to enter particular relationships with recipients; it merely requires them to use the proper legal instrument in the exercise of that authority.

The Act requires a procurement contract to be used "whenever the principal purpose of the instrument is the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government."[4] Assistance, as opposed to procurement, requires either a grant agreement or cooperative agreement. In both cases, a relationship exists where:

> * * * the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the State or local government or other recipient in order to accomplish *a public purpose of support or stimulation authorized by* Federal statute* * *. [Emphasis added.][5]

A grant agreement must be used when "no substantial involvement" by the Federal agency in the recipient's activity is anticipated;[6] a cooperative agreement must be used when "substantial involvement" is anticipated.[7]

The purpose of these provisions is to provide uniform, Government-wide criteria for selecting a legal instrument that will reflect the type of basic relationship expected between the Federal Government and non-Federal parties.[8] Taken together, they "provide a basic structure that

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[1] 41 U.S.C. § 502(4); *see* 5 U.S.C. §§ 101–105.

[2] 28 U.S.C. § 509, 510; *see also* 21 U.S.C. § 871.

[3] The Act does not apply to direct cash assistance to individuals, subsidies, loans, loan guarantees, or insurance. 41 U.S.C. § 502(5).

[4] 41 U.S.C. § 503.

[5] 41 U.S.C. § 504(1), 505(1).

[6] 41 U.S.C. § 504(2).

[7] 41 U.S.C. § 505(2).

[8] S. Rept. 449, 95th Cong., 1st sess., 2, 7 (1977). *See also* Federal Grant and Cooperative Agreements Act, Pub. L. No. 95-224, § 2(b)(2); 123 CONG. REC. H. 10159–60 (Sept. 27, 1977).

expresses existing relationships between the Federal Government and non-Federal entities."[9]

The powers conferred by § 7(a) of the Act, 41 U.S.C. § 506(a), must be understood in this context. Section 7(a) provides:

> Notwithstanding any other provision of law, each executive agency authorized by law to enter into contracts, grant or cooperative agreements, or similar arrangements is authorized and directed to enter into and use types of contracts, grant agreements, or cooperative agreements as required by this Act.

On its face, the section permits and directs any agency to use the type of instrument which the preceding sections have declared appropriate to the type of relationship the agency is entering. As the Senate committee report on the bill explains, agencies may have previously been statutorily restricted to a type of instrument that did not accurately reflect the nature of the relationship. The authority given by § 7(a), it continues, "will provide the executive agencies with needed flexibility in their efforts to use appropriate legal instruments to reflect the relationships established with non-Federal recipients."[10] In other words, § 7(a) gives the executive agencies authority to comply with the criteria of §§ 4–6.

Sections 4–6, however, do not alter the substantive power of the agency to enter a particular type of relationship. Instead, they require the use of grant or cooperative agreements only when the agency is "authorized by Federal statute" to provide support or stimulation.[11] As the legislative history repeatedly points out, their purpose is to require the form of the agreement to reflect the substance of the relationship.[12] It follows that the Act does not confer on the Department of Justice new authority to procure property or services, make grants, or cooperate with non-Federal entities. Rather, it authorizes and directs the Department to use the correct legal instrument to carry out its authorized functions. Where the Attorney General has delegated his authority to procure or to enter cooperative relations, it would be consistent with the purpose of the Act to read into the delegation the power and duty to use the appropriate instrument provided by § 7(a).

Applying these principles to DEA, it is apparent that § 7(a) has not given DEA authority to use grant agreements to implement a program under 21 U.S.C. § 873(a)(2). The latter statute provides:

> The Attorney General shall cooperate with local, State, and Federal agencies concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end, he is authorized to—
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[9] S. Rept. 449, 95th Cong., 1st sess., 10 (1977).

[10] S. Rept. 9, 95th Cong., 1st sess., at 10 (1977).

[11] 41 U.S.C. §§ 504(1), 505(1).

[12] *See* S. Rept. 449, 95th Cong., 1st sess., 2, 7–8, 10 (1977); 123 CONG. REC. H. 10159–60 (Sept. 27, 1977).

(2) cooperate in the institution and prosecution of cases in the courts of the United States and before the licensing boards and courts of the several States* * *.

The Attorney General's authority under it has been delegated to the Administrator of DEA.[13] The relationship which this statute authorizes DEA to enter is a cooperative one—*i.e.*, mutual involvement and assistance in a matter of common concern. There is nothing in its legislative history or, insofar as we are aware, in its previous application, that would authorize DEA to provide simple financial assistance to state or local law enforcement agencies. Accordingly, the effect of § 7(a) is not to permit DEA to provide such assistance through grants, but rather to require it to provide otherwise permissible assistance in the form of a cooperative agreement.

There is, however, other statutory authority for DEA to make grants to State or local law enforcement agencies for limited purposes. Under 21 U.S.C. § 872(a)(2) DEA is authorized to conduct research programs relating to controlled substance law enforcement, including "studies or special projects designed to compare the deterrent effects of various enforcement strategies on drug use and abuse."[14] Under 21 U.S.C. § 872(b), contracts for such research are authorized. The statute contemplates that research will be performed by persons outside the Federal Government.[15] State or local law enforcement agencies are logical bodies to conduct a special project testing new enforcement methods. We are therefore of the opinion that the Act permits DEA to provide them with funds in order to conduct a limited test of a new enforcement strategy. Since the underlying authority to enter a financial relationship with these agencies for enforcement research exists, the Federal Grant and Cooperative Agreement Act permits and requires DEA to use the type of legal instrument that accurately reflects the purpose of the relationship. Depending on the specific circumstances of the project, this would be either a grant or cooperative agreement.

MARY C. LAWTON
Deputy Assistant Attorney General
Office of Legal Counsel

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[13] 21 U.S.C. § 871(a); 28 CFR §§ 0.100(b), 0.101(a).

[14] We note that the Department of Justice Appropriation Authorization Act, § 2(10), 92 Stat. 3461, authorizes appropriations for research under this statute.

[15] *See* H. Rept. 1444 (Part 1), 91st Cong., 2d sess., 24, 51 (1970).

January 26, 1979

79-9 MEMORANDUM OPINION FOR ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

Grand Jury—Disclosure—Rule 6(e), Federal Rules of Criminal Procedure

You have requested our opinion on the question whether grand jury materials or information derived from grand jury materials may be disclosed to attorneys in the Civil Division for use in civil proceedings, absent court order. As you note, this is an important question, since grand jury investigations often produce information or evidence that is useful in civil cases.

Rule 6(e) of the Federal Rules of Criminal Procedure forbids the disclosure of grand jury materials[1] except in certain circumstances. The rule recognizes four exceptions to this general prohibition. Disclosure of grand jury materials may be made pursuant to court order (1) preliminary to or in connection with a judicial proceeding, or (2) at the request of the defendant upon showing that grounds may exist for dismissal of the indictment (*see* Rule 6(e)(3)(C)(i) and (ii)); and absent court order, disclosure may be made (3) to Government personnel deemed necessary by an attorney for the Government to assist the attorney in the performance of his duty to enforce Federal criminal law, or (4) to an attorney for the Government for use in the performance of his duty (*see* Rule 6(e)(3)(A)(i) and (ii)).

Your question implicates the last of these exceptions, the exception for disclosure to an attorney for the Government for use in the performance of his duty. In a nutshell, the issue is whether a disclosure of grand jury materials to an attorney in the Civil Division for use in a civil case is a disclosure to "an attorney for the Government for use in the performance of such attorney's duty" within the meaning of subsection (3)(A)(i) of Rule 6(e).

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[1] We use the phrase "grand jury materials" as shorthand for the statutory phrase "matters occurring before the grand jury." The Rule prohibits the disclosure of "matters occurring before the grand jury." *See, United States* v. *Interstate Dress Carriers, Inc.*, 280 F. (2d) 52 (1960).

Rule 6(e) has been amended recently, but the language of subsection (3)(A)(i) is identical to language that was contained in the old Rule. Like the new Rule, the old Rule permitted disclosures to be made to attorneys for the Government for use in the performance of their duties. The old Rule was interpreted by this Office as permitting Department of Justice attorneys to use grand jury materials for civil purposes absent court order,[2] and the courts so held.[3]

We know of no reason to support that the recent amendment to the Rule was intended to change this result. The relevant language was retained without modification, and the legislative history contains no suggestion of a contrary intention. We have been referred to a recent decision in the Fifth Circuit that confirms this conclusion. *See, In re Grand Jury, Miscellaneous No. 979,* 583 F. (2d) 128 (5th Cir., Oct. 18, 1978). In our opinion, Rule 6(e)(3)(A)(i) permits grand jury materials or information derived from them to be disclosed to attorneys in the civil division for use in civil proceedings without court order.

We would like to add a word of caution. To some degree, the rule of secrecy is designed to promote the efficiency of the grand jury, but the Rule is also designed to prevent this powerful and intrusive process from being misused. The Rule permits intradepartmental disclosures for civil purposes, but we must remember that whenever grand jury materials are disclosed for civil purposes, they are disclosed for purposes that could not, under our law, justify the use of the grand jury in the first instance. For this reason among others, whenever their permission is required, the courts are often reluctant to permit civil disclosures to be made during the pendency of a grand jury investigation. Plainly, the appearance and the possibility of misuse are greatest if a civil case can proceed simultaneously with a criminal investigation, drawing life from information or evidence developed in the grand jury room. *See, e.g., Capitol Indemnity Corp.* v. *First Minn. Const. Co.,* 405 F. Supp. 929 (1975).

We think that the problem of contemporaneous disclosure is substantial even in the context of intradepartmental disclosures. There is no rule of law that would require a civil disclosure within the Department to be deferred until the relevant criminal investigation had been completed; but unless there is a genuine need for disclosure during the pendency of the grand jury investigation, it might well be the better practice to forestall disclosure until the grand jury is discharged. This is the course of prudence. Most of the reasons for the rule of secrecy fall away once the grand jury is discharged, *see, Grand Jury, Miscellaneous No. 979, supra*; and claims of misuse are easier to rebut if there is no obvious risk that the path of a grand jury investigation was directed by civil concerns. That risk diminishes if the rule of secrecy is not suspended until after the grand jury's work is done.

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[2] *See* Memorandum dated December 21, 1961, to the Deputy Attorney General.

[3] *See, e.g., United States* v. *Proctor & Gamble Co.,* 356 U.S. 677 (1958).

Where there is a genuine need for grand jury material before the grand jury's investigation has reached its conclusion, you may wish to consider taking steps to assure that there will be no foundation for making the claim that the civil interests of the Government shaped the direction of the criminal grand jury investigation. This could be done, for instance, by restricting the civil attorneys in their contacts with the attorneys handling the grand jury investigation and limiting the civil attorneys to performing the more passive role of simply receiving requested information.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

February 2, 1979

79-10 MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Constitutional Law—Fourth Amendment—Interception of Oral Communications—Legality of Television Surveillance in Government Offices

This responds to your request for our opinion concerning the legality of using concealed television cameras for surveillance in buildings owned by or leased to the Government, where the Government officer occupying the particular space has consented to the surveillance.

While existing statutes govern certain aspects of television surveillance, no statute specifically regulates the surveillance for law enforcement purposes. The requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.*, would apply if a television device intercepts an oral communication "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510(2). In the area of foreign intelligence and foreign counterintelligence, the recently enacted Foreign Intelligence Surveillance Act of 1978 specifically encompasses television surveillance "under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes." 50 U.S.C. § 1801(b)(4). That Act generally requires that any such surveillance undertaken for foreign intelligence purposes be authorized by judicial order.

Since the existing statutes do not cover much of this area,[1] the Fourth Amendment is the only existing check on governmental action in similar situations. The relevant statutes are themselves predicated on the Fourth Amendment, and are framed in terms of that Amendment's test of "reasonable expectation of privacy." Our discussion will focus on the requirements of the Fourth Amendment.

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[1] For example, Title III does not apply to surveillance that does not intercept communications, and the Foreign Intelligence Surveillance Act of 1978 would not apply to surveillance conducted outside the United States.

We have identified only a few cases dealing with the Fourth Amendment aspects of surreptitious television surveillance.[2] While these cases apply generally to surveillance conducted in Government buildings, we do not believe that the case law in this area has been developed sufficiently to provide authoritative guidance. The following discussion will therefore be drawn from the general principles of Fourth Amendment law and its application in analogous contexts.

The starting point in our analysis is the Supreme Court's decision in *Katz* v. *United States,* 389 U.S. 347 (1967), holding that the Government may not, without warrant or in the absence of exigent circumstances, violate "the privacy upon which [an individual] justifiably relied." *Id.* at 353. In delineating the circumstances in which one may have a justifiable expectation of privacy, the Court stated:

> What a person knowingly exposes to the public even in his own home or office, is not a subject of Fourth Amendment protection * * *. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. [389 U.S. at 351-52.]

Justice Harlan, in elaborating on this concept, stated that whether what one seeks to preserve as private will, in fact, be constitutionally protected depends on whether that expectation of privacy is "one that society is prepared to recognize as 'reasonable.' " *Id.* at 361. *See also, United States* v. *White*, 401 U.S. 745, 752 (1971).

Under these principles, the installation and maintenance of video surveillance in a private office would constitute, in our opinion, an invasion of one's reasonable expectation of privacy and would thus be a search and seizure within the Fourth Amendment. *See, United States* v. *Humphrey, supra,* 451 F. Supp. at 60; *People* v. *Teicher, supra* at 590. The next

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[2] The most recent, *United States* v. *Humphrey*, 456 F. Supp. 51 (E.D. Va. 1978), will be more fully discussed below. *United States* v. *McMillon*, 350 Supp. 593 (D.D.C. 1972) upheld police visual observations and videotapes of an individual's yard; the court reasoned that, since the officers had authority to be on an adjacent piece of property, the observations were within the plain view doctrine and that the police actions were reasonable under the circumstances. *Poore* v. *State of Ohio*, 243 F. Supp. 777 (N.D. Ohio 1965), *aff'd,* 366 F. (2d) 33 (6th Cir. 1966), was a pre-*Katz* decision concluding that police observations and movies made from behind a "two-way" glass in a men's washroom were not a search, for the reason that any member of the public might have walked into the washroom and made the same observations.

The State courts have also dealt on occasion with this issue. *People* v. *Teicher*, 395 N.Y.S. 2d 587 (N.Y.S.C. 1977), upheld a visual surveillance conducted pursuant to court order against contentions that the court had no statutory authority to issue the order and that it did not conform to the Fourth Amendment's requirements as to probable cause, particularly, minimization, and use of electronic surveillance where other investigative tools were available. Another decision, *Avery* v. *State*, 292 A.2d 728 (Md. Ct. of Special Appeals 1972), *appeal dismissed*, 410 U.S. 977 (1973), upheld the warrantless use of a television camera primarily on the ground that the surveillance was conducted with the full cooperation and consent of the victim. *Sponick* v. *City of Detroit Police Department*, 211 N.W. 2d 674, 690 (Mich. Ct. App. 1973), upheld television surveillance of a bar on the ground that the surveillance only made "a permanent record of what any member of the general public would see if he entered the tavern as a patron."

question is whether the situation differs when the surveillance is conducted in Government buildings or offices. For the following reasons we believe that the situation is not any different in Government offices and that persons within Government offices also have a reasonable expectation of privacy.

A.

Surveillance in a Government office still constitutes a search within the Fourth Amendment. In *United States* v. *Hagarty*, 388 F. (2d) 713 (7th Cir. 1968), the only Court of Appeals decision to date applying *Katz* analysis to the question of a warrantless continuous electronic surveillance in a Government office, the court held that evidence obtained by such a surveillance violated the Fourth Amendment. The court stated that the key question under *Katz* was whether the defendant sought to exclude "the uninvited ear" and that, under this standard, it was "immaterial that the overheard conversation took place in an IRS office." *Id.* at 716. The same rationale would apply to a visual surveillance by electronic means.

In *United States* v. *Humphrey, supra,* the court indicated that while one's reasonable expectation of privacy is less in an office than at home, the television surveillance of the Government office involved was subject to the Fourth Amendment. 451 F. Supp. at 60.[3]

Several arguments, predicated on the Government's authority over its buildings, may be advanced contrary to this result. First, it is a familiar canon that one with joint access or control over property may permit it to be searched, *United States* v. *Matlock,* 415 U.S. 164, 171 note 7 (1974), and the Government's control over its buildings may be a basis for allowing the appropriate officials to "consent" to the search. However, the courts have not taken such a broad view of the Government's authority. The cases generally utilize the traditional test whether the property has in a practical sense been devoted to the exclusive use of the employee. *See, United States* v. *Blok*, 188 F. (2d) 1019 (D.C. Cir. 1951) (search of employee's desk); *United States* v. *Kahan*, 350 F. Supp. 784 (S.D.N.Y. 1972), *aff'd on other issues,* 415 U.S. 239 (1974) (search of employee's wastebasket). *Cf., United States* v. *Millen*, 338 F. Supp. 747, 753 (E.D. Wis. 1972). Under this test, if the property has been devoted to the exclusive use of a person, he has a justifiable expectation of privacy in it sufficient to insulate the property from search even though the search is

[3] The court found, first, that the television surveillance was justified by the same exception for audio surveillance, and that the intrusion was reasonable, at least until the date that the primary focus shifted from foreign intelligence. The court then found, however, that television surveillance after that date was reasonable due to the office setting and the limited scope of the intrusion. It is unclear whether this latter finding was meant to suggest that television surveillance might be conducted without a warrant even in a law enforcement context so long as it is conducted reasonably, or whether it was only addressing the issue of reasonableness apart from the warrant question.

consented to by the owner of the property (or his agent) who for certain purposes at least has authorized access to the property. *See, Stoner* v. *California,* 376 U.S. 483 (1964); *Chapman* v. *United States,* 365 U.S. 610 (1961).

More importantly, it is doubtful whether the Government's "consent" has any validity with respect to surveillance of an individual, as opposed to discrete physical searches. Under Title III of the Omnibus Crime Control Act electronic monitoring of telephonic and oral communications requires a warrant even though the owner of the property or the subscriber to the telephone has consented; only the consent of a party to a communication suffices to dispense with the warrant requirement. *See* 18 U.S.C. § 2511 (2)(c). The same was true prior to Title III under § 605 of the Communications Act of 1934, 47 U.S.C. § 605, with respect to telephone communications. *See, Rathbun* v. *United States,* 355 U.S. 107 (1957).

These statutory restrictions have a constitutional foundation. The cases upholding the doctrine of consent to surveillance under the Fourth Amendment are not predicated on the consent of the owner of the pertinent property, but rather on the consent of the person to whom the targeted individual reveals his communications or activities. *United States* v. *White, supra.* The underlying rationale seems to require that the doctrine be kept within these limits. The courts reason that there can be no justifiable expectation of privacy regarding information voluntarily revealed to another; one's confidant may later reveal the disclosures to the Government. *Hoffa* v. *United States,* 385 U.S. 293 (1966). The use of electronic equipment, with the confidant's consent, to record these disclosures simultaneously is then regarded as much the same as a subsequent disclosure to the Government. *Lopez* v. *United States,* 373 U.S. 427 (1963). The "consent" necessary for the surveillance is thus that of the confidant, whose ability to report to the police is equated with the electronic surveillance—*i.e.,* the one to whom the disclosures are made.

The Government's authority over its buildings may raise another question. It is a generally accepted principle of Fourth Amendment law that no "search" occurs when an officer observes objects or activities from a location where he has a right to be. *Harris* v. *United States,* 390 U.S. 234, 236 (1968). *See also, McDonald* v. *United States,* 335 U.S. 451, 458 (1948) (Jackson, J., concurring). Under this rationale, courts have upheld searches of areas that are usually deemed quite private—*e.g.,* looking into bedrooms, *United States* v. *Johnson,* 561 F. (2d) 832 (D.C. Cir. 1977) *(en banc)*; *Nordskog* v. *Wainwright,* 546 F. (2d) 69 (5th Cir. 1977); or bathrooms, *Ponce* v. *Craven,* 409 F. (2d) 621 (9th Cir. 1969), *cf. Smayda* v. *United States,* 352 F. (2d) 251 (9th Cir. 1965).

Even searches when the police went to great lengths to secure a view from a position where they were authorized to be were upheld by the courts: for example, searches through only a narrow opening, *see, United States* v. *Wright,* 449 F. (2d) 1355 (D.C. Cir. 1971) (peeping through an 8-to-9-inch crack in garage); *United States* v. *Vilhotti,* 323 F. Supp. 425,

431-32 (S.D.N.Y. 1971) (gaps between boards covering window),[4] or where the officers had to go through various machinations to conduct their "search," *see, e.g., James* v. *United States,* 418 F. (2d) 1150, 1151 note 1 (D.C. Cir. 1969) (squatting to see under garage door), *United States* v. *Fisch*, 474 F. (2d) 1071 (9th Cir. 1973) (listening at crack below door between motel rooms),[5] or even where Government agents have resorted to artificial means to conduct their surveillance. *See, United States* v. *Solis,* 536 F. (2d) 880 (9th Cir. 1976) (use of dogs to smell drugs); *Fullbright* v. *United States,* 392 F. (2d) 432 (10th Cir. 1968) (use of binoculars to see through shed door). *Cf., United States* v. *Lee,* 274 U.S. 559, 563 (1927).[6] These cases could arguably allow the surveillance here, since the Government's authority over its premises could certainly confer on an officer the right to be in the location from which he could conduct the surreptitious monitoring. In fact, one decision upholding the use of video equipment relied in part on this rationale. *See, United States* v. *McMillon, supra.*

We think, however, that this is not a controlling principle here. In the cited cases the Government agent's "search" was usually limited in time; the outcome of the case may have been different were the investigation an ongoing one. *Cf., Texas* v. *Gonzales,* 388 F. (2d) 145 (5th Cir. 1968) (involving repeated police peeps through window). Moreover, the targeted individual himself left his affairs open to public view in these cases. *See, e.g., United States* v. *Coplen,* 541 F. (2d) 211, 215 (9th Cir. 1976); *Ponce* v. *Craven, supra* (both suggesting that if an individual wanted privacy, he should have closed the window to public view). This rationale has little applicability in a Government office where an individual cannot bar entry to a Government agent. *Cf., United States* v. *Holmes,* 521 F. (2d) 859, 865 (5th Cir. 1975), *aff'd by an equally divided court,* 537 F. (2d) 227 (5th Cir. 1976) (*en banc*).

More importantly, however, adherence to this "plain view" rationale in all circumstances would disregard the fundamental teaching of *Katz*. The Court there decided that individuals might retain under the Fourth Amendment a justifiable expectation of privacy despite the existence of sophisticated techniques that could intrude on that privacy. Just as this precept holds true in the area of oral communications, it would appear to be equally applicable with respect to an individual's activities. Of course, the fact that these activities are visible by officers in a position where they are authorized to be will bear heavily on the issue whether a person's expectations of privacy are reasonable. But this fact cannot be determinative without ignoring the essential inquiry mandated by *Katz*.

The courts appear to share this view of Katz. In response to intrusive

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[4] *See also, People* v. *Berutko,* 453 P. 2d 721 (S.C. Cal. 1969) (opening in drape).

[5] *See also, State* v. *Day,* 362 N.E. 2d 1253 (Ohio Ct. of App. 1976). *But see, State* v. *Kaaheena,* 575 P. (2d) 462 (S.C. Haw. 1978).

[6] *See also, Commonwealth* v. *Hernley,* 263 A. 2d 904 (Pa. Super. Ct. 1970) (use of ladder and binoculars); *People* v. *Ferguson,* 365 N.E. 2d 77 (Ill. App. 1977) (use of binoculars).

investigative methods, the courts have gone beyond the test of whether the officer was where he was authorized to be and focused instead on whether his observations intruded on a reasonable expectation of privacy. In *United States* v. *Kim*, 415 F. Supp. 1252, 1254 (D. Haw. 1976), the court explicitly stated that *Katz* protected individuals against "unreasonable visual intrusions," even from viewpoints where the police had a right to be, and held that the Government's use of a powerful telescope to observe activities in the defendant's apartment constituted a search.[7] The courts have also held invalid those police searches which, although not dependent on sophisticated equipment, depended on particularly intrusive methods of search to view areas usually considered private. *See, e.g., Kroehler* v. *Scott*, 391 F. Supp. 1114 (E.D. Pa. 1975) (peephole use to view public toilet stall).[8]

This approach is also reflected in the cases upholding police investigative activities. It is implicit in the decisions upholding police observations into windows on the ground that, because the area was open to public view, no reasonable expectation of privacy existed. More recent decisions make this trend more explicit by going beyond the "plain view" concept and inquiring whether the investigation intruded into the subject's privacy or constituted reasonable police conduct. *See, e.g., United States* v. *Solis, supra* (use of dogs to smell drugs in trailer home); *United States* v. *McMillon, supra. See also, United States* v. *Bronstein*, 521 F. (2d) 459, 464 (2nd Cir. 1965) (Mansfield, J., concurring); Comment, Shiner, *Police Helicopter Surveillance,* 15 Ariz. L. Rev. 145, 162–67 (1973).

We believe that this approach would, at the least, preclude a mechanistic resort to warrantless television surveillance in Government buildings, although the Government may otherwise have full authority to implement the monitoring. While Government employees may not reasonably expect that their activities will remain wholly private, the *Hagarty* and *Humphrey* decisions demonstrate that at least some employees may retain justifiable expectations of privacy at work.

A reasonable expectation of privacy is a factual matter and there may be circumstances when no such expectation exists. For example, where (1) the search is directly related to safeguarding the integrity of the work being performed by the employee, (2) the employee has effective notice that such a search might be made, and (3) there is an especially important public need concerning the integrity of the work being performed by the employee, the employee probably has no justifiable expectation of privacy.

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[7] *See also, People* v. *Fly*, 34 Cal. App. 3d 665 (1973) (use of telescope); *People* v. *Sneed*, 32 Cal. App. 3d 535 (1973) (use of helicopter); *but see, State of Hawaii* v. *Stachler*, 570 P. 2d 1323 (Haw. 1977) (use of helicopter); *People* v. *Superior Court*, 37 Cal. App. 3d 836 (1974) (air patrol); *Dean* v. *Superior Court*, 35 Cal. App. 3d 112 (1973) (use of helicopter).

[8] *See also, People* v. *Triggs*, 506 P. 2d 232 (Cal. 1973) (observation of a toilet stall) and cases cited therein; *State* v. *Bryant*, 177 N.W. 2d 800 (Minn. 1970) (same); *State* v. *Kent*, 432 P. 2d 64 (Utah 1967) (observation from motel attic through ventilator to bathroom and part of bedroom).

See, United States v. *Bunkers,* 521 F. (2d) 1217 (9th Cir. 1975); *United States* v. *Collins,* 349 F. (2d) 863 (2nd Cir. 1965) cert. denied, 383 U.S. 960 (1966); *Shaffer* v. *Field,* 339 F. Supp. 997 (C.D. Cal. 1972), *aff'd,* 484 F. (2d) 1196 (9th Cir. 1973); *United States* v. *Donato,* 269 F. Supp. 921 (E.D. Pa. 1967), *aff'd,* 379 F. (2d) 288 (3d Cir. 1967).

In most cases where the television surveillance is related to the safeguarding of the integrity of the employee's work, the surveillance could also be characterized as a search for evidence of crime; some courts have taken a dim view of warrantless searches conducted on Government premises for this purpose. *See, United States* v. *Hagarty, supra,* at 718; *United States* v. *Blok, supra,* at 1201. *Cf., McMorris* v. *Alioto,* 567 F. (2d) 897, 900 (9th Cir. 1978). Second, it is not entirely clear whether in most cases the employees receive effective notice, or even any inkling, that they may be subjected to surreptitious electronic surveillance; the absence of such notice may preclude such surveillance. *See, United States* v. *Speights,* 557 F. (2d) 362 (3rd Cir. 1977) (relying heavily on absence of notice to overturn search of employee's locker). Finally, even if the Government does give warning of surreptitious television monitoring, it is questionable whether the courts would uphold searches based upon such notice in all circumstances. The courts have, in other contexts, warned of the Government's manipulation of an individual's reasonable expectation of privacy, *see, United States* v. *Albarado,* 495 F. (2d) 799, 807 note 14 (2nd Cir. 1974); *United States* v. *Kim, supra,* at 1256–57; *cf., Collier* v. *Miller,* 414 F. Supp. 1357, 1366 (D. Tex. 1976),[9] and they may accordingly look with disfavor upon a notice of television surveillance intended to alter the expectations of a large number of employees.

B.

A second justification advanced for conducting warrantless surreptitious television surveillance of Government employees is the "public" nature of the area to be surveilled. The Fourth Amendment will not protect information knowingly exposed to the public, even if the exposure occurs in a home or office. *Katz* v. *United States, supra,* at 351. Accordingly, if a particular employee's activities could be said to be exposed to the public, *see, United States* v. *Santana,* 427 U.S. 38, 42 (1976), surreptitious television surveillance may be conducted without a warrant.

Under this standard, certain places are so open to public observation that no justifiable expectation exists with respect to activities conducted there. For example, open fields, *see, Air Pollution Variance Board* v. *Western Alfalfa Corp.,* 416 U.S. 861 (1974), public streets, *see, United States* v. *Santana, supra,* and common areas of buildings generally open to the public, *see, United States* v. *Cruz Pagan,* 537 F. (2d) 554 (1st Cir.

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[9] *See also* Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349, 384 (1974); Note, 86 Yale L.J. 1461, 1475, 1498 (1977).

1976), have been held, in given contexts, to be such public areas. This doctrine has been applied to uphold surreptitious television monitoring of a public place. *See, Sponik* v. *City of Detroit Police Department, supra* (tavern); *see also, Poore* v. *State of Ohio, supra* (public washroom). We believe that, as a general rule, warrantless surreptitious television surveillance may be used to monitor activity conducted in public areas. *Cf., United States* v. *Brooks,* 567 F. (2d) 134 (D.C. Cir. 1977) (camera surveillance of customers in a "Sting" operation); *United States* v. *Mitchell,* 538 F. (2d) 1230 (5th Cir. 1976) (*en banc*) (videotaping of activities in public parking lot).

However, several caveats are in order. First, even though an area may be usually thought as open to public view, under special circumstances even these areas may afford a reasonable expectation of privacy. *See, United States* v. *FMC Corporation,* 428 F. Supp. 615, 618 (W.D. N.Y. 1977) ("open fields" doctrine not applicable to a lagoon with highly restricted access). Second, even though an individual is in an area where his activities are open to public view, he still may reasonably expect that his privacy is protected against certain types of investigations such as the use of a beeper on his clothing, *cf., United States* v. *Holmes, supra,* at 866, or the use of a powerful microphone to hear his conversations far removed from those who could normally overhear him.

A different situation exists regarding Government offices or working spaces generally not open to public view. As we have already outlined, an individual in a private office has a greater justifiable expectation of privacy, at least with respect to surreptitious electronic monitoring. *United States* v. *Hagarty, supra.* The more troublesome questions arise with respect to offices that are occupied by two or more employees or spaces that are entered at times by others.

Joint occupation or frequent entry does not automatically preclude a reasonable expectation of privacy. *Katz* made clear "what [an individual] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U.S. at 351–52. Under this standard, although an individual's activity is subject to the view of those who share or enter his office, he still may enjoy reasonable expectation of privacy due to such factors as the configuration of the office or an individual's knowledge of the habits of others in the office. Indeed, the subject's ability to shield his activities from others' view is generally the reason for installing a continuous monitoring system to investigate his actions. We do not believe that the fact that an office is shared or subject to entry by others will always allow the Government to install surreptitious television surveillance without a warrant. A recent decision by the Ninth Circuit adopts this view. *United States* v. *McIntyre,* 582 F. (2d) 1221, 1224 (9th Cir. 1978).

This conclusion is bolstered by recent developments in Fourth Amendment law concerning reasonable expectations of privacy in public places. It appears that, even though an individual is in a public place, he may still

retain a reasonable expectation of privacy with respect to certain forms of investigation. This principle is evident in *Katz* itself: while an individual in a public telephone booth is subject to visual surveillance (or to eavesdropping unaided by artificial techniques, see *United States* v. *Fuller*, 441 F. (2d) 755, 760–61 (4th Cir. 1971)), he may not be subjected to electronic surveillance without a warrant. In the same manner, several courts have indicated that although a person driving in public is not free from visual observation, he may reasonably assume that he is not being monitored by a "beeper." *See, United States* v. *Moore,* 562 F. (2d) 106, 112 (1st Cir. 1977); *United States* v. *Holmes, supra,* at 866;[10] *but see, United States* v. *Hufford*, 539 F. (2d) 32 (9th Cir. 1976).

The above cases show that the lack of reasonable expectations with regard to one form of surveillance does not necessarily forfeit the reasonable expectations with regard to other forms of surveillance. Rather, any inquiry into a reasonable expectation of privacy must take into account a person's expectations both to his surroundings and to the methods of investigation that may be utilized in those surroundings. The use of surreptitious monitoring may not be justified solely by the occasional presence of others in the same room, because the subject could still reasonably expect to be free from surreptitious monitoring and because the Government has not routinely used this type of investigatory technique to date to monitor its employees' activities. *People* v. *Triggs, supra.* The decision in *Hagarty* supports this view. Just as the Government might not conduct continual surveillance of oral communications by electronic means, neither can it maintain continual visual surveillance by electronic means.[11]

Even though at least one court has upheld the use of television surveillance on the basis of consent of others in the room, *Avery* v. *State, supra,* we do not believe that this factor will necessarily alter our conclusion. As discussed above, the doctrine of consent is predicated on the rationale that the targeted individual is voluntarily disclosing his activities or communications to those around him. This rationale would allow surveillance of those activities that the target freely allowed others to see. However, the rationale would have no application to activities that the target was not voluntarily leaving open to others and which he might in fact succeed in preventing others from seeing. In such instances the

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[10] *See also, United States* v. *Choate,* 422 F. Supp. 261, 269 (C.D. Cal. 1976); *People* v. *Triggs, supra; People* v. *Smith,* 67 Cal. App. 3d 638, 654 (1977) (beeper on plane); *People* v. *Sneed, supra,* at 541.

[11] For this reason we do not believe that the result in *Poore* v. *State of Ohio, supra,* retains all of its validity today. The court there upheld police observations and movies from behind a two-way glass in a restroom on the basis that any member of the public could have walked in and made the same observation. The approach in *Katz* may alter this result by looking to the reasonable expectations of those using public restrooms, and some courts have explicitly so held. *See, Kroehler* v. *Scott, supra; People* v. *Triggs, supra.* Moreover, even if one has no reasonable expectations with regard to the public, he may still have a reasonable expectation with regard to police use of two-way mirrors and cameras.

surveillance is not merely securing evidence that would be otherwise available, but collecting evidence that the Government could not obtain at all from the consenting individuals. Indeed, this seems to be the very purpose of surreptitious television surveillance.

Conclusion

It is apparent from the above discussion that few, if any, definitive conclusions can be made with regard to the general use of surreptitious television surveillance without a warrant. Rather, the question whether such surveillance will amount to a "search," and thus be subject to the strictures of the Fourth Amendment or of various statutes that adopt Fourth Amendment standards, must depend on all the facts and circumstances of a particular situation. A particularized study of these facts and circumstances must be conducted in each case to determine whether judicial authorization must be obtained.[12]

We recommend that the responsibility for screening proposed television surveillance for law enforcement purposes be lodged in a Deputy Assistant Attorney General for the Criminal Division. Where such surveillance is proposed for foreign intelligence purposes, this same responsibility should be vested in the Chief Attorney of the Investigation Review Unit. If, on the basis of this screening, the responsible official concludes that the surveillance would not intrude on the target's justifiable expectations of privacy, we suggest that he then be vested with the authority to approve the surveillance. If the surveillance would infringe on the target's justifiable expectations of privacy, he should be required to initiate proceedings for securing judicial authorization or, in cases involving foreign intelligence, appropriate executive approval.

We further recommend that guidelines for the screening in the Criminal Division and the Investigation Review be formulated in order to ensure that the screening in the Criminal Division and the Investigation Review Unit is conducted on a consistent basis.

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[12] In certain foreign intelligence situations—*e.g.*, overseas surveillance—the approval of the President or his designee might take the place of judicial authorization in the absence of legislation.

February 2, 1979

79-11 MEMORANDUM OPINION FOR THE ADMINISTRATOR OF VETERANS AFFAIRS

Federal Labor Relations Council—Labor-Management Relations for Executive Agencies (Executive Order No. 11491)—Jurisdiction of the Council in Labor Disputes Concerning the Conditions of Employment of Medical, Dental, and Nursing Personnel of the Veterans Administration

This responds to your request for the opinion of the Attorney General concerning the obligation of the Administrator of Veterans Affairs (VA) to abide by the decision of the Federal Labor Relations Council (FLRC) in *American Federation of Government Employees, Local 1739 and Veterans Administration Hospital, Salem, Va.*, No. 76A-88 (1978) (Union and Hospital, respectively), that Executive Order No. 11491 required the Hospital to negotiate with the Union the procedures for the evaluation of probationary professional medical employees. VA contends that 38 U.S.C. § 4108(a) exempts its Department of Medicine and Surgery (DMS) from the order's requirement. The Attorney General referred the matter to this office. We conclude that 38 U.S.C. § 4108(a) does not exempt VA, and that VA will not be acting unlawfully in implementing FLRC's decision.

Executive Order No. 11491 established a system of labor-management relations for executive agencies.[1] It applied, with exceptions not relevant here, to all agencies of the executive branch, including VA.[2] The order authorizes a majority of the employees in an appropriate unit of an

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[1] *See, generally, Old Dominion Branch No. 496, National Association of Letter Carriers* v. *Austin*, 418 U.S. 264, 273-75 (1974). Exec. Order No. 11491 has been superseded, effective January 13, 1979, by Title VII of the Civil Service Reform Act of 1978, 92 Stat. 1111, 5 U.S.C. § 1101 *et seq.* (Supp. 1979). However, the Act does not affect administrative proceedings initiated under Exec. Order No. 11491. *See* § 902(b), 92 Stat. 1224.

[2] Exec. Order No. 11491, §§ 2(a), 3(a); *see* 38 U.S.C. § 201.

agency to select a union as its exclusive representative.[3] To the extent permitted by law and executive-branch-wide regulations, § 11(a) of the order requires an agency to negotiate in good faith with an exclusive representative of the bargaining unit with respect to personnel policies and practices and matters affecting working conditions. But an agency is not required to negotiate over the content of its own agency-wide regulations "for which a compelling need exists under criteria established by the Federal Labor Relations Council."[4]

When an agency contends that a subject on which a union proposes to negotiate is controlled by an agency-wide regulation, the union may appeal to the FLRC.[5] If the FLRC determines that there is no compelling need for the regulation, the agency is required to negotiate on the subject.[6] Failure to negotiate then becomes an unfair labor practice, and the Assistant Secretary of Labor for Labor-Management Relations may order the agency to negotiate.[7] The agency may appeal the Assistant Secretary's decision to the final administrative authority, the FLRC.[8]

The dispute in question concerns the negotiability of VA's procedures for retaining or dismissing probationary medical professional employees. Physicians and other medical professionals in the DMS are appointed "after [their] qualifications have been satisfactorily established, in accordance with regulations prescribed by the Administrator, without regard to civil service requirements." 38 U.S.C. § 4106(a). Under 38 U.S.C. § 4106(b):

> Such appointments as described in subsection (a) of this section shall be for a probationary period of three years and the record of each person serving under such appointment in the Medical, Dental, and Nursing Services shall be reviewed from time to time by a board, appointed in accordance with regulations of the Administrator, and if said board shall find him not fully qualified and satisfactory he shall be separated from the service.

The implementing VA regulations provide that each employee subject to § 4106(b) will have his record reviewed in a fair and impartial manner by a professional standards board (PSB) during the employee's probationary period. Although the regulations authorize the employee to submit a written or oral statement to the PSB during the review, the employee "is not entitled to legal or other representation."[9] The Union requested the Hospital to negotiate the professional employees' right to legal or other representation during the review of their records by the PSB. The VA

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[3] Exec. Order No. 11491, § 10(a); *cf.* 29 U.S.C. § 159.

[4] Exec. Order No. 11491, § 11(a).

[5] Exec. Order No. 11491, § 11(c)(4)(ii).

[6] Exec. Order No. 11491, § 4(c)(2).

[7] Exec. Order No. 11491, §§ 6(a)(4); 6(b); 19(a)(6). The agency cannot reopen the negotiability dispute in the unfair labor practice proceeding. Exec. Order No. 11491, § 19(d).

[8] Exec. Order No. 11491, § 4(c)(1).

[9] Veterans' Administration Manual, MP-5, Part II, Ch. 4, § 4-06(b)(4).

determined that the proposal was contrary to its agency-wide regulations, and the Union appealed to the FLRC for a "compelling need" determination.

The VA argued before the FLRC that it was deprived of jurisdiction by 38 U.S.C. § 4108(a), which provides in pertinent part:

> Notwithstanding any law, Executive order, or regulation, the Administrator shall prescribe by regulation the hours and conditions of employment and leaves of absence of physicians, dentists, podiatrists, optometrists, nurses, physician assistants, and expanded-function dental auxiliaries appointed to the Department of Medicine and Surgery * * *.

In its decision dated February 28, 1978, the FLRC first decided that it had jurisdiction over the case. On the merits, it held that no compelling need existed for the regulation prohibiting probationary professional medical employees from being assisted by counsel in a PSB review. The VA continues to contend that 38 U.S.C. § 4108(a) excluded this type of dispute from the FLRC's jurisdiction, and therefore, the Hospital refused to negotiate with the Union on the subject.

The VA claims first, that 38 U.S.C. § 4108(a) exempts it from the authority of any other statute or Executive order in determining the "hours, conditions of employment, and leaves of absence"[10] of DMS professional employees. Further, it argues that evaluation procedures under 38 U.S.C. § 4106(b) are "conditions of employment." Based on these arguments it concludes that notwithstanding Executive Order No. 11491, § 4108(a) deprived FLRC of jurisdiction, and VA was not required to negotiate on these procedures. It is not necessary, however, to determine whether § 4108(a) or the Executive order would control should they conflict. Such a conflict would arise only if the issue on which the Union wishes to negotiate—procedures before professional standards review boards—is in fact a "condition of employment" within § 4108(a). Our examination of the legislative history of the statute that established the DMS has convinced us it is not.

The Department of Medicine and Surgery was established by Pub. L. No. 293, 79th Cong., 1st sess., 59 Stat. 675. In creating the department the Congress intended to insure that VA may hire and discharge medical, dental, and nursing professionals without regard to competitive examination and procedural protections given employees in the classified civil service.[11] Accordingly, § 6 of the statute, now 38 U.S.C. § 4106, regulated the appointment, tenure, and promotion of professional probationary

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[10] We note that 38 U.S.C. § 4108(a) is incorrectly quoted on page 3 of your request as empowering the Administrator to prescribe "terms and conditions of employment."

[11] *See* H. Rept. 1316, 79th Cong., 1st sess., at 1-2; S. Rept. 853, 79th Cong., 1st sess., at 1; Hearings before the Committee on World War Veterans Legislation of the House of Representatives on H.R. 4225, 79th Cong., 1st sess., at 36–39 (statement of Paul Hawley, Surgeon General, Veterans' Administration).

employees appointed "without regard to civil-service requirements." Probationary tenure, governed by § 6(b), 38 U.S.C. § 4106(b), permits the dismissal of unsatisfactory probationers after a 3-year period. The procedural protections given classified civil service employees were not granted to this class of employees.[12] Further, section 10 of the statute, 38 U.S.C. § 4110, establishes a disciplinary system for permanent employees independent of the civil service laws.[13]

Section 4108(a) of title 38 was enacted as 7(b) of the statute. In his remarks on behalf of the House Committee on World War Veterans Legislation, Representative Scrivner explained:

> In section (b), we provide that notwithstanding any law, Executive order, or regulation, the Administrator shall prescribe by regulation the hours and working conditions and leaves of absence of doctors, dentists, and nurses.[14]

This is the only discussion of § 7(b) in the legislative history.

From its context in the statute and its limited legislative history, the "conditions of employment" in 38 U.S.C. § 4108(a) are matters similar to hours and leave, *i.e.*, duties and workload; tenure and discharge of professional employees are regulated by other portions of the statute. Moreover, if "conditions of employment" included tenure and discharge, the breadth of § 4108(a) would have made it unnecessary for Congress to expressly exclude appointments under § 4106 from the civil service laws or to provide a separate disciplinary system under 38 U.S.C. § 4110. The procedures for professional evaluation are set out in 38 U.S.C. § 4106(b). Therefore, § 4108(a) does not exempt the Department of Medicine and Surgery from the FLRC's jurisdiction in this case.

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[12] Section 6 and subsection 6(b) were extensively discussed in the legislative process. *See* S. Rept. 858, 79th Cong., 2d sess., at 1, 3; H. Rept. 1316, 79th Cong., 1st sess., at 1-2; 91 CONG. REC. 11656 (Representative Rogers), 11659 (Representative Cunningham), 11665 (Representative Engle).

[13] *See* S. Rept. 858, 79th Cong., 1st sess., at 4; 91 CONG. REC. 11663 (Representative Scrivner).

[14] 91 CONG. REC. 11662–63 (Representative Scrivner).

February 7, 1979

79-12 MEMORANDUM OPINION FOR THE SPECIAL COUNSEL, MERIT SYSTEMS PROTECTION BOARD

Employment of Temporary or Intermittent Attorneys and Investigators—5 U.S.C. § 3109; 31 U.S.C. §§ 665(b), 686(a)—Office of the Special Counsel, Merit Systems Protection Board

This responds to your request for our views on whether your desire to employ temporary or intermittent attorneys and investigators to investigate and assist in the processing of your cases is consistent with relevant law and ethical considerations.[1]

It is our understanding that you want to appoint both employees detailed from other Federal agencies and individuals from the private sector. They will serve under your supervision on a part-time basis not to exceed 6 months. These employees will be appointed when you have a backlog of work and will perform the same functions as permanent employees of your Office; in particular, they will screen cases and interview witnesses.

I.

Temporary or intermittent experts and consultants may be retained by agencies when authorized by an appropriation or other statute. 5 U.S.C. § 3109. Although your appropriation act authorizes you to employ experts and consultants, 93 Stat. 572, in our view, this appropriation may not be used to hire employees to perform the same functions as are performed by regular employees in your Office. Subchapter 1-2 of the *Federal Personnel Manual*, Chapter 304, provides a definition of consultant and expert. A consultant who is excepted from the competitive service is "a person who

[1] We have been told that you are no longer interested in employing such persons to train your permanent staff or to assist in the development of a computer-based information retrieval system.

serves as an advisor to an officer or instrumentality of the Government, as distinguished from an officer or employee who carries out the agency's duties and responsibilities." A consultant position is defined as "a position requiring the performance of purely advisory or consultant services, not including performance of operating functions." The definition of expert is somewhat broader but, in our view, does not provide a basis for the plan you contemplate. The *Federal Personnel Manual* describes an expert as "a person with excellent qualifications and a high degree of attainment in a professional * * * field. His knowledge and mastery of the principles, practices, problems, methods, and techniques of his field of activity, or of a specialized area in a field, are clearly superior to those usually possessed by ordinarily competent persons in that activity." An expert position is one that "for satisfactory performance, requires the services of an expert in the particular field * * * and with duties that cannot be performed satisfactorily by someone not an expert in that field." Thus, although your appropriation for temporary experts could most likely be used to hire particularly qualified attorneys or investigators to work on unusually difficult matters, we do not understand this to be your current plan. Nor do we believe that short-term employees hired to perform work exactly like that of your regular staff can properly be considered experts.

II.

Since we believe that the temporary agency and private sector employees you want to appoint cannot be considered experts or consultants under the plan you contemplate, the question arises whether there is any other statutory authorization for hiring them outside the competitive service.

Employees from Other Federal Agencies

Section 686(a) of title 31, United States Code, authorizes purchase of services by one Federal Government entity from another Federal Government entity. This statute states:

> Any executive department or independent establishment of the Government, or any bureau or office thereof, if funds are available therefor and if it is determined by the head of such executive department, establishment, bureau, or office to be in the interest of the Government so to do, may place orders with any other such department, establishment, bureau, or office for * * * services, of any kind that such requisitioned Federal agency may be in a position to supply or equipped to render, and shall pay promptly by check to such Federal agency as may be requisitioned * * * all or part of the estimated or actual cost thereof * * *.

We read § 686(a) as allowing you to request the services of attorneys and investigators employed in another Federal Government entity that has authority to conduct activities similar to those the employees will be

pursuing for you. In our view, two prerequisites to your use of funds to reimburse the transferor agency are that the funds were appropriated for the type of work you will have the detailed attorneys and investigators perform for you,[2] and that you provide an adequate rationale why the responsibilities cannot be satisfactorily performed by your own staff or by using the funds to increase your agency's staff. This second requirement would be met if you can make a showing that Government efficiency is best served by bringing into your Agency on a temporary basis employees who have gained experience in the kind of work to be performed while working for other agencies rather than hiring your own new employees and having to train them for a job that will last at most six months.

Employees from the Private Sector

You also propose to accept the gratuitous services of attorneys and investigators from the private sector.[3] The acceptance of voluntary services is prohibited by 31 U.S.C. § 665(b), which states that:

> No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law * * *.

This has been interpreted by the Attorney General to prohibit a contract for services for which no payment is required, but that the prohibition on acceptance of voluntary services was not intended to cover services rendered gratuitously in an official capacity under a regular appointment to a position otherwise permitted by law to be nonsalaried. 30 Op. Att'y Gen. 51 (1913). *See also* subchapter 1-4.d of *Federal Personnel Manual*, Chapter 311.

Subchapter 1-4 of Chapter 311 defines gratuitous service as that offered and accepted without pay under an appointment for duties the pay for which has not been established by law. If Congress has fixed a minimum salary for a position, an individual cannot waive that salary. *Glavey* v. *United States,* 182 U.S. 595 (1901). *Cf., MacMath* v. *United States*, 248 U.S. 151 (1918). You are in a better position than we to determine as a factual matter whether the attorneys and investigators you hope to hire from the private sector will be filling jobs for which a minimum salary has been fixed by law. Even if such a minimum salary is set, this element of the definition of gratuitous service could be interpreted to mean that if the Government is to pay anything more than a nominal sum, the minimum salary established by law must be paid, but that "a position for which no minimum salary is set by law" includes all those positions for which no

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[2] Money appropriated for the hiring of attorneys and investigators to perform the tasks you intend to have the detailed employees perform may be used only for the purposes for which they are appropriated, 31 U.S.C. § 628, but these funds are available to pay either employees of your own or those detailed from another agency.

[3] We leave aside for the moment the question of whether you can pay each private sector employee a nominal sum, not to exceed $100, for all services rendered by the participant during the 6 months of the program.

salary or a nominal salary is paid. Section 5102(c)(13) of title 5, United States Code, states that Chapter 51 of title 5 providing for the classification of pay and allowances does not apply to employees who serve without pay or at nominal rates of pay.

We conclude, therefore, that you can appoint attorneys and investigators from the private sector and that you can pay a nominal sum such as you propose to those providing the gratuitous service. We do not think as stated above, that your appropriation for hiring temporary consultants or experts can be used to provide these funds and thus you will have to be able to justify the appointment and expenditure under 5 U.S.C. 1206(j), authorizing you to appoint the legal, administrative and support personnel necessary to perform the functions of your office, and as an expense necessary thereto under your recent appropriation act.

III.

Finally, we consider whether the plan you propose is consistent with relevant conflict of interest laws. This advice is necessarily general and does not preclude the need for careful consideration of particular factual circumstances.

The employees whose services you obtain from other Federal agencies will continue to be subject to the conflict of interest restrictions for regular Government employees. Your proposed plan raises no unusual questions as to those employees and therefore we see no need to discuss the requirements in detail.

Those appointed from the private sector will be subject to the same requirements as regular Government employees, but they may be made subject to the less stringent conflict of interest requirements for special Government employees if you decide in advance to appoint them to serve less than 130 days in any 365-day period. 18 U.S.C. 202(a) defines "special government employee" as "an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States * * * who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis * * *." In estimating in advance of appointment the number of days an employee may serve, a department must in good faith find that the special Government employee will serve no more than 130 days; a part of a day must be counted as a full day, and a Saturday, Sunday, or holiday on which duties are to be performed must be counted equally with a regular work day. Federal Personnel Manual, Ch. 735, Appendix C. If an employee does, however, serve for more than the 130 days, he or she will nevertheless continue to be regarded as a special Government employee so long as the original estimate was made in good faith. *Id.* Once an employee is appointed as a special Government employee, the restrictions imposed by the

conflict of interest laws apply even on days the employee does not serve the Government. *Id.*

Compensation

Sections 203 and 209 of title 18 limit compensation employees may receive in addition to their Government salary. The restrictions of 18 U.S.C. 209 on the receipt of "salary, or any contribution to or supplementation of salary" as compensation for services as an employee of the United States from any source other than the Government of the United States is expressly not applicable to special Government employees. 18 U.S.C. 209(c). The restrictions found in 18 U.S.C. 203(a) on receipt of outside compensation when one is serving as an officer or employee of the United States in relation to any matter in which the United States is a party or has a direct and substantial interest before any department, agency, or civil commission, applies to special Government employees only in relation to a particular matter involving a specific party or parties in which the employee has at any time participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, or which is pending in the department or agency of the Government in which he or she is serving.[4] Furthermore, § 203 applies to matters pending in the department only when a special Government employee has served in the department for at least 61 days during the immediately preceding 365 days. 18 U.S.C. 203(c).

If you do not hire private employees as special Government employees, they will be subject, as are the regular Government employees whose services you might utilize, to the restrictions of § 203. But even if the private employees were hired for more than 130 days and thus could not qualify as special Government employees, if they serve without compensation, they nevertheless will not be subject to § 209. 18 U.S.C. 209(c).

If the employees from the private sector are regular employees and are paid by the Government, § 209 requires that their private sector compensation be reviewed to ensure that it does not include payment for Government work and to reflect their more limited participation in the private firm's business. To satisfy § 203, these employees' salaries will have to be further reviewed, if necessary, to ensure that they do not share fees for representational services performed by another as outlined above.[5]

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[4] Section 203 applies as well to receipt of compensation by an employee for services rendered by another, such as a law partner.

[5] The restrictions of § 209 do not prohibit continued participation by employees in *bona fide* pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plans maintained by a private employer. 18 U.S.C. 209(b).

Representation Restrictions

Regular Government employees must refrain from acting as agents or attorneys for anyone before any department, agency, court, court-martial, or officer, or any civil, military, or naval commission in connection with any particular matter in which the United States is a party or has a direct and substantial interest. 18 U.S.C. § 205. This section restricts special Government employees in more limited fashion; such an employee may not act as attorney or agent in relation to any particular matter involving a specific party or parties in which that employee has at any time participated in the course of his or her Government service, or, if the employee has served at least 61 days, any matter which is pending in the department in which he or she is serving. A special Government employee is not otherwise barred from acting as an attorney in court proceedings or in proceedings before other agencies.

Section 208 of title 18 requires an officer or employee (including a special Government employee) to disqualify himself or herself from participating in decisions with regard to particular matters where he or she, a spouse, minor child, partner, organization in which the employee is serving as officer, director, trustee, partner or employee, or any person or organization with whom he or she is negotiating or has any arrangement concerning prospective employment, has a financial interest. A waiver is available under certain conditions, 18 U.S.C. § 208(b), and as with the applicability of all of the conflict of interest sections discussed in this memorandum, a careful examination of the particular facts would have to be made in each individual case.

Postemployment Restrictions

Section 207 of title 18 was amended by the Ethics in Government Act of 1978 to require that regular employees and special Government employees be permanently barred from acting as attorney or agent or otherwise representing any person other than the United States in making any communication, with intent to influence, or in making any informal or formal appearance before any department, agency, commission, or court in relation to any particular matter in which the United States or the District of Columbia is a party or has a direct and substantial interest and in which the employee participated personally and substantially.[6] The employee will also be prohibited for 2 years from acting as agent or attorney in similar circumstances with regard to matters under his or her official responsibility, but in all likelihood the realm of official responsibility

[6] We assume that the employees you are considering hiring will not be among those designated for more stringent coverage under § 207(d).

of the employees you would have would be no broader than the matters in which they participated personally and substantially.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

February 9, 1979

79-13 MEMORANDUM OPINION FOR THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET*

Department of Agriculture, Forest Service—Department of the Interior, National Park Service—Management Functions Over National Monuments in Admiralty and Misty Fiords, Alaska—Executive Order No. 6166 (5 U.S.C. § 901 note)—National Forest Management Act of 1976 (16 U.S.C. § 1609)

This memorandum responds to the inquiry by your General Counsel's office whether § 2 of Executive Order No. 6166 (1933), 5 U.S.C. § 901 note (1976), creating national monuments at Admiralty and Misty Fiords, Alaska, requires the transfer of management functions over national forest lands within the monuments from the Forest Service of the Department of Agriculture to the National Park Service of the Department of the Interior; and, if so, what legal action would be necessary to secure the Forest Service's continuing administration of the lands. We conclude that the order does require the transfer of management, and that a legally effective reorganization plan, or other legislative action, is necessary in order to authorize the Forest Service to administer the two monuments.

Exercising his powers under § 2 of the Antiquities Act of 1906, 16 U.S.C. § 431 (1976),[1] the President, on December 1, 1978, created national monuments in Admiralty Island (Proc. 4611, 43 F.R. 57009

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* This memorandum was supplemented and, in the main, superseded by a Memorandum Opinion for the Director of the Office of Management and Budget, dated February 8, 1980, reflecting a reconsideration of this opinion requested by the General Counsel of the Department of Agriculture.

[1] Section 2 of that Act reads:

The President of the United States is authorized, in his discretion, to declare by (Continued)

(1978)), and Misty Fiords, Alaska (Proc. 4623, 43 F.R. 57087 (1978)). Within Misty Fiords National Monument are approximately 2,285,000 acres of Federal land that had been reserved as part of Tongass National Forest in 1907, 35 Stat. (Pt. 2) 2152. Within Admiralty Island National Monument are approximately 1,100,000 acres of Federal land that were added to Tongass National Forest in 1909, 35 Stat. (Pt. 2) 2226. Because the President's powers under the Antiquities Act of 1906 extend to any "objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government," the forest system status of Admiralty Island and Misty Fiords did not bar the creation of monuments on those sites. Neither were the monuments barred because of the requirement under § 9 of the National Forest Management Act of 1976, 16 U.S.C. § 1609 (1976), that lands set aside by the President as part of the national forest system not be returned to the public domain except by act of Congress. The reservation of national forest lands as parts of national monuments did not return those lands to the public domain, but, on the contrary, further restricted their lawful use to purposes consistent with the preservation of the monuments' objects.

Under § 2 of Executive Order No. 6166, issued in 1933:

> All functions of administration of * * * national monuments * * * are consolidated in the National Park Service in the Department of the Interior * * *; except that where deemed desirable there may be excluded from this provision any public building or reservation which is chiefly employed as a facility in the work of a particular agency. [5 U.S.C. § 901 note (1976).]

Because the Admiralty Island and Misty Fiords National Monuments are covered by § 2 and do not fall within the single stated exception to its general provisions, one consequence of the President's creation of national monuments on national forest lands would appear to be the transfer of the management of those lands from the Forest Service to the National Park Service. Such a transfer is consistent with a 1972 agreement between the Departments of Agriculture and the Interior that the 1933 Executive order did "expunge the dual reservation status formerly existing on monuments carved out of National Forests, and vested administration of those areas in the Department of the Interior."[2]

(Continued)

public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.

[2] Quoted in a letter of December 11, 1978 from the Acting General Counsel, USDA, to the Acting Assistant Attorney General, Office of Legal Counsel.

The Department of Agriculture (USDA) argues, however, that § 9 of the National Forest Management Act of 1976, *pro tanto,* superseded Executive Order No. 6166 with respect to national monuments that incorporate national forest lands.[3] Based on the legislative history, USDA interprets § 9 to require that national forests set aside by the President remain within the national forest system, except when removed from the system by act of Congress. Because Congress has vested management authority over the system in USDA and the Forest Service, it follows, according to USDA, that until Congress acts to the contrary, all lands set aside by the President as national forests must be administered by the Forest Service.

If § 9 requires Admiralty Island and Misty Fiords to remain within the national forest system, the statutes relevant to the management of that system further require that the monuments be managed by the Forest Service. 16 U.S.C. § 472, 551, 1600 (1976). Ordinarily, in cases where statutes[4] are inconsistent, the most recent statute controls. Under this rule, the 1976 Act—if it does require that national forest monuments remain within the national forest system—would impliedly limit or repeal the management provisions of the Executive order. We conclude, however that § 9 does not require Admiralty Island and Misty Fiords to remain within the national forest system and that a contrary interpretation would misconstrue the statute. Thus, unless amended, Executive Order No. 6166 remains in force.

The disputed portion of § 9 reads:

> Notwithstanding the provisions of the Act of June 4, 1897, no land now or hereafter reserved or withdrawn from the public domain as national forests pursuant to the Act of March 3, 1891, or any act supplementary to and amendatory thereof, shall be returned to the public domain except by an Act of Congress.

The term "public domain" is not defined in the Act, but ordinarily it refers to unreserved lands of the United States that are subject to disposal or appropriation under the public land laws. Considering the plain meaning of its words, § 9 seems only to require that lands, once withdrawn by the President as parts of national forests, may not again become subject to private appropriation under the public land laws without an act of Congress. Such an interpretation appears wholly consistent with the express

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[3] In connection with this opinion, we sought the views of the Department of Agriculture and of the Department of the Interior. Agriculture furnished its views to us by letter dated December 11, 1978 (*see* note 2, *supra*). In addition, we have consulted the Assistant Attorney General, Lands and Natural Resources Division.

[4] Because Exec. Order No. 6166 has the force of law and cannot be amended without the assent of Congress, *see* discussion, *infra,* our opinion assumes that the ordinary rules of statutory interpretation, *e.g.,* implicit repeals are disfavored, apply to the order. However, our conclusion as to the effect of Exec. Order No. 6166 does not rest on our judgment as to the deference a court would accord its provisions, but rather on our interpretation of 16 U.S.C. § 1609(a). Pretermitting any determination of the force that the order would have if found inconsistent with a subsequent statute, we do not believe the proper construction of § 9 is inconsistent with the order.

purpose of the section to preserve lands reserved as national forests for the "long-term benefit" of "present and future generations."

In suggesting a narrower interpretation, namely, that "shall [not] be returned to the public domain," means "shall not leave the National Forest System," Agriculture relies on one paragraph in the legislative history that appears in the report of the Senate Committee on Agriculture and Forestry on the National Forest Management Act of 1976, S. Rept. 893, 94th Cong., 2d sess. (1976). The single relevant paragraph concerning § 9 reads:

> Section 9 of the bill amends redesignated section 11(a) of the Forest and Rangeland. Renewable Resources Planning Act of 1974 by adding a provision which, in effect, gives Congressional status to National Forest lands reserved from the public domain. Other National Forests lands already have Congressional status through specific Acts, such as the Weeks Act. The new provision states that, notwithstanding the authority conferred on the President to revoke, modify, or suspend proclamations or executive orders setting apart and reserving public domain land as National Forests, public domain lands which are now or may hereafter be reserved as National Forests are not to be returned to the public domain except by an act of Congress. This does not affect the President's authority to combine National Forests, separate a forest into two or more National Forests, or change the boundary lines of a forest, providing such changes do not remove lands from National Forest status. Also unaffected are existing authorities regarding exchanges of lands involving public domain National Forests. [*Id.* at 19.]

This paragraph is, at best, inconclusive with respect to the proper interpretation of § 9. It states that the President may still modify the size and boundaries of national forests, "providing such changes do not remove lands from National Forest status." It further states that § 9 gives congressional status to national forest lands reserved from the public domain and makes reference to an impliedly analogous provision in the Weeks Act. However, the Weeks Act, which permits the purchase of lands "necessary to the regulation of the flow of navigable streams or for the production of timber," 16 U.S.C. § 515 (1976), expressly (16 U.S.C. § 521) provides that such lands:

> [S]hall be permanently reserved, held, and administered as national forest lands under the provisions of section 471 of this title and acts supplemental to and amendatory thereof.

Congress' willingness and ability to provide in the Weeks Act expressly for the permanent administration, as national forests, of lands purchased for forest use raises the question why Congress chose words with plainly different meanings in the Forest Management Act of 1976 if its purpose was the same.

The inference that Congress did not intend to provide in the National

Forest Management Act the same permanent status to lands reserved from the public domain as the Weeks Act accorded to certain acquired lands is buttressed by Congress' enactment in 1958 of a statute that expressly made acquired lands not covered by the Weeks Act subject to its protective provisions, and specifically excepted lands reserved from the public domain. 16 U.S.C. § 521a (1976). Congress, when it wanted to expand the coverage of the Weeks Act, thus referred to it expressly. Congress' decision neither to adopt the Weeks Act's phrasing, nor to incorporate it by reference as it had done in 1958, strongly implies that the intended effects of the 1976 Act, 16 U.S.C. § 1609(a), and the protective provisions of the Weeks Act, 16 U.S.C. § 521, are not the same.

Further, USDA's interpretation poses a potential problem for the interpretation of § 2 of the Antiquities Act of 1906, *supra*. Under this section, the President is empowered to declare certain landmarks, structures, and objects as national monuments, and to:

> [R]eserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

If it were true that lands reserved from the public domain as national forests were to continue to be national forests without regard to their subsequent incorporation in national monuments, then such lands would continue to be subject to the uses approved for national forests by the Act of June 4, 1897, 16 U.S.C. §§ 473–478 (1976), the Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. §§ 523–31 (1976), the Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. §§ 1601–10 (1976), and the National Forest Management Act of 1976. Of these approved uses, it is readily conceivable that timbering, in particular, might conflict in a given case with the protection of objects properly designated as the bases for a national monument. In such a case, the perpetual forest system status of public domain lands reserved as national forests would conflict with the President's ability to create and protect national monuments on public domain lands, a conflict clearly not provided for by any of the forest acts.

In a given case it may be that no such conflict would exist and the fulfillment of national forest objectives may be wholly consistent with the purposes of a national monument. However, Congress has anticipated the possibility of conflict between monument and national forest uses and it prohibited the President from creating national forests out of national monuments, 16 U.S.C. § 471(b) (1976). (This section was repealed by Pub. L. No. 94–579, Title VII § 704(a), 90 Stat. 2792.) This provision effectively leaves to Congress the judgment of compatibility since Congress could, if it so chose, give to any public land dual monument and forest status.

It might be argued that the forest statutes may be read as not requiring timbering on every acre of forest land, even if the forest land is ideally suited for such use. The complexity of the forest-related statutes and the unforeseen problems that would be posed, however, further support an

interpretation of the National Forest Management Act of 1976 which avoids even potential conflict with the Antiquities Act. Attributing to § 9 the plain meaning of its words avoids that conflict and is consistent with the statute's purpose and with the language of the Weeks Act, 16 U.S.C.§ 521a; it also preserves Congress' role in determining whether, with respect to a particular parcel of public domain land, monument and forest uses are compatible.

Because of our interpretation of § 9, the Admiralty Island and Misty Fiords National Monuments are not parts of the National Forest System but simply national monuments. Accordingly, Executive Order No. 6166 requires the transfer of management functions from the Forest Service to the National Park Service. In order to permit the Forest Service to manage these monuments, the President would have to submit to Congress a reorganization plan under § 2 of the Reorganization Act of 1977, 5 U.S.C. §§ 901–12 (1977), presumably upon finding that the return of management functions to the Forest Service would "promote the better execution of the laws," 5 U.S.C. § 901(a)(1) (1977). Under § 2, the plan would become effective "at the end of the first period of sixty calendar days of continuous session of Congress" after the transmission of the plan, unless either House of Congress voted to disapprove the plan. It is not possible to amend Executive Order No. 6166 merely by issuing an amendatory order because the original order itself became effective only with the assent of Congress. The Attorney General in 1934, concluded that the President could revoke provisions of Executive orders issued under the Act of March 3, 1933 only "in the same manner in which they were enacted into law." 37 Op. Atty. Gen. 418 (1934). The current transfer of functions under a new reorganization plan would be consistent with the Attorney General's conclusion.[5]

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

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[5] The President, of course, is not required to act by reorganization plan and may, if he so chooses, submit a legislative proposal subject to the usual constitutional processes. Under either alternative, it should be recognized that the legislative designation of the Forest Service as the managing authority for two monuments will not itself determine the standards under which the monuments must be administered. Unlike the National Park Service, whose governing statutes, 16 U.S.C. §§ 1-3 (1976), impose particular duties on the Service in connection with all lands under its administration, the Forest Service is subject to no such specific mandate concerning the administration of non-national forest system lands. In recommending appropriate congressional action, the President may wish to consider the uses to which the monument lands should be subjected and to propose to Congress a more restrictive set of uses than would ordinarily apply to national forests.

February 14, 1979

79-14 MEMORANDUM OPINION FOR THE ASSISTANT DIRECTOR, LEGAL COUNSEL, FEDERAL BUREAU OF INVESTIGATION

Assertion of State Secrets Privilege in Civil Litigation

This responds to your request for the views of this Office regarding two questions: (1) whether properly classified information qualifies for nondisclosure in civil litigation on the basis of the privilege for state secrets; and (2) whether a claim of privilege for state secrets may be asserted concurrently with other claims of privilege for the same information. Your Office states that these questions are particularly important in litigation where the parties seek information pertaining to the identity of informants.

The issue whether classified information satisfies the requirements of the state secrets privilege raises two different but related questions: The first is whether classified material is protected by the state secrets privilege—*i.e.*, "matters relating to international relations, military affairs, and public security." 8 Wigmore, *Evidence* § 2378, at 794 (McNaughton rev. 1961). *See also* 8 Wright and Miller, *Federal Practice and Procedure* § 2019, at 158 (1970). Even when the information falls within these categories, however, it does not necessarily qualify for the state secrets privilege; its disclosure must also pose some risk of harming the national security. As the Supreme Court stated in *United States* v. *Reynolds,* 345 U.S. 1, 10 (1953), the Government must

> satisfy the court, from all circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.

The lower courts have also required the Government to demonstrate a reasonable danger that the disclosure of such information would be detrimental to the national security. *See, e.g., Jabara* v. *Kelley,* 75 F.R.D. 475, 483, 489, 492 (E.D. Mich. 1977); *Kinoy* v. *Mitchell,* 57 F.R.D. 1, 9 (S.D.N.Y. 1975). *See also* 8 Wigmore, *Evidence* § 2212a at 159 (McNaughton rev. 1961).

In our view, properly classified material would satisfy these two separate criteria. Section 1-301 of Executive Order No. 12065 prohibits the classification of information unless it concerns:

> (a) military plans, weapons, or operations;
>
> (b) foreign government information;
>
> (c) intelligence activities, sources or methods;
>
> (d) foreign relations or foreign activities of the United States;
>
> (e) scientific, technological, or economic matters relating to the national security;
>
> (f) United States Government programs for safeguarding nuclear materials or facilities; or
>
> (g) other categories of information which are related to national security and which require protection against unauthorized disclosure as determined by the President, by a person designated by the President pursuant to Section 1-201, or by an agency head.[1]

Since all these matters appear to be encompassed by the state secrets privilege—material relating to military affairs, international relations, or the national security—it seems that the first requirement of the state secrets privilege is met.

Properly classified information would also appear to meet the second requirement of the state secrets privilege—*i.e.*, whether there is a reasonable danger that disclosure would be detrimental to the national security. Section 1-302 of the order provides that, even though information may satisfy the criteria set forth in section 1-301, it may not be classified unless "unauthorized disclosure reasonably could be expected to cause at least identifiable damage to the national security." If this determination is properly made, the information would, in our view, satisfy the criteria for the state secrets privilege.

Regarding the question of informants, we believe that, where the identities (or information that would disclose the identities) of national security informants has been properly classified, the state secrets privilege may be asserted with regard to such information. For example, in *Pan American World Airways, Inc.* v. *Aetna Casualty and Surety Co.*, 368 F. Supp. 1098, 1140-41 (S.D.N.Y. 1973), *aff'd* 505 F. (2d) 989 (2d Cir. 1974), the court upheld a claim of privilege based on the Central Intelligence Agency's (CIA) representation that the disclosure of the identity of its sources could result in a loss of information to the CIA and in serious physical danger to the sources. Similarly, in *United States* v. *American Telephone and Telegraph Co.*, 419 F. Supp. 454, 457 (D.D.C. 1976), *remanded for further efforts at negotiation,* 551 F. (2d) 384, 388 (D.C.

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[1] Section 6-104 of the Executive order defines the term "national security" as the "national defense and foreign relations of the United States."

Cir. 1976), *remanded for further efforts at accommodation,* 567 F. (2d) 121 (D.C. Cir. 1977), the Government was concerned whether disclosing the identity of our counteragents would diminish their usefulness or even endanger their lives. This was only one of several concerns advanced by the Government. While neither the district court nor the circuit court independently evaluated these concerns, both courts concluded that legitimate national security considerations were at stake in the Executive's withholding of information from the Congress, thus indicating that the identity of informants may be a legitimate national security concern.

Although properly classified information is generally entitled to the protection of the privilege for state secrets, the fact that information is properly classified does not, in itself, require the assertion of the state secrets privilege. Rather, the Department's decision to assert the privilege is to be made on a case-by-case basis, taking into account not only the sensitivity of the information, but also factors not considered in the classification process such as the public interest in releasing the information in the context of particular litigation and the effect which invoking the privilege would have on its long-term viability. *Cf.* Executive Order No. 12065, §3-303 (recognizing that the need to protect properly classified information may be outweighed by the public interest in disclosure of the information). Moreover, the courts have insisted that the privilege must be formally claimed by the head of the department that has control over the information, after actual personal consideration by that official. *United States* v. *Reynolds, supra,* at 7-8; *Jabara* v. *Kelley, supra,* at 487-88; *Kinoy* v. *Mitchell, supra,* at 8. A representation that the information is classified is not sufficient; the courts also require representations that the criteria of the state secrets privilege are met and require sufficient additional information in order to make an informed judgment as to the merits of the claim. *See, Kinoy* v. *Mitchell, supra,* at 9-10; 8 Wigmore, *Evidence* § 2379, at 810 (McNaughton rev. 1961) ("the government must make a showing supporting its plea of privilege"). A proposed assertion of the state secrets privilege would normally thus cause two different sorts of review of the information at issue. First, reviewing the information and preparing the requisite representations should entail a reevaluation of the sensitivity of the information within the government and an assessment of the propriety of invoking the privilege. *See* 2 Weinstein *Evidence* § 509[04], at 509-3 (1977). Second, before it may accept the claims, the court is also obliged to satisfy itself that the invoking of the privilege is appropriate. *United States* v. *Reynolds, supra,* at 9-11; *Jabara* v. *Kelley, supra,* at 484, 491.

Your second question addresses the issue whether the state secrets privilege may be asserted concurrently with other claims of privilege for the same information. Although we have been unable to find any court decision on point,[2] we see no reason why two separate privileges may not

[2] Several decisions, however, have recognized that the concerns underlying different privileges may arise with respect to the same information or document. *Machin* v. *Zuckert,* 316 F. (2d) 336, 339 (D.C. Cir. 1963); *Jabara* v. *Kelley,* 62 F.R.D. 424, 425, 431 (E.D. Mich. 1974).

be asserted with respect to the same information. The foundation for all of the Government's privileges is, ultimately, the public interest. In our view, the public interest could only be properly served if, in a situation where the concerns underlying a particular piece of information relate to two or more of the Government's privileges, all of those concerns were addressed before a decision is made to release the information. The Government should thus be able to assert all available privileges in order that a court may make an informed judgment whether the public interest would actually be served by disclosure.

This conclusion is supported by other aspects of the law. The general policy of the law is to allow for alternate or multiple claims or defenses in civil litigation. *See* Fed. R. Civ. Proc. 8(e). In fact, in the analogous context of Freedom of Information litigation, the Government frequently claims that information is exempt from disclosure under two or more exemptions (which are themselves often founded on common-law privileges). *See, e.g., Weissman* v. *CIA*, 565 F. (2d) 692 (D.C. Cir. 1977). We thus believe that, if the state secrets privilege and another privilege are both legitimately applicable, the Government as a legal matter may assert each of them at the same time. Whether it should actually do so is, of course, a judgment that must be made in each case by the attorneys in charge of the case.[3]

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

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[3] This determination might be based on both the relative weight of the privileges and the ease in which they may be asserted. For example, even though the informer's privilege is a qualified one, *see, Roviaro* v. *United States*, 353 U.S. 53 (1957), and may thus afford the informant's identity less protection than the state secrets privilege, it might also be less burdensome to assert. While there is some contrary authority, it appears that the privilege need not be asserted by the head of the agency, but may be advanced by any appropriate representative of the Government. *See, Kinoy* v. *Mitchell, supra,* at 11 n. 36; McCormack, *Evidence* § 111, at 237 (1972). *Cf., Bocchicchio* v. *Curtiss Publishing Co.*, 203 F. Supp. 403, 406 n. 7 (E.D. Pa. 1962). *But see, Mitchell* v. *Bass*, 252 F. (2d) 513, 516 (8th Cir. 1958); *Fowler* v. *Wirtz*, 34 F.R.D. 20, 23 (S.D. Fla. 1963).

February 16, 1979

79-15 MEMORANDUM OPINION FOR ASSISTANT ATTORNEY GENERAL, LANDS AND NATURAL RESOURCES DIVISION

Federal Aviation Administration—Federal Airport Act of 1946 (60 Stat. 170)—Airport and Airway Development Act of 1970 (49 U.S.C. §§ 1716, 1723)—Conveyance of Federal Lands for Airport Development

Mr. Harmon has asked me to respond to your memorandum requesting this Office to initiate action to reinstate the authority initially conferred by Executive Order No. 10536, but subsequently revoked by § 2 of Executive Order No. 12079. For the reasons expressed herein, we do not believe it necessary to reinstate that authority. Rather, we conclude that the authority conferred by § 1 of Executive Order No. 12079 is sufficient to meet your concerns.

I. Background

You raise issues concerning the interrelationship of two separate but related pieces of legislation and the orders issued thereunder. The pertinent portions of the separate enactments relate both to the development of public airports and to Federal assistance to such projects. The first enactment, the Federal Airport Act of 1946, 60 Stat. 170 (hereinafter referred to as the 1946 Act), required that, as a condition of receiving Federal grants, State and local public agencies submit airport development project applications to the Administrator of the Federal Aviation Administration. § 9(a), 60 Stat. 174. The Administrator, before entering into any grant agreement, was required to approve the project application. Numerous conditions were to be met before approval could be given; one condition was that

> No project shall be approved by the Administrator with respect to any airport unless a public agency holds good title, satisfactory to the Administrator, to the landing area of such airport or the

site therefor, or gives assurance satisfactory to the Administrator that such title will be acquired. [Section 9(d), 60 Stat. 175.]

Another provision of the same Act provided for the conveyance of Federal lands when the Administrator determined that this was "reasonably necessary for carrying out a project" under the Act. § 16(a), 60 Stat. 179. The procedure for carrying out such a conveyance was as follows:

> Upon receipt of a request from the Administrator under this section, the head of the department or agency having control of the lands in question shall determine whether the requested conveyance is inconsistent with the needs of the department or agency, and shall notify the Administrator of his determination within a period of four months after receipt of the Administrator's request. If such department or agency head determines that the requested conveyance is not inconsistent with the needs of that department or agency, such department or agency head is hereby authorized and directed, with the approval of the President and the Attorney General of the United States, and without any expense to the United States, to perform any acts and to execute any instruments necessary to make the conveyance requested; but each such conveyance shall be made on the condition that the property interest conveyed shall automatically revert to the United States in the event that the lands in question are not developed, or cease to be used, for airport purposes. [Section 16(b), 60 Stat. 179.]

In Executive Order No. 10536 of June 9, 1954, the President authorized the heads of departments and agencies to execute conveyances under this provision without the approval of the President.

The second pertinent piece of legislation, the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219 (hereinafter referred to as the 1970 Act), repealed the 1946 Act, but it also enacted provisions which, to a great extent, adhered to that Act's approach. As a condition of receiving Federal grants, public agencies once again had to obtain approval of project applications for airport development. 49 U.S.C. §§ 1716(a), 1719. The conditions of approval were largely the same as in the 1946 Act, including that of good title, 49 U.S.C. § 1716(c), but stricter environmental standards were to be applied. *See* 49 U.S.C. § 1716(c)(4), (d) and (e). A provision similar to that of the 1946 Act was made for conveyances of Federal lands, except that certain parklands were exempted. 49 U.S.C. § 1723. In Executive Order No. 12079, 3 CFR 224 (1979), the President authorized the conveyances to be executed without his approval.

The repeal of the 1946 Act soon gave rise to the question whether, where grant agreements had been finalized under the 1946 Act, conveyances of Federal land pursuant to those agreements might still be made and approved under the authority of the 1946 Act. In our opinion of January 19, 1971, this Office answered the question affirmatively. The opinion relied on § 52(c) of the 1970 Act, 84 Stat. 219, 236, which explicitly continued in

effect "all orders, determinations, rules, regulations, permits, contracts, certificates, licenses, grants, rights and privileges" which had taken effect under the 1946 Act. The opinion also reasoned that, since a conveyance of land was "inextricably bound up with the grant agreement," Congress must have intended that the savings clause permitted conveyancing in accordance with the 1946 Act.

Under this interpretation, conveyances continued to be made under the 1946 Act by reason of Executive Order No. 10536, and were made without the approval of the President. Despite the significant lapse of time since the repeal of the 1946 Act, it is our understanding that a number of conveyances, which could be approved without Presidential approval under Executive Order No. 10536 and our previous opinion, have yet to be made. However, since Executive Order No. 10536 has been revoked by Executive Order No. 12079, the question is whether a new authorization must be obtained in order to execute these conveyances without the approval of the President. As noted above, we do not believe this to be the case.

II. Discussion

Section 23 of the 1970 Act, 49 U.S.C. § 1723, provides as follows:

(a) Requests for use.

Subject to the provisions of subsection (c) of this section, whenever the Secretary determines that use of any lands owned or controlled by the United States is reasonably necessary for carrying out a project for airport development under this part, [part II], or for the operation of any public airport, including lands reasonably necessary to meet future development of an airport in accordance with the national airport system plan, he shall file with the head of the department or agency having control of the lands a request that the necessary property interests therein be conveyed to the public agency sponsoring the project in question or owning or controlling the airport. The property interest may consist of the title to, or any other interest in, land or any easement through or other interest in airspace.

(b) Execution of conveyances.

Upon receipt of a request from the Secretary under this section, the head of the department or agency having control of the lands in question shall determine whether the requested conveyance is inconsistent with the needs of the department or agency, and shall notify the Secretary of his determination within a period of four months after receipt of the Secretary's request. If the department or agency head determines that the requested conveyance is not inconsistent with the needs of that department or agency, the department or agency head is hereby authorized and directed, with the approval of the President and the Attorney General of the United States, and without any expense to the United States, to perform any acts and to execute any

instruments necessary to make the conveyance requested. A conveyance may be made only on the condition that, at the option of the Secretary, the property interest conveyed shall revert to the United States in the event that the lands in question are not developed for airport purposes or used in a manner consistent with the terms of the conveyance. If only a part of the property interest conveyed is not developed for airport purposes, or used in a manner consistent with the terms of the conveyance, only that particular part shall at the option of the Secretary, revert to the United States.

(c) Exemptions of certain lands.

Unless otherwise specifically provided by law, the provisions of subsections (a) and (b) of this section shall not apply with respect to lands owned or controlled by the United States within any national park, national monument, national recreation area, or similar area under the administration of the National Park Service; within any unit of the National Wildlife Refuge System or similar area under the jurisdiction of the Bureau of Sport Fisheries and Wildlife; or within any national forest or Indian reservation.

Except for the language "under this part" in subsection (a), there is nothing in the section precluding its use in situations involving projects for airport development conducted under the authority of the 1946 Act. Rather, the language of the section is generally broad enough to encompass conveyances contemplated in grants under the 1946 Act.

Of course, the phrase "under this part" could be read to restrict the application of § 23 to those airport development projects conducted under the authority of part II of the 1970 Act. We do not believe, however, that the phrase was meant to preclude the use of § 23 in situations involving grants under the 1946 Act. Since § 23 largely restates the analogous provision of the 1946 Act, Congress obviously wished to *continue* that Act's purpose of allowing Federal lands to be conveyed for carrying out airport projects. This purpose would hardly be served by reading the language "under this part" to preclude the use of § 23 in projects conducted under the authority of the 1946 Act. Rather, in light of Congress' purpose in enacting § 23, and because part II of the 1970 Act is largely a reenactment of the 1946 Act, *see* H. Rept. 601, 91st Cong., 1st sess. 12–13 (1969), a more reasonable assessment of Congress' intent would be to interpret the term "under this part" as including projects undertaken under the 1946 Act.[1]

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[1] Indeed, the language "under this part" essentially tracks the language "under this Act" in the analogous provision of the 1946 Act. This would suggest that it was not intended to restrict § 23 with respect to the 1946 Act, but rather was simply a continuation of the policy of the 1946 Act to allow Federal conveyances only for purposes of aiding airport development projects.

Another aspect of the statute supports our conclusion. As noted above, § 52 of the 1970 Act provides that grants in effect at the time of the effective date of the Act were to continue in effect. *See* 49 U.S.C. § 1701 note. Moreover, as we explained in our January 19, 1971 opinion, grant agreements were inextricably bound up with conveyances of Federal land. We cannot believe that Congress would, on the one hand, act to preserve grants under the 1946 Act that were dependent on such conveyances and, on the other hand, restrict § 23 to preclude conveyances with respect to these grants. Rather, since Congress wished to preserve existing grants, a more likely interpretation of § 23 would be that its authority is available to effectuate those grants.[2]

The legislative history of the 1970 Act supports this view. One committee report states that land may be conveyed under § 23 "for the purpose of carrying out projects for airport development." H. Rept. 601, 91st Cong., 1st sess. 15 (1969). *See also* H. Rept. 1074, 91st Cong., 2d sess. 43 (1970). This general statement of intent would appear to encompass projects conducted not only under the 1970 Act, but also under the 1946 Act. In addition, the Conference Report states that § 23 "continues, with minor modifications, the policy contained in existing law." H. Rept. 1074, 91st Cong., 2d sess. 44 (1970). Since the existing law had allowed for conveyances to aid projects under the 1946 Act, this statement would indicate Congress' intent to allow for the same result to occur under § 23.

We thus conclude that, where grant agreements had been finalized under the 1946 Act, conveyances of land may be made pursuant to those agreements under the authority conferred by § 23 of the 1970 Act. By reason of Executive Order No. 12079, such conveyances may be made without Presidential approval. There is thus no need to initiate action for reinstatement of the authority, contained in the revoked Executive Order No. 10536, in order to convey Federal lands without Presidential approval under the 1946 Act.

The fear has been expressed that, if conveyances are made under § 23 of the 1970 Act, other requirements of that Act would also have to be met. As we have already noted, however, Congress in the 1970 Act continued in force those grants under the 1946 Act that existed on the effective date of the 1970 Act. Even though the provisions of the 1970 Act may impose additional or different requirements on grants, it seems clear to us that those provisions do not apply to grants finalized before the 1970 Act became effective. Moreover, we see no reason for § 23 to be deemed inapplicable to 1946 Act grants by requirements which, as Congress expressly provided,

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[2] We recognize that, in our January 19, 1971 opinion, we concluded that such conveyances could go forward under the authority of the 1946 Act. That opinion, however, did not deal with the availability of § 23 of the 1970 Act; rather, it dealt only with the question whether conveyances could be made under the revoked 1946 Act. While we have no occasion to question our prevous opinion's conclusion, we believe it more appropriate to proceed under the authority of § 23—which we believe to be applicable to projects under the 1946 Act—rather than under a provision in a repealed statute.

were not to apply to such grants. We have found nothing in § 23 or its legislative history to suggest a contrary conclusion; rather, on the basis of our previous discussion, we think that the language and the legislative history of § 23 indicate that Congress intended § 23 to permit conveyances pursuant to those grant agreements entered into under the 1946 Act.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

March 14, 1979

79-16 MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

Designation of Acting General Counsel—Federal Labor Relations Authority

The Federal Labor Relations Authority (Authority) has made an inquiry concerning the question of designating an Acting General Counsel for the Authority. In our opinion the power to make such a designation is vested in the President. The issue is one of statutory interpretation. We are addressing this memorandum to you because it involves a question of Presidential authority. Mr. Cardozo is aware of this matter. He has asked us to send a copy of this memorandum to the Federal Labor Relations Authority, which we have done.

The Federal Labor Relations Authority was originally created, by § 301 of Reorganization Plan No. 2 of 1978 (Plan), as an independent establishment in the executive branch. Section 302 of the Plan provides for a General Counsel of the Authority to be appointed by the President by and with the advice and consent of the Senate. Under § 402 of the Plan the President may fill the office of General Counsel on an interim basis until it is first filled pursuant to the provisions of the Plan or by way of recess appointment.[1] The pertinent provisions of the Plan became effective on January 1, 1979. *See* Executive Order No. 12107 of December 29, 1978.

The Civil Service Reform Act of 1978 (Act) became effective on January 11, 1979.[2] Section 701 of the Act added to title 5, United States Code, a section 7104 providing for a Federal Labor Relations Authority and a

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[1] Section 402 reads in pertinent part as follows:

Section 402. Interim Officers. (a) The President may authorize any persons who, immediately prior to the effective date of this Plan, held positions in the Executive Branch of the Government, to act as * * * the General Counsel of the Authority, until those offices are for the first time filled pursuant to the provisions of this Reorganization Plan or by recess appointment, as the case may be.

[2] Section 907 of the Act provides that it shall take effect 90 days after its enactment. It was approved by the President on October 13, 1978.

General Counsel of the Authority. Its members and General Counsel are to be appointed by the President by and with the advice and consent of the Senate. The Act, however, does not in terms contain an interim designation authority corresponding to § 402 of the Plan.

The President gave recess appointments to two members of the Authority during the interval between the 95th and 96th Congresses. He did not, however, make such an appointment to the office of General Counsel. We have been told that the lack of a General Counsel seriously hampers the operations of the Authority. In particular, because of the close interrelation of the functions of the Authority and those of its General Counsel, the Authority is unable to issue its rules and regulations as required by the Act, 5 U.S.C. § 7134, without being joined by the General Counsel. It is our opinion that it was the intention of Congress to preserve the President's express authority under § 402 of the Plan to designate an Acting General Counsel. This intention is reflected in the transitional provisions of the Act.

Section 904 of the Act provides:

> Except as otherwise expressly provided in this Act, no provision of this Act shall be construed to—(1) limit, curtail, abolish, or terminate any function of, or authority available to, the President which the President had immediately before the effective date of this Act; * * *.

Immediately before the effective date of the Act the President clearly had the authority under § 402 of the Plan to designate an Acting General Counsel. The Act, as mentioned above, does not confer a similar authority on the President; but it does not contain any express provision to the contrary. The President therefore retains his power to make an interim designation under § 402 of the Plan, notwithstanding the subsequent coming into effect of the Act.

The same result follows from § 905 of the Act, dealing specifically with the interrelation between the Act and Reorganization Plan 2 of 1978. That section provides:

> Any provision in either Reorganization Plan Number 1 or 2 of 1978 inconsistent with any provision in this Act is hereby superseded.

There is no provision in the Act inconsistent with the President's interim designation authority under § 402 of the Plan. The mere silence of the Act with respect to a transitional provision of the Plan is plainly not an inconsistency.

As we see it, the President thus has the power under § 402 of the Plan to authorize a person who on December 31, 1978, held a position in the executive branch of the Government to act as the General Counsel of the Authority until a General Counsel is appointed by him by and with the advice and consent of the Senate.

We also note that the provisions of the Vacancy Act, 5 U.S.C. §§ 3345-3349 (in particular § 3348, which limits an interim designation to

the first 30 days of a vacancy), are not applicable to the situation at hand. First, that Act applies only to vacancies in the executive and military departments as defined in 5 U.S.C. §§ 101, 102. The Authority is not an executive or military department; it is an "independent establishment in the Executive Branch" within the scope of 5 U.S.C. § 104. Section 101 of the Plan.[3] Moreover, 5 U.S.C. § 3348 applies by its own terms only where a vacancy was filled temporarily pursuant to the provisions of the Vacancy Act. Here the designation would not be made under that Act but under the authority of § 402 of the Plan.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

[3] There is no corresponding provision in the Act. This provision of the Plan, therefore, remains in effect in the absence of an inconsistent provision in the Act. *See* § 905 of the Act, *supra*.

March 15, 1979

79-17 MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION

Civil Rights—Busing—Effects of Eagleton-Biden Amendments (92 Stat. 1586)—Department of Justice Use of Personnel and Resources of the Department of Health, Education, and Welfare in Desegregation Litigation

This responds to your memorandum of December 13, 1978, concerning the applicability of the Eagleton-Biden Amendment to use by the Civil Rights Division of employees and other resources of the Department of Health, Education, and Welfare (HEW).

I. Background; Summary

A. The Eagleton-Biden Amendment is § 209 of the Department of Health, Education, and Welfare Appropriation Act for Fiscal Year 1979, Pub. L. No. 95-480, 92 Stat. 1586 (1978). Section 209 reads as follows:

> None of the funds contained in this Act shall be used to require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home, except for a student requiring special education, to the school offering such special education, in order to comply with title VI of the Civil Rights Act of 1964. For the purpose of this section an indirect requirement of transportation of students includes the transportation of students to carry out a plan involving the reorganization of the grade structure of schools, the pairing of schools, or the clustering of schools, or any combination of grade restructuring, pairing, or clustering. The prohibition described in this section does not include the establishment of magnet schools.

An essentially identical provision was contained in the HEW appropriation

act for fiscal year 1978,[1] and similar provisions were included in the appropriation acts for the previous 3 years.

Your memorandum states that HEW wishes to refer to the Civil Rights Division, for the bringing of a lawsuit to enforce Title VI of the Civil Rights Act of 1964, the matter of the desegregation of the Chicago public schools. According to your memorandum, a suit against the Chicago school system would considerably overtax the resources of this Department, and HEW has offered to provide the resources needed for the suit. In light of the fact that any appropriate remedy would, it appears, certainly require transporting some students beyond their nearest schools, you have raised a number of questions concerning the ability of this Department to use HEW resources.

B. The basic issue is whether § 209 applies at all to the conduct of such litigation. Although the question, which is essentially one of statutory construction, may be thought by some not to be free from doubt, in our opinion, the statute was not intended to bar HEW's cooperation with this Department. Our view, as explained below, is that § 209 restricts only HEW's conduct of administrative fund-termination proceedings and that it does not limit the use of HEW funds to support a lawsuit brought by this Department.

At the outset, however, we should note that there are other limits upon the ability of the Department of Justice to use the resources of other agencies. Provisions in Titles 5 and 28 of the United States Code assign to this Department general responsibility for conducting litigation involving Federal agencies. With regard to the role of HEW attorneys in title VI litigation, those provisions must be considered. Also, quite apart from § 209, HEW funds must be used in a manner consistent with the HEW appropriation statute. Within the limits of these several statutes, we believe that it would be permissible for this Department to make substantial use of HEW employees and resources in connection with title VI litigation, including school desegregation cases that may result in student-transportation orders.

II. Discussion

A. The Meaning of the Eagleton-Biden Amendment

As your memorandum indicates, the language of § 209 may be interpreted in various ways. The statutory interpretation that would bar HEW's cooperation can be simply stated: the work of Government attorneys in preparing or bringing a desegregation suit in which the remedy is likely to involve busing is "indirectly requiring" the transportation of students beyond their nearest schools. Yet, the language of the statute does not readily lend itself to that construction. Moreover, that construction is not supported by the legislative history. The history of § 209 makes clear that Congress intended to bar use of HEW fund-termination

[1] *See* § 208 of Pub. L. No. 95-205, 91 Stat. 1460 (1977).

proceedings as means of requiring busing. It also makes clear that Congress did not intend to interfere either with the ability of HEW to refer such cases to the Department of Justice or with the manner in which this Department conducts the litigation of those cases. For example, in opposing Senator Brooke's amendment to delete § 209, Senator Eagleton referred to HEW's administrative proceeding against the school system of Kansas City, Missouri, as "the kind of situation the Eagleton-Biden amendment is designed to prevent."[2] Then he added: "The amendment puts HEW on notice that if they want busing in a school district, they are going to have to get it through the Federal courts." The same basic view that § 209 applies only to "administrative busing" ordered by HEW was made by Senator Biden.[3]

Our review of the legislative history reveals no discussion of the question whether HEW personnel can assist the Department of Justice in preparing or bringing a title VI-based lawsuit for desegregation of a school system. In our opinion, such assistance is not contrary to the purpose of § 209. The legislative history shows that Congress opposed requiring busing in the context of HEW administrative proceedings. When a matter is referred to the Department of Justice, the context becomes a judicial proceeding and the Government's position is controlled by this Department. There is no reason to read § 209 as barring HEW from assisting this Department, even with regard to the student-assignment or busing aspects of a lawsuit. The crucial point is that, if a busing requirement results from litigation, the basis will be a court order or a negotiated settlement, not the threat of fund termination.

Our view is supported by the fact that Congress was fully aware of the decision regarding the constitutionality of the virtually identical fiscal year 1978 version of the Eagleton-Biden Amendment. *Brown* v. *Califano,* 455 F. Supp. 837 (D.D.C. 1978).[4] In rejecting the plaintiff's view that the provision was unconstitutional on its face, the District Court stressed the fact that HEW could enforce title VI by referring matters to this Department. In its conclusion, the court stated the following:[5]

> Should further proceedings in this case reveal that the litigation option left undisturbed by these provisions cannot, *or will not,* be made into a workable instrument for effecting equal educational opportunities, the Court will entertain a renewed challenge by plaintiffs on an *as applied basis* * * *. [Emphasis in original.]

An interpretation of § 209 that would prohibit or severely restrict HEW

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[2] 124 CONG. REC. S16302 (daily ed., Sept. 27, 1978).

[3] 124 CONG. REC. S16303 (daily ed., Sept. 27, 1978).

[4] Senator Biden placed the court's decision in the CONGRESSIONAL RECORD. He and Senators Eagleton and Brooke referred to the decision during the Senate debate on the amendment to delete § 209. 124 CONG. REC. S16298 (Senator Brooke), S16302 (Senator Eagleton), and S16303-305 (Senator Biden) (daily ed., Sept. 27, 1978).

[5] 455 F. Supp. at 843.

assistance to this Department in regard to referred cases might make application of the legislation more vulnerable to attack. This is a further reason for concluding that the proponents of § 209 did not intend such an interpretation.

In sum, it appears to us plain that Congress intended to leave untouched this Department's litigation authority in these cases. It must likewise be concluded that, had Congress intended to effect a significant alteration in the usual relationship between this Department and HEW in the handling of that litigation, its intent would have been clearly spelled out. We have found no evidence in the legislative consideration of HEW's appropriation for fiscal year 1979 to suggest a congressional intent to curtail HEW's usual role of providing assistance in these cases. With that conclusion in mind, we will turn to a review of the statutory limitations ordinarily impinging upon interagency cooperation in litigation.

B. Limits Upon Department of Justice Use of HEW Resources

A primary purpose for creating the Department of Justice was to centralize control of litigation involving the United States or a Federal agency. This is reflected in 28 U.S.C. § 516, which reads as follows:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party * * *, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

A parallel section, 5 U.S.C. § 3106, provides that, except as otherwise authorized by law, an executive department "may not employ an attorney * * * for the conduct of [such] litigation * * * or for the securing of evidence therefor, but shall refer the matter to the Department of Justice."

As a practical matter, cooperation between attorneys of this Department and agency attorneys is necessary.[6] So long as this Department retains control over the conduct of the litigation, even an extensive role for attorneys of other agencies seems consistent with the purposes of 28 U.S.C. § 516 and 5 U.S.C. § 3106. The large number of agreements between this Department and our "client" agencies (most of which are summarized in the Civil Division's Practice Manual) attests to the importance of cooperation.

A related question is allocation, between this Department and an agency involved in a civil suit, of the expense of litigation. Clearly, when one department is given sole responsibility for a type of activity, the appropriation of another department may not properly be used to cover the cost of that activity. *See* 31 U.S.C. § 628. With respect to litigation, however, the

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[6] As you probably know, litigation management is the subject of a study by the President's Reorganization Project.

authority of this Department has never been read as ousting other agencies from performing a supporting role. Given this long history, and given the necessity of cooperation, we think it may be assumed that, ordinarily, when Congress appropriates funds for an agency general counsel's office, Congress intends a portion of such funds to be used to carry out the agency's functions concerning litigation.

We are not suggesting that this Department could adopt a practice of charging other agencies, such as HEW, for the cost of bringing lawsuits. Our point is that, in general, the other agencies have the responsibility of assisting this Department and that agency appropriations may properly be used for that purpose. *Cf.* 39 Comp. Gen. 643, 646–47 (1960). Regarding the present matter, we believe that there is broad latitude regarding the amount and types of assistance that HEW may provide to this Department.

HEW attorneys and supporting personnel may properly provide factual material and may also draft interrogatories, pleadings, briefs, and other papers. HEW employees, whose salaries are paid by HEW, may be detailed to this Department to work on such matters. An HEW attorney, who has been designated as a special attorney under 28 U.S.C. § 543 or § 515(a), may take part in judicial proceedings.

As a matter of policy, in view of the possibility that the Eagleton-Biden Amendment may be susceptible to a more prohibitive interpretation, you may wish to consider whether it might be advisable to limit the role of HEW employees with respect to the busing-related aspects of a case. That is, regarding those issues, an HEW attorney detailed to this Department might refrain from assuming the lead role in conducting negotiations or litigation. The likelihood of successfully defeating a claim of violation of § 209 would be enhanced if the busing-related aspects of the case were clearly controlled by a Department of Justice employee.

With regard to use of HEW computer programmers and computer time, there should be much leeway. This kind of support would seem to be a proper use of HEW's appropriation.

There have been situations in which HEW has paid the travel expenses of Department of Justice employees. Ordinarily, however, this type of expense is paid from the appropriation of this Department. The propriety of accepting travel funds from HEW might well depend upon the particular circumstances (*e.g.*, whether the travel is for an investigation or for trial). For example, when HEW makes a referral, it is responsible for performing at least a preliminary investigation. Thus, if a Department of Justice employee were to assist HEW in conducting an HEW investigation, it would seem proper for HEW to pay his or her expenses and even his or her salary. In other words, HEW would be purchasing services from this Department. *See* § 601 of the Economy Act, 31 U.S.C. § 686.

Your memorandum describes three hypothetical situations and raises a number of questions with regard to each of them. Our views on most of these questions are indicated by the general guidelines set forth above, but we will respond briefly to the specific issues.

Case 1: Detail of HEW Personnel

> (A) HEW employees, paid by HEW, could properly be detailed to your Education Section and could work on cases involving Eagleton-Biden questions, *i.e.*, busing. An HEW attorney could properly work, in a subsidiary role, on any aspect of such cases. As a policy matter, as noted above, we question whether an HEW employee should be the lead attorney regarding Eagleton-Biden issues.

A detailed HEW employee could work on cases not involving busing, assuming the case is related to the responsibilities of HEW.[7]

Because of our construction of § 209, our views do not depend upon the statutory basis of the case (title IV, title VI, etc.) or the timing of a referral by HEW.

> (B) HEW employees, paid by HEW, could properly be detailed to a Civil Rights division Section other than the Education Section. Their work would not have to relate to title VI, if it related to some other responsibility of HEW.[8]

You ask whether this Department could properly "demand," as a condition for accepting a referral of the Chicago case, that HEW detail a number of employees to the Civil Rights Division. This question is more difficult, and the answer would seem to depend upon the particular facts. Regarding this kind of litigation, there is no precise dividing line between the responsibilities of this Department and of the other agency. We can properly insist that the other agency cooperate and provide substantial assistance. Still, basic responsibility for conducting the litigation and bearing its expense belongs to this Department. If our funds are not adequate to permit the bringing of a large-scale suit, we would ordinarily consider seeking an additional appropriation. While a greater amount of interim, or short-term, assistance might be appropriate in particular cases, there is probably a point at which HEW's assistance would constitute a circumvention on this Department's appropriation limitations.

Obviously, it is difficult to identify the proper line beyond which this Department should not go in demanding assistance from "client" agencies. If HEW is unable or unwilling to provide sufficient assistance, we would be pleased to consider the matter further in light of the specific circumstances.

Case 2: Use, Within HEW, of HEW Resources

(A)-(C) HEW personnel and resources could properly be

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[7] Clearly, a suit involving higher education or sex discrimination in education would relate to the statutory responsibilities of HEW. A more general—but probably valid—basis for detailing HEW employees would be training, *i.e.*, the benefits of learning techniques of investigating and litigating civil rights cases.

[8] *See* footnote 7, *supra.*

used, within HEW, to assemble material regarding any aspect of a potential school-desegregation case. Such work could be done before or after a referral of the matter to this Department.

(D) Our opinion is the same with regard to preparing litigation material, such as pleadings and exhibits. Of course, material of this type would be subject to review by Department of Justice attorneys.

Case 3: Expert Witnesses

We do not construe § 209 as limiting in any way this Department's use of expert witnesses. For example, an expert who is an HEW employee could properly express views concerning student assignment practices and necessary remedies, including busing. In our opinion, such statements would not amount to "indirectly requiring" busing.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

March 21, 1979

79-18 MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

Jurisdiction—Federal or State—"Victimless" Crimes Committed by Non-Indians on Indian Reservations—18 U.S.C. §§ 1152, 1153

This responds to your request for our opinion whether so-called "victimless" crimes committed by non-Indians on Indian reservations fall within the exclusive jurisdiction of the State or Federal courts, or whether jurisdiction is concurrent. The question posed is a difficult one[1] whose importance is far from theoretical. We understand that in the wake of *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978), serious concern exists as to the adequacy of law enforcement on a number of reservations. While many questions of policy may be involved in allocating law enforcement resources, you have asked—as an initial step—for our legal analysis of the jurisdictional limitations.

In an opinion to you dated June 19, 1978, we expressed the view that, although the question is not free from doubt, as a general matter existing law appears to require that the States have exclusive jurisdiction with regard to victimless offenses committed by non-Indians. At your request, we have carefully reexamined that opinion. We have also discussed the legal issue raised with others in the Department, with representatives of the Department of the Interior, and with Indian representatives; and we have carefully considered the thoughtful submission prepared by the Native American Rights Fund on behalf of the Litigation Committee of the National Congress of American Indians.

Our further consideration of the question has led us to conclude that our earlier advice fairly summarizes the essential principles. There are,

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[1] The few writers who have touched obliquely on this question have expressed varying views. *See, e.g.,* Clinton, "Criminal Jurisdiction Over Indian Lands," 18 *Ariz. L. Rev.* 503, 529–30 (1976); Goldberg, "Public Law 280: The Limits of State Jurisdiction over Reservation Indians," 22 *U.C.L.A. L. Rev.* 535, 541 n. 25 (1975); Davis, "Criminal Jurisdiction Over Indian Country in Arizona," 1 *Ariz. L. Rev.* 62, 73–74 (1959).

however, several significant respects in which we wish to expand upon that analysis. There are also several *caveats* that should be highlighted in view of the large number of factual settings in which these jurisdictional issues might arise. We also note, prefatorily, that there are now several cases pending in courts around the country in which aspects of these jurisdictional issues are being, or are likely to be, litigated,[2] and we may therefore anticipate further guidance in the near term in applying the central principles discussed in this memorandum.

I. Introduction

Two distinct competing approaches to the legal question you have posed are apparent. First, it may be contended that pursuant to 18 U.S.C. § 1152, with only limited exceptions, offenses committed on Indian reservations fall within the jurisdiction of the Federal courts. The Supreme Court's determination in *United States* v. *McBratney,* 104 U.S. 621 (1882), that the States possess exclusive jurisdiction over crimes by non-Indians against non-Indians committed on such enclaves, it is said, was based on an erroneous premise that § 1152 does not control; at best, the argument goes, *McBratney* creates a narrow exception to the plain command of the statute; this decision should therefore be given only limited application and should not be deemed to govern the handling of other crimes that have no non-Indian victim. A related argument might also be advanced: with rare exceptions, "victimless" crimes are crimes against the whole of the populace; unlike offenses directed at particular non-Indian victims (which implicate the Indian community only incidentally, or accidentally), on-reservation offenses without a particular target necessarily affect Indians and therefore fall outside of the limited *McBratney* exception and squarely within the terms of § 1152.

On the other hand, it may be argued that *McBratney* was premised on a view of the States' right to control the conduct of their citizenry generally anywhere within their territory; the presence or absence of a non-Indian victim is thus irrelevant. Although continuing Federal jurisdiction has been recognized with regard to offenses committed by or against Indians on a reservation, victimless crimes, by definition, involve no particularized injury to Indian persons or property, and therefore, under the *McBratney* rationale, exclusive jurisdiction remains in the States.

We have carefully considered both of these theses and, in our opinion, the correct view of the law falls somewhere between them. The *McBratney* rationale seems clearly to apply to victimless crimes so as, in the majority of cases, to oust Federal jurisdiction. Where, however, a particular

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[2] *Mescalero Apache Tribe* v. *Griffin Bell et al.*, No. 78-926 C (D.N.M. filed Dec. 14, 1978) (jurisdiction over traffic offenses by non-Indians on Indian reservations); *State* v. *Herber*, No. 2CA-CR 1259 (Ariz. Ct. App. April 27, 1978), *pending on motion to reconsider* (authority of State police authorities to arrest non-Indian on Indian reservation).

offense poses a direct and immediate threat to Indian persons, property, or specific tribal interests, Federal jurisdiction continues to exist, just as is the case with regard to offenses traditionally regarded as having as their victim an Indian person or property. While it has heretofore been assumed that as between the States and the United States, jurisdiction is either exclusively State or exclusively Federal, we also believe that a good argument may be made for the proposition that even where Federal jurisdiction is thus implicated, the States may nevertheless be regarded as retaining the power as independent sovereigns to punish non-Indian offenders charged with "victimless" offenses of this sort.

II.

Section 1152 of title 18 provides in pertinent part:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country * * *.[3]

Given its full sweep, this provision would require that Federal law generally applicable on Federal enclaves of various sorts would be equally applicable on Indian reservations. Thus, Federal law with regard to certain defined crimes such as assault, 18 U.S.C. § 113, and arson, 18 U.S.C. § 81, would govern, as would the provisions of the Assimilative Crimes Act, 18 U.S.C. § 13, which renders acts or omissions occurring in areas within Federal jurisdiction Federal offenses where they would otherwise be punishable under State law.[4]

Notwithstanding the provision's broad terms, the Supreme Court has significantly narrowed § 1152's application. Thus, where a crime is committed on a reservation by a non-Indian against another non-Indian exclusive jurisdiction lies in the State absent treaty provisions to the contrary. *United States* v. *McBratney, supra; Draper* v. *United States,* 164 U.S. 240 (1896). Subsequent cases have, for the most part, carefully repeated the precise *McBratney* formula—non-Indian perpetrator and non-Indian victim—and have not elaborated on whether the status of the defendant alone or his or her status in conjunction with the presence of a non-Indian victim is critical.[5] However, the *McBratney* rule was given an

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[3] The current version of § 1152 is not of recent vintage, but has roots in the early 19th century. *See* Act of March 3, 1817, 3 Stat. 383; Act of June 30, 1834, 4 Stat. 733, as amended by Act of March 27, 1854, 10 Stat. 269. *See also* Trade and Intercourse Act of 1790, 1 Stat. 137 (offenses by non-Indians against Indians).

[4] The Assimilative Crimes Act has been regarded as establishing Federal jurisdiction over "victimless" offenses occurring within a Federal enclave. *See, e.g., United States* v. *Barner,* 195 F. Supp. 103 (N.D. Cal. 1961) (reckless driving on air force base); *United States* v. *Chapman,* 321 F. Supp. 767 (E.D. Va. 1971) (possession of marijuana).

[5] *See, e.g., United States* v. *Wheeler,* 435 U.S. 313, 325 n. 21 (1978) ("crimes committed

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added gloss in *New York ex rel. Ray* v. *Martin*, 326 U.S. 496 (1946). The Supreme Court in that case characterized its prior decisions as "stand[ing] for the proposition that States, by virtue of their statehood, have jurisdiction over such crimes notwithstanding [18 U.S.C. § 1152]." 326 U.S. at 500.[6] Similarly, in *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 651 (1930), the Court spoke in the following broad terms: "[Indian] reservations are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards." The Court's rationale thus appears to be rooted at least to some extent in basic notions of federalism.

It is, moreover, significant that the historical practice—insofar as we have found evidence on this matter—has been to regard *McBratney* as authority for the States' assertion of jurisdiction with regard to a variety of "victimless" offenses committed by non-Indians on Indian reservations. Examination of the limited available precedent provided by turn-of-the-century State appellate court decisions reveals that State jurisdiction was upheld with regard to non-Indian offenders charged with violating State fish and game laws while on an Indian reservation. *See, Ex parte Crosby*, 38 Nev. 389, 149 P. 989 (1915).[7] An early Washington State case held that a non-Indian charged with the "victimless" crime of manufacturing liquor on an Indian reservation was also held to be properly

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by non-Indians against non-Indians"); *United States* v. *Antelope*, 430 U.S. 641, 643 n. 2 (1977) ("non-Indians charged with committing crimes against other non-Indians"), 644 n. 4 ("crimes by non-Indians against other non-Indians"); *Village of Kake* v. *Egan*, 369 U.S. 60, 73 (1962) ("murder of one non-Indian by another"); *Williams* v. *United States*, 327 U.S. 711, 714 (1946) ("offenses committed on this reservation between persons who are not Indians"); *Donnelly* v. *United States*, 228 U.S. 243, 271 (1913) ("offenses committed by white people against whites"). *But see United States* v. *Sutton*, 215 U.S. 291, 295 (1909) (characterizing *Draper* as holding that the State enabling act "did not deprive the State of jurisdiction over crimes committed within a reservation by others [except] Indians or against Indians").

[6] That the *Martin* discussion is more than a *post hoc* explanation for the *McBratney* Court's failure to give sufficient weight to the plain language of § 1152 is suggested by the careful language of *United States* v. *Rogers*, 45 U.S. (4 How.) 567, 572 (1846), recognizing Federal jurisdiction under the early version of § 1152 with regard to a crime committed by a non-Indian against a non-Indian victim on a territorial reservation ("where the country occupied by [the Indian tribes] is not within the limits of one of the States, Congress may by law punish any offence [sic] committed there, no matter whether the offender be a white man or an Indian"). *See also, In re Mayfield*, 141 U.S. 107, 112 (1891).

[7] More recently, in *State ex rel. Nepstad* v. *Danielson*, 149 Mont. 438, 427 P. 2d 689 (1967), the Montana Supreme Court expressed a similar view after determining that the application of State law had not been preempted by the passage of 18 U.S.C. § 1165, making unlawful the unauthorized entry onto Indian land for purposes of hunting, fishing, or trapping. In 1971, relying on *Danielson, Crosby*, and opinions of the Attorneys General of Nevada, New Mexico, and Oregon, the Solicitor of Interior opined that a State would have both the power and the right to exercise jurisdiction over non-Indians alleged to have violated State game laws on an Indian reservation. 78 I.D. 101, 104.

within the jurisdiction of the State's courts. *See, State* v. *Lindsey,* 133 Wash. 140, 233 P. 327 (1925).[8] State jurisdiction has also been upheld at least as to a woman regarded by the court as a non-Indian who had been charged with adultery; the charge against the other alleged participant in this consensual offense, an Indian man, was dismissed as falling outside the court's jurisdiction. *See, State* v. *Campbell,* 53 Minn. 354, 55 N.W. 553 (1893).[9] More recent decisions, while not examining the question in depth, have upheld State jurisdiction as to possessory drug offenses, *State* v. *Jones,* 92 Nev. 116, 546 P. 2d 235 (1976), and as to traffic offenses by non-Indians on Indian reservations, *State* v. *Warner,* 71 N.M. 418, 479 P. 2d 66 (1963).[10]

At the same time as *McBratney* has been given such broad application, however, the courts have carefully recognized that Federal jurisdiction is retained with regard to offenses against Indians. The Court in both *McBratney* and *Draper* was careful to limit its holdings to the precise facts presented, reserving the question whether State jurisdiction would also be found with regard to the "punishment of crimes committed by or against Indians, [and] the protection of the Indians in their improvements." *See* 104 U.S. at 624. Subsequent decisions have expressly recognized that where a crime is committed in Indian country by a non-Indian against the person or property of an Indian victim, Federal jurisdiction will lie. *United States* v. *Chavez,* 290 U.S. 357 (1933) (theft); *United States* v. *Ramsey,* 271 U.S. 467 (1926) (murder); *Donnelly* v. *United States,* 228 U.S. 243 (1913) (murder). Insight concerning the significance of and reasoning behind this exception to *McBratney's* broad sweep is provided by *United States* v. *Bridleman,* 7 F. 894 (1881), a decision of the U.S. District Court for Oregon. The case involved the theft, on the Umatilla Reservation, of an Indian's blanket by a white man. Judge Deady, writing without the benefit of the *McBratney* decision decided the same year, upheld Federal jurisdiction, reasoning that while the admission of Oregon into the Union in 1859 ousted general territorially based jurisdiction previously asserted by the Federal Government, "the jurisdiction which arises out of the subject—the intercourse between the inhabitants of the state and the Indian tribes therein—remained as if no change had taken place in the relation of the territory to the general government." *Id.* at

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[8] Where the identical acts that constitute a violation of State law would also constitute a violation of a Federal statute expressly prohibiting conduct such as unauthorized hunting and fishing or manufacture or sale of liquor on a reservation without attempting to preempt State jurisdiction, a separate prosecution under Federal law would of course remain a possibility. *See, e.g., United States* v. *Lanza,* 260 U.S. 377, 382 (1922).

[9] The only other early case with which we are familiar upheld State jurisdiction with regard to one who appeared to be a non-Indian charged with obstructing the use of Indian lands. *See, State* v. *Adams,* 213 N.C. 243, 195 S.E. 822 (1938). The statement of the case in the appellate court's opinion is extremely obscure; we therefore regard the apparent holding as having limited significance.

[10] *See also,* Op. Ariz. Att'y Gen. No. 58-71 (1958).

899. He therefore concluded that to the extent that § 1152 provided for punishment of persons "for wrong or injury done to the person or property of an Indian, and *vice versa*," it remained in force. *Id.*

Bridleman and the numerous subsequent cases thus support the view that Federal jurisdiction exists with regard to offenses committed by non-Indians on the reservation against the person or property of Indians.

The principle that tangible Indian interests—in the preservation of person and property—should be protected dates from the earliest days of the Republic when it was embodied in the Trade and Intercourse Acts.[11] To say that these tangible interests should be protected is not, however, necessarily to say that a generalized interest in peace and tranquility is sufficient to trigger continuing Federal jurisdiction. *McBratney* itself belies that view since the commission of a murder on the reservation—a much more significant breach of the peace than simple vagrancy, drug possession, speeding, or public drunkenness—provided no basis for an assertion of Federal jurisdiction. Indeed, as the reasoning of *Bridleman* suggests, it is necessary that a clear distinction be made between threats to an Indian person or property and mere disruption of a reservation's territorial space.

We therefore believe that a concrete and particularized threat to the person or property of an Indian or to specific tribal interests (beyond preserving the peace of the reservation) is necessary before Federal jurisdiction can be said to attach. In the absence of a true victim, unless it can be said that the offense peculiarly affects an Indian or the tribe itself, *McBratney* would control, leaving in the States the exclusive jurisdiction to punish offenders charged with "victimless" crimes. Thus, in our view, most traffic violations, most routine cases of disorderly conduct, and most offenses against morals such as gambling which are not designed for the protection of a particular vulnerable class, should be viewed as having no real "victim," and therefore to fall exclusively within State competence.

In certain other cases, however, a sufficiently direct threat to Indian persons or property may be said to bring an ordinarily "victimless" crime within Federal jurisdiction. Certain categories of offenses may be identified that routinely involve this sort of threat to Indian interests. One such category would be crimes calculated to obstruct or corrupt the functioning of tribal government. Included in this category would be bribery of tribal officials in a situation where State law in broad terms prohibits bribery of public officials;[12] such an offense would cause direct injury to the tribe

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[11] *See, e.g.*, § 5, Act of July 22, 1790, 1 Stat. 137 ("crimes upon, or trespass against, the person or property of any friendly Indian or Indians"). *See also, Donnelly* v. *United States, supra,* 228 U.S. at 272 ("crimes committed by white men against the persons or property of the Indian tribes"); *United States* v. *Chavez,* 290 U.S. at 365 ("where the offense is against an Indian or his property").

[12] The effect of the Assimilative Crimes Act is to make punishable under Federal law minor offenses as defined and punished under State law. *See, Smayda* v. *United States,* 352 F. (2d) 251, 253 (9th Cir. 1965). Whether bribery of tribal officials would constitute an offense punishable under Federal law would therefore depend on the precise terms of the applicable State statute and whether it applied to public officials generally or only to enumerated officers of the State or local governments.

and cannot therefore be regarded as truly "victimless." A second group of offenses that may directly implicate the Indian community are consensual crimes committed by non-Indian offenders in conjunction with Indian participants, where the Indian participant, although willing, is within the class of persons which a particular State statute is specifically designed to protect. Thus, Federal jurisdiction will lie under 18 U.S. § 2032 for the statutory rape of an Indian girl, as would a charge of contributing to the delinquency of a minor, where assimilated into Federal law pursuant to 18 U.S.C. § 13. A third group of offenses that may be punishable under the law of individual States and assimilated into Federal law pursuant to the Assimilative Crimes Act would also seem intrinsically to involve the sort of threat that would cause Federal jurisdiction to attach where an Indian victim may in fact be identified. Such crimes would include reckless endangerment, criminal trespass, riot or rout, and disruption of a public meeting or a worship service conducted by the tribe.

In certain other cases, conduct that is generally prohibited because of its ill effects on society at large and not because it represents a particularized threat to specific individuals may nevertheless so specifically threaten or endanger Indian persons or property that Federal jurisdiction may be asserted. Thus, speeding in the vicinity of an Indian school or in an obvious attempt to scatter Indians collected at a tribal gathering, and a breech of the peace that borders on an assault may in unusual circumstances be seen to constitute a Federal offense.

III.

Whatever the contours of the area in which Federal jurisdiction may be asserted, a final critical question remains to be considered: whether State authorities may also legally charge a non-Indian offender with commission of an offense against State law or whether Federal jurisdiction, insofar as it attaches, is exclusive. This issue is an exceedingly difficult one and many courts, without carefully considering the question, have assumed that Federal jurisdictions whenever it obtains is exclusive. We nevertheless believe that it is a matter that should not be regarded as settled before it has been fully explored by the courts. Although *McBratney* firmly establishes that State jurisdiction, where it attaches because of the absence of a clear Indian victim, is exclusive, we believe that, despite Supreme Court *dicta* to the contrary, it does not necessarily follow that, where an offense is stated against a non-Indian defendant under Federal law, State jurisdiction must be ousted.

The exclusivity of Federal jurisdiction vis-a-vis the States with regard to 18 U.S.C. § 1153, the Major Crimes Act, has been recognized, *see, e.g., Seymour* v. *Superintendent,* 368 U.S. 351 (1962), but has only formally been addressed and decided in the past year. *See, United States* v. *John,* 437 U.S. 634, 651 (1978). The Court in *John* relied on notions of preemption and the slight evidence provided by the legislative history of this

provision to reach a result that had long been assumed by the lower courts.[13]

Section 1152 has likewise been viewed as ousting State jurisdiction where Indian defendants are involved.[14] Supreme Court *dicta*, moreover, suggests that Federal jurisdiction may similarly be exclusive where offenses by non-Indians against Indians within the terms of § 1152 are concerned.[15] Square holdings to this effect are, however, rare. The Supreme Court of North Dakota has held that State jurisdiction is ousted where Federal jurisdiction under § 1152 is seen to exist in cases where non-Indians have committed offenses against Indians on the reservation.[16] At least, three other earlier cases suggest a contrary result, however, recognizing that, as in *McBratney,* the States have a continuing interest in the prosecution of offenders against state law even while Federal prosecution may at the same time be warranted.[17]

Although it would mean that § 1152 could not be uniformly applied to provide for exclusive Federal jurisdiction in all cases of interracial crimes, a conclusion that both Federal and State jurisdiction may lie, where conduct on a reservation by a non-Indian presenting a direct and immediate

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[13] *See, e.g., Application of Konaha,* 131 F. (2d) 737 (7th Cir. 1942); *In re Carmen's Petition,* 165 F. Supp. 942, 948 (N.D. Cal. 1958), *aff'd sub nom., Dickson* v. *Carmen,* 270 F. (2d) 809 (9th Cir. 1959), cert. denied, 361 U.S. 934 (1960).

[14] *See, e.g., United States ex rel. Lynn* v. *Hamilton,* 233 F. 685 (W.D.N.Y. 1915); *In re Blackbird,* 109 F. 139 (W.D. Wis. 1901); *Application of Denetclaw,* 83 Ariz. 299, 320 P.2d 697 (1958); *State* v. *Campbell,* 53 Minn. 354, 55 N.W. 553 (1893); *Arquette* v. *Schneckloth,* 56 Wash. 2d 178, 351 P.2d 92 (1960).

[15] *See, State of Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation,* 47 U.S.L.W. 4111, 4113 (Jan. 16, 1979) ("State law reaches within the exterior boundaries of an Indian reservation only if it would not infringe 'on the right of reservation Indians to make their own laws and be ruled by them.' *Williams* v. *Lee,* 358 U.S. 217, 219-20. As a practical matter, this has meant that criminal offenses by or against Indians have been subject only to federal or tribal laws . . . except where Congress in the exercise of its plenary and exclusive power over Indian affairs has 'expressly provided that state laws shall apply' "); *Williams* v. *Lee,* 358 U.S. at 220 ("if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other [than state] courts has remained exclusive"); *id.* at n. 5 ("Congress has granted to the federal courts exclusive jurisdiction upon Indian reservations over 11 major crimes. And non-Indians committing crimes against Indians are now generally tried in federal courts . . . ."); *Williams* v. *United States,* 327 U.S. 711, 714 (1946) ("the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed [on the reservation] by one who is not an Indian against one who is an Indian"). *See also, Bartkus* v. *Illinois,* 359 U.S. 121, 161 (1959) (Black, J., dissenting); *United States* v. *Cleveland,* 503 F. (2d) 1067 (9th Cir. 1975) (Federal law applies to assault by non-Indian against an Indian).

[16] *State* v. *Kuntz,* 66 N.W. 2d 531 (N. Dall. 1954) (State prosecution of non-Indian for unlawful killing of livestock of Indian on Indian reservation dismissed on grounds that Federal jurisdiction of the offense was exclusive).

[17] *See, State* v. *McAlhaney,* 220 N.C. 387, 17 S.E. 2d 352 (1941) (State jurisdiction upheld as to non-Indian charged with kidnapping Indian on Indian reservation); *Oregon* v. *Coleman,* 1 Ore. 191 (1855) (territorial jurisdiction upheld as to non-Indian charged with sale of liquor to Indian on reservation notwithstanding existence of comparable offense under Federal law). *See also, United States* v. *Barnhart,* 22 F. 285, 291 (D. Ore. 1884) (Federal jurisdiction would exist as to non-Indian charged with manslaughter of Indian on reservation even if State court had jurisdiction of offense under State law) (dicta).

threat to an Indian person or property constitutes an offense against the laws of each sovereign, could not be criticized as inconsistent or anomalous. Section 1153 was enacted many years after § 1152 had been introduced as part of the early Trade and Intercourse Acts; its clear purpose was to provide a Federal forum for the prosecution of Indians charged with major crimes, a forum necessary precisely because no State jurisdiction over such crimes was contemplated. Consistent with this purpose, § 1152 may properly be read to preempt State attempts to prosecute Indian defendants for crimes against non-Indians as well.

In cases involving a direct and immediate threat by a non-Indian defendant against an Indian person or property, however, a different result may be required. The State interest in such cases, as recognized by *McBratney*, is strong. Section 1152 itself recognizes that where an Indian is charged with an interracial crime against a non-Indian, Federal jurisdiction is to be exercised only where the offender is not prosecuted in his or her own tribal courts. But in no event would the State courts have jurisdiction in such a case, absent a separate grant of jurisdiction such as that provided by Pub. L. No. 83-280, 67 Stat. 588. An analogous situation is presented where a non-Indian defendant is charged with a crime against an Indian victim; the Federal interest is not to preempt the State courts, but only to retain authority to prosecute to the extent that State proceedings do not serve the Federal interest.

This result follows from the preemption analysis set forth in *Williams* v. *Lee,* where the Court recognized that, in the absence of express Federal legislation, the authority of the States should be seen to be circumscribed only to the extent necessary to protect Indian interests in making their own laws and being ruled by them. While significant damage might be done to Indian interests if Indian defendants could be prosecuted under State law for conduct occurring on the reservation, no equivalent damage would be done if State as well as Federal prosecutions of non-Indian offenders against Indian victims could be sustained.

Finally, it might be argued that such a result is consistent with principles governing the administration of other Federal enclaves. It is generally recognized that a State may condition its consent to a cession of land involving Government purchase or condemnation by reserving jurisdiction to the extent consistent with the Federal use. *Kleppe* v. *New Mexico*, 426 U.S. 529, 540 (1976); *Paul* v. *United States,* 371 U.S. 245, 265 (1963). Although Indian reservations are in many respects unique, insofar as they existed in most cases prior to statehood rather than arising as a result of a cession agreement or condemnation proceedings, an analogy may nevertheless serve.

Since, in most cases, States may retain concurrent jurisdiction except to the extent that that would interfere with the Federal use, they may do so here as well by prosecuting non-Indian offenders while Federal jurisdiction at the same time remains as needed to protect Indian victims in the event that a State prosecution is not undertaken or is not prosecuted in good

faith. For these reasons, therefore, we believe a strong possibility exists that prosecution may be commenced under State law against a non-Indian even in cases where, as a result of conduct on the reservation that represents a direct and immediate threat against an Indian person or property, Federal jurisdiction may also attach.

IV. Conclusion

In sum, although we understand that in many cases commission by non-Indians of crimes traditionally regarded as victimless touches in a significant way upon the peace and tranquility of Indian communities, as a general rule we believe that such offenders fall within the exclusive jurisdiction of State courts. A more limited class of crimes involving direct injury to Indian interests should, however, be recognized as having Indian victims—whether the tribe itself, an Indian who falls within the class of persons to whom certain statutes are particularly designed to afford protection, or an individual Indian or group of Indians who are victimized by conduct that either as a matter of law or as a matter of fact constitutes a direct and immediate threat to their safety. In such cases, Federal law enforcement officers may properly prosecute non-Indian offenders in the Federal courts. We also believe that despite the common understanding that jurisdiction over crimes on Indian reservations is either exclusively State or exclusively Federal, a substantial case can be made for the proposition that the States are not ousted from jurisdiction with regard to offenses committed by non-Indian offenders that pose a direct and substantial threat to Indian victims, but in their separate sovereign capacities may prosecute non-Indian offenders for violations of applicable State law as well.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

March 28, 1979

79-19 MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

Trading with the Enemy Act (50 U.S.C. App. § 1 *et seq.*)—Attorney General—Title Claim of the Commissioner of Customs—Decision of the Director, Office of Alien Property, Allowing the Claim Reversed

In October 1978, at the request of the Attorney General's Office, we reviewed the decision of the Director of the Office of Alien Property of the Department of Justice disposing of five claims remaining under the Trading with the Enemy Act, 50 U.S.C. App. § 1 *et seq.*

We had no problem with the decisions concerning four of the claims; the Director's decision on them was allowed to take effect. However, we believed that one claim—Title Claim No. 63801 filed by the Commissioner of Customs—raised substantial legal questions. Because of these questions, and because a reversal of the Director's decision on this claim would result in the disputed funds (less 5 percent) being paid to private parties rather than to the Treasury, *see* 50 U.S.C. App. §§ 39, 2012, we recommended that, pursuant to the regulations of the Office of Alien Property, 8 CFR § 502.23, the Attorney General order a review of the Director's decision upholding that claim. By virtue of the Attorney General's order to this effect, a final decision on this one claim is now required. Pursuant to 28 U.S.C. § 510, the Attorney General has delegated that function to you. *Id.*

For the reasons given in the attached proposed decision and summarized herein,* we do not believe that the Commissioner of Customs is entitled to file a claim under the Act. We therefore recommend that you reverse the decision of the Director and deny the claim filed by the Commissioner of Customs.

Title Claim No. 63801 originated from Customs' seizure of imported

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* The decision was signed by the Associate Attorney General on May 8, 1979.

semiprecious and synthetic stones and diamonds in the early 1940s. They were seized for violation of the customs laws and were turned over to the Alien Property Custodian, pursuant to a vesting order issued in 1945, on the ground that they were enemy property; the Custodian later sold them for approximately $1,291,000. Customs later filed a claim for this money, contending that it had proprietary rights in the goods prior to vesting.

The Chief Hearing Examiner of the Office of Alien Property, an entity in this Department and the successor of the Alien Property Custodian, rejected Customs' claim, primarily because, in his opinion, Customs lost its interest in the property when it surrendered the goods to the Alien Property Custodian. The Director of the Office of Alien Property (now the Assistant Attorney General in charge of the Civil Division, 28 CFR § 0.47) reversed this decision, and allowed Customs' claim, on the basis that Customs had an interest in the property cognizable under the Act, an interest not defeated by either the transfer to the Alien Property Custodian or the subsequent sale of the goods.

We believe that another issue not discussed in the Director's initial decision (although briefed in the proceedings and referred to in the Chief Hearing Examiner's decision) is determinative here. The remedies provided in the Act are exclusive, and the pertinent provision of the Act allows only a "person" to file a claim for return of property. The Commissioner of Customs contends that he satisfies this requirement, for the reason that the Act defines "person" to include a "body politic" and that the United States meets this latter definition. We believe, as detailed in the proposed decision, that the structure of the Act, its underlying purposes, the legislative history of the term "person," and judicial authority lead to the conclusion that the United States is not a "person" within the Act and thus may not file a claim for return of property.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE ASSOCIATE ATTORNEY GENERAL

WASHINGTON, D.C. 20530

In the Matter of the Commissioner of Customs Title Claim No. 63801

Decision of the Associate Attorney General

Pursuant to the authority vested in the Attorney General by 8 CFR § 502.23, he directed a review of the initial decision of the Director, Office of Alien Property, with respect to Title Claim No. 63801 filed by the Commissioner of Customs under the Trading with the Enemy Act, as amended, 50 U.S.C. App. § 1 *et seq.* The Attorney General pursuant to 28 U.S.C. § 510 has delegated to me the function of rendering a decision on the claim. Upon due consideration of the initial decision of the Director of the Office of Alien Property and the submission of the Commissioner of Customs, I have concluded that the Commissioner of Customs is not entitled to file a claim under section 9(a) of the Trading with the Enemy Act. Accordingly, the decision of the Director of the Office of Alien Property is overruled and Title Claim No. 63801 is hereby denied.

The factual circumstances underlying the claim are set out in detail in the initial decision of the Director of the Office of Alien Property and need not be repeated at any length here. Briefly, the claim relates to the seizure by Customs, for violation of the customs laws, of imported semi-precious and synthetic stones and diamonds in the early 1940s. These commodities were turned over to the Alien Property Custodian pursuant to a vesting order issued in 1945 on the ground that they were enemy property; the Custodian later sold them for a total sum of about $1,291,000. Customs subsequently filed a claim for the proceeds, contending that its seizure gave it proprietary rights in the commodities prior to vesting. Customs also relies on the decision in *von Clemm* v. *Smith,* 255 F. Supp. 353 (S.D.N.Y. 1965), *aff'd,* 363 F. (2d) 19 (2d Cir. 1966), as establishing that the customs laws were, in fact, violated.

The Chief Hearing Examiner of the Office of Alien Property rejected Customs' claim, primarily on the basis that Customs lost its interest in the property due to its surrender of the commodities to the Alien Property Custodian and his subsequent sale of the goods. The Director of the Office of Alien Property disapproved this decision, and allowed Customs' claim, on the basis that Customs had an interest in the property which was cognizable under the Act and which was not defeated by either the transfer

to the Alien Property Custodian or the subsequent sale of the goods.

Section 7(c) of the Act provides that all property conveyed to or seized by the Alien Property Custodian "shall be held, administered and disposed of as elsewhere provided in this Act." 50 U.S.C. App. § 7(c).[1] In this proceeding the Commissioner of Customs has founded his claim under section 9(a) of the Act,[2] which provides in pertinent part:

> Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled.

As is evident from this provision, only a "person" is entitled to file a claim for a return of property. The Commissioner of Customs contends that he satisfies this requirement, on the ground that section 2(c) of the Act defines "person" to include a "body politic," 50 U.S.C. App. § 2(c), and that the United States meets this latter definition. I believe that the structure of the Act, its underlying purposes, the legislative history of the definition of "person," and judicial decisions interpreting that term all refute this interpretation of the Act.[3] I thus conclude that the Commissioner of Customs is not entitled to file a claim under the Act.

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[1] The decisions construing this provisions have held that the remedies provided in the Act are exclusive. *Becker Steel Company* v. *Cummings*, 296 U.S. 74, 79 (1935); *La Due & Company* v. *Rogers*, 259 F. (2d) 905, 908 (7th Cir. 1958).

[2] Portions of the record might suggest that the Commissioner of Customs' claim is also founded on section 32 of the Act, 5 U.S.C. App. § 32, which provides for administrative relief to certain classes ineligible under section 9(a). I doubt that the Customs' claim is in fact founded on section 32, in light of its explicit statement in the record that "Title Claim No. 63801 is filed in accordance with section 9(a) of the Trading with the Enemy Act." Preliminary Trial Brief of the Commissioner of Customs at 9. In any event, the text in section 32 makes clear that only a "person" is entitled to file claims under that provision, and thus the conclusion and rationale set forth in the text would apply to claims under section 32 as well as under section 9(a).

[3] Although this issue was discussed in the proceedings before the Chief Hearing Examiner, he only briefly mentioned it in his decision, and the Director did not discuss it at all in her decision.

A.

In my view, an examination of the structure of the Act and the underlying purposes of section 9(a) strongly suggests that Congress did not intend for the United States to be a claimant thereunder. It allows claimants to apply to the Alien Property Custodian for a return of vested property; if a claimant does not obtain administrative relief, he is authorized to bring suit to obtain a return. This provision was deemed by the Congress as "necessary to preserve and protect innocent claimants." S. Rept. No. 111, 65th Cong., 1st sess. 8 (1917); S. Rept. No. 113, 65th Cong., 1st sess. 8 (1917). *See also* H. Rept. No. 85, 65th Cong., 1st sess. 4 (1917). The courts have indicated that, in the absence of such a remedy, the Act would be of doubtful constitutionality. *Becker Steel Company* v. *Cummings, supra,* at 79.

This structure of section 9(a) hardly seems designed to afford the United States a remedy; rather, these factors suggest that the United States was not to have a remedy under that provision. It seems unreasonable to attribute an intent on the part of Congress to allow the United States, in effect, to file claims against itself and then to bring suit against itself in court.[4] Not only does this seem to be wasteful of governmental resources which could be devoted to other efforts, but the possibility of one agency suing the Alien Property Custodian would raise constitutional questions relating to a proper case or controversy. *See, e.g., United States* v. *Easement and Right of Way, Etc.,* 204 F.Supp. 837 (E.D. Tenn. 1962); *The Pietro Campanella,* 47 F.Supp. 374 (D. Md. 1942) (involving a controversy arising under the Trading with the Enemy Act); *but cf., United States* v. *Nixon,* 418 U.S. 683, 692–97 (1974).

To allow this result would seem particularly unjustified in light of the congressional intent underlying section 9(a). As noted above, Congress provided for a remedy in section 9(a) because such was necessary to protect innocent claimants. Since an agent of the United States could already be holding the property, it would hardly seem that the interests of the United States require the protection afforded by that provision. Concededly, Congress provided that the Alien Property Custodian was to make payments to the United States in certain instances—*e.g.*, the payment of taxes, § 24(b), 50 U.S.C. App. § 24(b), and the return of money paid by the United States under license, assignment, or sale of patents, § 27, 50 U.S.C. App. § 27. While such provisions might suggest that Congress believed that the interests of the United States were not fully protected by custody of the property in the hands of the Alien Property Custodian, they also suggest that, where Congress wished to provide for payments by the Alien Property Custodian to the United States, it so

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[4] The courts have made clear that a suit against the Alien Property Custodian is, in effect, a suit against the United States. *See, e.g., Cummings* v. *Deutsche Bank,* 300 U.S. 115, 118 (1937); *Becker Steel Company* v. *Cummings, supra,* at 78.

provided explicitly.[5] I thus do not believe that section 9(a) was intended by Congress to afford a remedy to the United States.

The fact that the major portion of the excess funds held by the Alien Property Custodian are to be paid into the War Claims Fund, *see* 50 U.S.C. App. §§ 39(d), 2012(a), does not alter this conclusion. Since such funds will not be retained by the United States, but rather will be paid to private parties for war losses, an argument might be made that the interests of the United States would be better served if it would take action under section 9(a) so as to retain the funds. However, I would question, first, whether those interests are any less served by payment to these private parties than by transfer to the Treasury to serve other purposes. Congress has obviously decided that the payments to these private parties is in the interest of the United States, and it is not for the Attorney General to question that judgment. While it might be argued that Congress could only intend to transmit to those private parties such funds that did not belong to the United States or any other proper claimant, this argument appears to me to asssume its own conclusion. If Congress had intended such a result, it presumably would have explicitly so provided in the same way it did in other provisions of the Act where the United States' interests were explicitly preserved.

B.

The legislative history of the term "body politic" also supports this result. Initially this term was not included in the definition of "person" under the bill. That omission was the occasion of the following colloquy on the House floor:

> Mr. LENROOT. Upon this subject of lienors the bill provides that any person not an enemy having a lien may have a remedy. The word "person" is defined in the bill, but what I want to ask the gentleman is this question: In the case of securities subject to taxation by the State or municipality and upon which they have a lien for tax, under the provisions of this bill the State or municipality will lose all such taxes, will they not?
>
> Mr. MONTAGUE. Why does the gentleman think so?
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> Mr. LENROOT. Because section 14 provides that there shall

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[5] This view is supported by the Supreme Court's decision in *Davis* v. *Pringle*, 268 U.S. 315 (1925), where the Court held that the United States was not a "person" for purposes of a provision in the Bankruptcy Act giving priority to debts "owing to any person who by the laws of the States of the United States is entitled to priority." The Court's reasoning could well apply to this case:

> It is incredible that after the conspicuous mention of the United States in the first place at the beginning of the section and the grant of a limited priority, Congress should have intended to smuggle in a general preference by muffled words at the end * * *. Elsewhere in cases of possible doubt when the Act means the United States it says the United States. We are of opinion that to extend the definition of 'person' here to the United States would be 'inconsistent with the context.'

be no lien upon any of this property except as specifically provided in the bill. That is in section 9, page 14. The word "person" as defined in the bill does not include State governments or municipalities.

Mr. MONTAGUE. The gentleman may be correct, and the definition of "person" may not embrace States or political subdivisions. I incline to believe he is correct and perhaps an amendment should be offered to meet the difficulty. [55 CONG. REC. 4847 (1917).]

The following day this same problem was also addressed:

Mr. WALSH. Mr. Chairman, I offer the following amendment:

The Clerk read as follows:

Page 25, line 23, after the word "corporation," insert "or State or any political or municipal subdivision thereof."

Mr. WALSH. Mr. Chairman, this amendment is offered because the word "person" used in subsequent sections of the act may not include a State, city, or town or any other political subdivision of the State. It might be that an alien enemy would have property situated in some State or some political subdivision of a State upon which property the State or the city or town or township might expect to collect State or local taxes, and this amendment to the definition of the word "person" would permit the State or a municipal, local, or political subdivision of a State to present its claim for the taxes assessed on the property to the custodian of such property provided for in this bill and have that claim adjudicated or passed upon and approved and the money paid over. The State, city, county, township, or whatever subdivision of the State it might be might have a lien on that property for taxes or for betterments and the like, and under the provisions of the bill it is not clear in my opinion that the word "person" as defined in this paragraph and especially used in the sections following would include a city, town, township, or a county or the State.

I have in mind, for instance, where a person who under the provisions of this bill would be classed as an alien enemy, owning a summer estate and that estate being assessed and liable for taxes. I doubt if under the provisions of the bill the town in which that estate is situated would be able to file its claim for taxes with the alien property custodian and receive payment therefor.

Mr. MANN. Will the gentleman yield?

Mr. WALSH. Yes.

Mr. MANN. Does not the word "corporation" include it?

Mr. WALSH. It would not include a State, and it would not include some towns in Massachusetts, for instance, which are not strictly incorporated.

Mr. MANN. They do not have to be incorporated.

Mr. WALSH. Well, there is a doubt about it applying to such corporations.

Mr. MANN. Municipal corporation.

Mr. WALSH. Municipal corporation is not included in the division.

Mr. MANN. It says corporation.

Mr. WALSH. But the word corporation as used in the bill, as I have stated, especially in subsequent sections, would, I am inclined to believe be interpreted to mean that it applied only to business or commercial corporations and not to municipal or political corporations. This amendment would clear up the doubt. Certainly after the property got into the custody of the Treasury of the United States or into the custody of this alien-property custodian, if there was any doubt about whether it included a political subdivision of a State and it meant the payment of money, the doubt probably would be resolved against the person: that is to say, the State, county, city, or town that was claiming payment. Certainly it would seem these taxes should not be lost to the State or localities levying them.

Mr. ELSTON. The gentleman is trying to particularize and cover all possible stages. Why can not you say corporation, body politic, or municipal? That would cover everything. If you said body politic it would cover it all.

Mr. WALSH. Well, Mr. Chairman, I ask unanimous consent to withdraw my amendment and substitute therefor, in line 23, page 25, the words "or body politic" after the word "corporation," in view of the suggestion of my learned friend, the gentleman from California [Mr. ELSTON].

The CHAIRMAN. The gentleman from Massachusetts asks unanimous consent to modify his amendment to the extent stated. Is there objection?

There was no objection.

Mr. MILLER of Minnesota. Does the gentleman think that a State is a body politic?

Mr. WALSH. I do not know what else it is if it is not a body politic.

The CHAIRMAN. The Clerk will report the amendment as modified.

The Clerk read as follows:

Page 25, line 23, after the word "corporation," insert "or body politic."

The CHAIRMAN. The question is on the amendment.

Mr. MILLER of Minnesota. Mr. Chairman, I desire to make an inquiry about this term "body politic" of the gentleman from Massachusetts [Mr. WALSH]. I have no doubt but that in a very

general sense a body politic consists of any body or group of individuals grouped together for governmental political purposes. That is old language that used to be current a hundred years ago or more. It has practically disappeared from the textbooks and from the decisions, and in a strictly technical sense I question whether a State is a body politic, as States are organized now as parts of the Federal Government. Why not leave it as it was originally?

Mr. ELSTON. It is not intended to refer to States within the United States at all?

Mr. MILLER of Minnesota. Oh, I understand so. Why not leave that "or corporation, commercial or municipal"?

Mr. WALSH. Does the gentleman desire an answer from me?

Mr. MILLER of Minnesota. I am propounding my inquiry to the distinguished gentleman from Massachusetts.

Mr. WALSH. Mr. Chairman, in answer to the inquiry propounded by the gentleman from Minnesota, I would say that I think a State is a body of citizens upon whom are conferred certain rights by the Congress of the United States in pursuance of the Constitution of the United States. They are given certain duties to perform and are subject to certain liabilities, and certainly that political division could be construed to be a body politic just as much as a city which might be incorporated within a State, by and under the constitution of that State, the citizens of which should be given certain rights and privileges and would be subject to certain liabilities. The State would include the city and the city would be a body politic, certainly; and I think the State would be a body politic, perhaps raised to the "nth" power. Has the gentleman from Illinois [Mr. MANN] completed the search he desired to make?

Mr. MILLER of Minnesota. Does not the gentleman think the language would be improved if he were to strike out the word "or," before the word "corporation," and say "corporation, municipal corporation, or State"? Then there would not be any doubt about it.

The CHAIRMAN. The time of the gentleman from Minnesota has expired.

Mr. WALSH. Mr. Chairman, inasmuch as the modified amendment has been seconded by a member of the committee, I will ask the gentleman from Virginia whether the chairman will accept the amendment?

Mr. MONTAGUE. Mr. Chairman, the amendment is agreeable to me.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Massachusetts.

The amendment was agreed to. [55 CONG. REC. 4917-18 (1917).]

In my view, the genesis and entire focus of this debate was the question whether the states or political subdivisions thereof would be able to present claims to the Alien Property Custodian. In the end, the House amended the term "person" to include a "body politic" so as to allow for this result; and the term was included in the statute as enacted. As such, I believe it would go beyond Congress' intent to include the United States—which was not mentioned at all in the debate—within the term "body politic."

The Commissioner of Customs has raised several objections to such a conclusion. He argues, first, that the United States has been called a "body politic" in the case law, *see United States* v. *Maurice,* 26 Fed. Case No. 15,747 (D. Va. 1823), *see also, United States* v. *Tingey,* 30 U.S. 115, 128 (1831), and the United States must thus be deemed to be such under the Trading with the Enemy Act. He also refers to a definition in *Black's Law Dictionary* 222 (4th ed. 1968) defining body politic as "a social compact by which the whole people convenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good," and, alternatively, as a "state or nation or public associations." Here, however, the determinative question is congressional intent; while the existing case law or accepted definitions might afford some basis for interpreting what Congress meant, the debate on the House floor—which focussed on the states and municipalities and did not mention the United States at all—is a much surer guide to what Congress intended by the term "body politic."

The Commissioner also points to the debate on the House floor as supporting his contention that the United States is a body politic. He first states that the phrase "State or any political or municipal subdivision thereof" was originally suggested in the House, but was withdrawn in favor of the term "body politic." He also refers to the fact that Representative Elston said it would "cover everything," and that Representative Miller stated that he had "no doubt but that in a very general sense a body politic consists of any body or group of individuals grouped together for governmental political purposes." While these aspects of the debate, taken alone, might suggest a broad interpretation of the term body politic, I believe any such interpretation would ignore the underlying genesis and focus of the debate—*i.e.*, the claims of the States and smaller political entities.

C.

The judicial decisions in this area further support my conclusion. In *United States* v. *Securities Corporation General,* 4 F. (2d) 619, 622 (D.C. Cir. 1925), *aff'd,* 269 U.S. 283 (1925), the court responded to the contention that the United States was entitled to satisfy war claims against Germany out of the funds held by the Alien Property Custodian:

> It is nowhere provided in the act that enemy funds in the possession of the defendants may be subjected to the payment of

claims due the United States. *Nor do we think that the United States is a "person," as mentioned in section 9 of the act, or such a party as can take advantage of the provisions thereof.* . . . The fund has been set aside by the act for the satisfaction of such claims as may be legally brought against it by claimants other than the United States. The United States has relinquished any interest it may have had in the fund in favor of creditors of the enemy, in this instance the German government. [Emphasis added.]

In an unreported decision, Judge Faris of the Eastern District of Missouri responded in the same way to a similar contention:

> By section 9 of the act it was enacted, however, that the money accruing from such confiscations might be used in paying debts due by the Imperial German Government to loyal citizens of the United States. *It is then, obviously, only upon the theory that the United States is a person, within the meaning of section 9 of the act, that such a view can stand for a minute.* I think this is so obviously erroneous, as I have already briefly attempted to point out, that the matter needs no further exposition* * *.
>
> Again, this fund was, absent section 9, the property of the United States for any use to which the United States wished to devote it. *The very fact that this section was enacted proves that the word "person" in the act does not include the United States.* [Emphasis added.] [*Mercantile Trust Co.* v. *White,* printed in Record at 32–37, *Hicks* v. *Mercantile Trust Company,* 269 U.S. 283 (1925).]

While these decisions dealt with a different issue than the one presented here, the courts clearly believed that the United States was not a person entitled to assert claims under section 9(a).

The Commissioner notes that the Supreme Court, in reviewing these decisions, did not adopt the rationale that the United States was not a "person" within section 9(a). Rather, the Court said:

> Even assuming, notwithstanding *Davis* v. *Pringle,* 268 U.S. 315, 318, that the United States is a "person" given the right to sue by § 9, there is no reservation of priority in the Act, or of a right to intermeddle in the private suit of another, or of any advantage that it might have retained as captor of the fund. Whether from magnanimity or forgetfulness, it has assumed the position of a trustee for the benefit of claimants and has renounced the power to assert a claim except on the same footing and in the same way as others, if at all. [*White* v. *Mechanics Securities Corporation,* 269 U.S. 283, 301 (1925).]

The Supreme Court's reference to *Davis* v. *Pringle,* a case in which the Court held that the United States was not a "person" within the meaning of the Bankruptcy Act, could suggest that the Court entertained these same doubts under the Trading with the Enemy Act. In any event, the

Court certainly said nothing to refute the lower courts' opinions on this subject, and the fact that it chose an alternate rationale cannot mean that the lower courts' decisions are deprived entirely of their force or persuasive weight. I thus believe that these decisions may legitimately be relied on in support of my conclusion that the United States is not entitled to file a claim under section 9(a).

D.

One aspect of the Act might suggest a conclusion different than that reached here. Section 24(a) of the Act provides in part:

> The Alien Property Custodian is authorized to pay all taxes (including special assessments), heretofore or hereafter lawfully assessed by any body politic against any money or other property held by him or by the Treasurer of the United States under this Act * * *. [50 U.S.C. App. § 24(a).]

Even though this provision refers only to taxes assessed by a "body politic," Congress intended that it would "permit the Alien Property Custodian to pay all lawful taxes." H. Rept. No. 1565, 67th Cong., 4th sess., 6 (1923). Indeed, the provision has been interpreted to impose a duty on the Alien Property Custodian to pay Federal income taxes. 33 Op. A.G. 511 (1923). This provision could thus suggest that Congress deemed the United States to be a "body politic" under the Act.

I doubt, however, whether this is actually the case, at least with respect to situations involving claims of the United States. As we have discussed above, the structure and underlying purposes of the Act, its legislative history, and judicial decisions all indicate that the United States is not a person within section 9(a). I do not believe that Congress' action on an entirely different topic, and occurring at a separate time,[6] is sufficient to alter the thrust of these authorities which directly bear on the question presented here.

Moreover, it is not entirely clear that Congress itself focused on this issue in enacting section 24(a). This section appears to have been drawn from a similar provision in the sundry civil appropriation act for fiscal year 1919. Act of July 1, 1918, ch. 113, 40 Stat. 646. The term "body politic" in this latter provision was obviously not affected by any of the factors discussed above, and as such may well have been meant to include the United States. The same provision was then inserted, apparently without much deliberation, into the Trading with the Enemy Act. Even though Congress may thus have intended for this provision to encompass the United States, Congress does not appear to have given much thought as to how this provision would operate in the context of this latter Act,

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[6] While the Trading with the Enemy Act (including section 9) was originally enacted in 1917, the provisions relating to taxes were first inserted into the Act in 1923. *See* Act of March 4, 1923, ch. 285, § 2, 42 Stat. 1516.

particularly in light of that Act's definitions and Congress' intent underlying them.

This point is supported by subsequent congressional action. In 1928 Congress added section 24(b), 50 U.S.C. App. § 24(b), to the Act, which provides in part:

> In the case of income, war-profits, excess-profits, or estate taxes imposed by any Act of Congress, the amount thereof shall, under regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, be computed in the same manner (except as hereinafter in this section provided) as though the money or other property had not been seized by or paid to the Alien Property Custodian, and shall be paid as far as practicable, in accordance with subsection (a) of this section.

The amendment was first suggested in the House of Representatives; its sponsor stated that "this amendment is simply *to clear up a doubt* and *protect the Government in the matter of taxation.*" 69 CONG. REC. 903 (1927) (remarks of Representative Green). [Emphasis added.][1] While the legislative history does not reveal the "doubt" which occasioned this amendment, it does not seem unreasonable to speculate that it may have arisen due to the limited nature of the term "body politic" in the Act. Since the provision in section 24(a) is otherwise quite broad, and since section 24(b) provides for the payment of taxes in accordance with section 24(a) "as far as practicable," it would seem that section 24(b) does little to achieve its purpose of protecting "the Government in the matter of taxation" except by specifically including the United States' taxes within the Act. As such, the fact that Congress thought such action was necessary would support my conclusion that the United States is not a body politic under the Act.

For the reasons discussed above, I do not believe that the Commissioner of Customs was entitled to file a claim under section 9(a) of the Act. I therefore overrule the decision of the Director of the Office of Alien Property and deny Title Claim 63801.

Dated: May 8, 1979.

/s/ MICHAEL J. EGAN
Associate Attorney General

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[1] Provisions added in the Senate went beyond this statement of intent, *see* S. Rept. 273, 70th Cong., 1st sess., 34 (1928), but nothing was said in the Senate to cast doubt on this original purpose.

April 3, 1979

79-20 MEMORANDUM OPINION FOR THE GENERAL COUNSEL, IMMIGRATION AND NATURALIZATION SERVICE

Constitutional Law—First Amendment—Amnesty International—Haitian Detainees

This is in response to your memorandum of February 15, 1979, requesting our opinion on the question whether the Immigration and Naturalization Service (INS) is obligated by the First Amendment either to make available to Amnesty International the names of all Haitian nationals held in detention pending deportation proceedings, or to give that organization the opportunity to interview detained Haitians for the purpose of determining whether they desire free legal representation in connection with potential claims for asylum. Based on the facts that you describe, it is our conclusion that INS is not obliged by the First Amendment to do either.

As we understand the situation, Amnesty International has indicated an intent to claim that, as an organization with purposes and functions similar in nature to those of the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU), it has a First Amendment right to contact Haitian detainees and to offer them free legal assistance, even if its aid has not been requested by the particular detainee. You anticipate that ancillary to this asserted primary First Amendment right, Amnesty International will maintain that it has a right both to know the names of all Haitians detained and to interview each in person to assure that he or she is fully cognizant of the legal position and the assistance that that organization proposes to offer. The claim will be that in order for the INS not to infringe Amnesty International's First Amendment right to association, INS is obligated to provide the names and to permit face-to-face, one-on-one interviews. This claim will be made within the following factual context.

Each Haitian detainee has already been informed that he or she has the right to legal representation at no expense to the Government, *see* 8 CFR § 242.2(a) (1978), and has been given the names of organizations in the

community qualified under 8 CFR § 292.2 (1978),[1] that are willing to provide legal services without charge or at a nominal cost.[2] If a detainee has asked to be represented by an attorney or the accredited representative of a qualified organization, his designated counsel is permitted to interview him as provided in § 21e-g of the INS Administrative Manual.[3] Further, INS is willing to deliver, via a blind mailing, a written communication[4] from Amnesty International to all Haitian detainees urging them to authorize visits by representatives of that organization. The INS will honor the request of an individual who authorizes such a visit.[5]

We assume for the purposes in this opinion that Amnesty International is, for First Amendment analysis purposes, identical in nature to the ACLU and the NAACP, and that the Government may not, consistent with the First Amendment, broadly prohibit it from offering free legal representation to a person with a potential case that, if litigated, might serve "as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public." *In Re Primus,* 436 U.S. 412, 431 (1978). *See also, NAACP* v. *Button*, 371 U.S. 415 (1963). However, that Amnesty International may have a limited constitutional right to solicit, or indeed to communicate with, detainees for other purposes, does not imply that INS is obliged to provide it with a list of potential litigants or that the Service must permit unrequested, in-person interviews of all detained Haitians.

With respect to a First Amendment duty of INS to disclose to Amnesty International a list of Haitian detainees, we believe that organization to be in a legal position analogous to that in which a reporter would find himself were he to make such a claim. That is, although the Government may be circumscribed by the First Amendment in regulating Amnesty International's solicitation, as it is in regulating a reporter's newsgathering activities, that limitation—whatever its nature and scope—does not give birth to a corollary affirmative duty to disclose or provide access to information that is not generally available to the public. *Cf., Houchins* v. *KQED, Inc.,* 438 U.S. 1 (1978); *Pell* v. *Procunier,* 417 U.S. 817 (1974); *Saxbe* v. *Washington Post Co.,* 417 U.S. 843 (1974).[6] In short, any right

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[1] Amnesty International, you state, has not applied for recognition under 8 CFR § 292.2(b), and therefore has no accredited representative under 8 CFR § 292.2(d) who may represent aliens as permitted by 8 CFR § 292.1(a)(4).

[2] You note that the Miami District Office has refused to refer detainees to the Haitian Refugee Center.

[3] Detainees are also permitted to have visits from relatives and friends, Administrative Manual § 21a, and Consuls. *Id.,* § 21e.

[4] Although you have not so stated, we assume that INS would be willing to communicate the content of the written communication orally to an illiterate detainee.

[5] As we understand it, INS is willing to permit interviews by Amnesty International at the request of a detainee even though that organization is not presently a qualified organization in a position to provide accredited representation to aliens in administrative proceedings. *See* n. 1, *supra.*

[6] An argument can be made that this general rule must be a qualified one. Thus, were
(Continued)

that Amnesty International may have to a list of names of detained Haitians is co-extensive with and no greater than that of the public.[7]

It is also clear that any First Amendment right that Amnesty International has to solicit does not preclude INS from adopting a policy reasonably designed to protect the privacy of detainees in its custody who wish to be free from in-person, face-to-face solicitation. The Supreme Court strongly implied, in *In Re Primus, supra,* at p. 435, n. 28, that even with respect to "free world" solicitation, the Government retains broad power to limit unrequested face-to-face solicitation. That power clearly exists when, as with detainees, the Government controls access to the physical environment in which a person desiring and entitled to some degree of privacy finds himself.

When the Government places a person in a situation in which he is unable to turn his back or walk away from third-party communications he has no desire to see or hear, *compare, Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975), it does not offend the First Amendment rights of the third party by offering its captive the opportunity to choose whether he wishes to be communicated with before he is addressed in person. This is so because the right of one wishing to communicate or associate with another has never been viewed as including the right to compel the person to listen to or view unwanted communications. *Rowan* v. *Post Office Department,* 397 U.S. 728, 737 (1970). The procedure that INS has adopted, namely, that it will communicate Amnesty International's desire to solicit to all Haitian detainees and leave the decision whether to submit to a face-to-face interview to each individual, is reasonable and does not abridge any First Amendment right of that organization. It is a procedure

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(Continued)
the situation that, without INS providing their names, Amnesty International would be totally unable to make contact with the Haitian detainees, and were litigating the cases of the Haitian detainees the only vehicle for exercising its First Amendment rights, Amnesty International would have an appealing argument for a special right to disclosure. However, no such argument is available to Amnesty International here. First, it has not shown that with diligence it could not identify at least some of the Haitian detainees (through, for instance, talking to friends, relatives, attorneys, or refugee organization); and second—and more importantly—INS has offered to deliver its solicitation via a blind mailing.

[7] The public's right to access to Government records is defined by the Freedom of Information Act, 5 U.S.C. § 552 (1976). You have asked whether a list of names of Haitian detainees would be withholdable under exemption (b)(6) of that Act. The Office of Information Law and Policy is the component of the Department of Justice to which questions concerning the applicability of an exemption to a given fact situation should be addressed.

sanctioned by the rule enunciated in *Rowan* v. *Post Office Department, supra.*[8]

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

[8] *Rowan* holds, generally, that the Government may permissibly adopt a regulation that permits a person to protect the privacy of his home by requesting the Government to order his name removed from mailing lists for materials he finds offensive. We view a detainee's cell as his "home" and believe that he has a right to privacy from third-party intrusions. We read *Rowan* as authority for INS to protect that privacy by reasonable regulation and view as reasonable a regulation (or procedure) that allows the detainee to decide which intrusions he will permit.

April 6, 1979

79-21 MEMORANDUM OPINION FOR THE COUNSEL TO THE VICE PRESIDENT

Advance Personnel—Federal Tort Claims Act (28 U.S.C. § 2671)—Form of Contract

On June 23, 1978, this Office gave its opinion that compensated or uncompensated part-time advance personnel for the President or the Vice President would be Federal employees under the Federal Tort Claims Act, 28 U.S.C. § 2671, and that the United States would therefore be exclusively liable under 28 U.S.C. § 2679(b) for damages arising out of automobile accidents occurring in the course of their official duties. The form contract of employment used by the Office of the President and the Office of the Vice President for these individuals designates them as independent contractors, and you have asked us to consider the effect of this language on our previous opinion.

It is our understanding that advance personnel are hired by and act under the close daily supervision of Presidential or Vice Presidential employees. They perform logistical tasks for official trips that include making hotel, travel and sound-system arrangements. While the more experienced personnel have greater independence of action than do the others, the day-to-day activities of all are controlled by Government employees through frequent communication. The selection of the cities and events the President or the Vice President visit and even the more minor decisions, in most cases, are the responsibility of the Presidential or Vice Presidential staff.

On the foregoing basis, it is our opinion that personnel performing advance work are employees within the meaning of 28 U.S.C. § 2671, despite the language of the employment contract. The Supreme Court has said that employees of a contractor who are not acting under the close, daily, physical supervision of the Federal Government are not Federal employees. *United States* v. *Orleans,* 425 U.S. 807 (1976); *Logue* v. *United States,* 412 U.S. 521 (1973). But individuals who contract with the Federal Government and who act under the close, daily, physical supervision of Federal employees should themselves be considered employees for purposes of the Act, regardless of

the form of the contract. *See, e.g., Witt* v. *United States,* 462 F. 2d 1261, 1263–64 (2d Cir. 1972); *United States* v. *Becker,* 378 F. 2d 319, 322–23 (9th Cir. 1967). The exclusion of contractors from the definition of Federal agencies in § 2671 should not defeat application of the common law of *respondeat superior* to individuals who contract for their services with a Federal agency. The critical element for liability is the Government's power "to control the detailed physical performance of the contractor." *See, Logue* v. *United States,* 412 U.S. at 527–28. We suggest, however, that the word "independent" preceding "contractor" be struck from the language of the form. As advance personnel do not act independently, this terminology can only confuse their status under § 2671.

It is appropriate to retain the word "contractor" rather than denominating the advance people "consultants" when contracting for their services. The authority of the President and the Vice President to procure the temporary or intermittent services of consultants is set forth in Pub. L. No. 95-570, 92 Stat. 2445 (1978). The Civil Service Commission in subchapter 1-2 of Federal Personnel Manual Chapter 304 states that a consultant who is excepted from the competitive service by statute is "a person who serves as an adviser to an officer or instrumentality of the Government, as distinguished from an officer or employee who carries out the agency's duties and responsibilities." Advance personnel do not serve as advisers; they simply carry out responsibilities assigned to Presidential or Vice Presidential employees.

Finally, we remind you of our recommendation that you inform those hired to perform advance work of their reporting responsibilities under the Federal Tort Claims Act. It would seem most appropriate to include this information in the contract.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

April 10, 1979

79-22 MEMORANDUM OPINION FOR THE DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT

Veterans Preference Act (5 U.S.C. §§ 2108, 3309-3320)—Hiring Procedures for Attorneys—Excepted Service—Preference Hiring of Eligible Veterans

This responds to your request for our opinion whether the Department of Justice attorney-hiring procedures give effect to the Veterans Preference Act. 5 U.S.C. §§ 2108, 3309-3320. You also ask whether the Office of Personnel Management (OPM)[1] may prescribe an examination procedure (particularly a numerical rating system) for the selection of attorneys. For the outlined reasons, we conclude: first, that this Department's attorney-hiring practices take into account fully the preferences that Congress afforded veterans; second, that OPM is barred by its appropriation legislation from imposing a rating or other examination system on the hiring of attorneys within the executive branch.

In the competitive civil service, known also as the classified civil service, veterans preference is implemented by adding a designated number of points to an eligible veteran's examination score. Section 3 of the 1944 Veterans Preference Act, codified at 5 U.S.C. § 3309, prescribes the following point system in the competitive service:

> A preference eligible receiving a passing grade in an examination for entrance into the competitive service is entitled to be assigned additional points above his earned rating, as follows—

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[1] The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978), and Reorganization Plan No. 2 of 1978 (43 F.R. 36037) divided the functions of the Civil Service Commission between two new agencies—the Office of Personnel Management (OPM) and an independent Merit System Protection Board. Since the legislative history and Executive orders cited herein refer to the Civil Service Commission, we will use the terms "Commission" and "OPM" interchangeably.

(1) a preference eligible under section 2108(3)(c)–(G) of this title—10 points; and

(2) a preference eligible under section 2108(3)(A) of this title—5 points.

Section 2108 of title 5 defines a "preference eligible" as an honorably discharged veteran who served in the Armed Forces under the conditions set forth in that section. Certain disabled veterans and, in some cases, their relatives or survivors are entitled to the 10-point preference provided by § 3309, while certain nondisabled veterans are entitled to a 5-point preference.

Although this point system was not mandated by statute until June 27, 1944, it had been implemented in the executive branch since March 3, 1923, pursuant to Executive Order No. 3801, as amended. The report of the Senate Civil Service Committee on the 1944 Veterans Preference Act states that:

> Section 3 [of the Act] would enact into law the 10-point preference for service-connected disabled veterans and the 5-point preference for non-disabled veterans presently contained in civil-service rules. [S. Rept. 907, 78th Cong., 2d sess. p. 2 (1944).]

The 1944 Act merely gave legislative sanction to the then-existing point system.

Although § 3309 applies only to the competitive service, there is a suggestion in 5 U.S.C. § 3320 that such a system is required in the excepted service. This provision reads in pertinent part as follows:

> The nominating or appointing authority shall select for appointment to each vacancy in the excepted service in the executive branch * * * from the qualified applicants in the same manner and under the same conditions required for the competitive service by sections 3308–3318 of this title.

Since the point system is required in the competitive service by § 3309, it would seem that the excepted service must also follow such a procedure. Upon closer scrutiny, however, this is not the case. Section 3320 in its present form results from Pub. L. No. 89–554, 80 Stat. 378, 422, which combined and restated for clarity §§ 9,[2] and 20 of the 1944 Veterans Preference Act. (Section 20 merely exempted the legislative and judicial branches, as well as advice and consent positions in the executive branch.)

The language of § 9 of the 1944 Act reads in pertinent part as follows:

> In the unclassified Federal * * * civil service * * * the nominating or appointing officer or employing official shall make selection from the qualified applicants in accordance with the provisions of this act.

This language is less suggestive concerning a point system in the excepted service than the "clarifying" language of § 3320. Further, § 9 indicates an

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[2] Section 9, first codified at 5 U.S.C. § 858, is now codified at 5 U.S.C. § 3320.

intent to require that employee preference be extended to those classes of preference eligibles listed in the Act. Section 2 of the 1944 Act provides in pertinent part that, with respect to applicants for Federal employment in the unclassified civil service as well as in the classified civil service, "preference shall be given" to preference eligibles. The method of implementing this preference was spelled out for the competitive service through the point system. However, the general direction of § 2, that a preference be granted to eligible veterans, is reflected in the language concerning application of the preference in the excepted service.

Section 3309's system was amended in 1953 to provide, *inter alia*, that preference points would be given only to those veterans receiving a passing score on an examination. 67 Stat. 581. Before this amendment the points were added to preference eligible scores if the points would bring the veterans up to the qualifying score. Significantly, as stated in the legislative history, the amendment would affect "the veteran in the competitive civil service system." S. Rept. 679, 83rd Cong., 1st sess. 1 (1953). The drafters of the Senate report apparently believed that the point system was not required in the excepted service.

Moreover, the essential distinction between the competitive and excepted service is that positions in the former are filled on the basis of competitive examinations while those in the latter are not. *See* 5 U.S.C. §§ 2102, 2103.[3] The Act contemplates continuation of the distinction. It makes reference to the unclassified service as well as the classified service. If examinations were required, it would eliminate the unclassified service. Therefore, the Veterans Preference Act's reference to unclassified service would be inaccurate if it meant that all positions filled pursuant to the Act should be subject to examination. Since there was no intent to erase this distinction and since the language of the Act itself requires that points be added only to an applicant's earned rating resulting from an "examination,"[4] we must conclude that the point system is not required in the unclassified service.

In considering the questions whether the Department's attorney-hiring procedure gives effect to the Veterans Preference Act and whether OPM could require that the Department implement a numerical rating system for attorneys, we now turn to a historical examination of attorney-hiring and veterans preference.

I. The History of Attorney-Hiring and Veterans Preference Since 1941

President Franklin D. Roosevelt, by Executive Order No. 8044 (1939),

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[3] These provisions also resulted from Pub. L. No. 89-554, *supra*. They merely carried forward, without substantive change, their predecessor provisions (22 Stat. 403, 406 (1883)) with respect to the competitive service. The earlier provisions noted this key distinction between the competitive and noncompetitive service.

[4] It might be suggested that a numerical rating system does not constitute an examination. However, we conclude in the discussion that follows that it does.

appointed a committee to study and make recommendations on, *inter alia*, how civil service procedures should apply to attorneys. In February 1941, that committee submitted its report entitled *Report of the President's Committee on Civil Service Improvement,* H. Doc. 118, 77th Cong., 1st sess. (1941). The report presented two principal views—Plan A and Plan B—on attorney-selection procedures.[5] Plan B recommended, at least in the case of inexperienced attorneys, that they be examined and rated competitively. Taking a contrary view, the authors of Plan A reasoned:

> [I]t seems to us highly unwise to force the unique problem of the attorney positions into any general pattern simply for the sake of uniformity. Wise administration of the civil service, as of other organizations, may often indicate the need for flexibility and *ad hoc* adjustments, even at the cost of uniformity and symmetry * * *.
>
> We therefore have considered and presented our recommendations on the assumption that the attorney positions present a unique problem in the professional service, which must be solved individually rather than by application of a general formula. [H. Doc. 118, *supra*, at 32–33.]

Plan A's proponents therefore recommended against a rating system for attorneys. They also objected to the application to attorneys of the competitive service procedure of certifying three applicants for each position to the appointing officer. *See* 5 U.S.C. § 3318. It was stated in this connection:

> We feel that any mechanical ranking and certification would operate in an undesirably arbitrary manner, that the superior officer who is responsible for the appointee's work should have more voice in his selection, and that *no principle of civil service or wise administration requires that there be an assumption of absolute accuracy in rating the candidates all of whom by definition are qualified to do legal work of a high order.* [H. Doc. 118, *supra,* at 38.] [Emphasis added.]

President Roosevelt in 1941 adopted Plan A in Executive Order No. 8743. *See* 5 U.S.C. § 3301 note. The order directed that all attorney positions be brought into the competitive service and created a Board of Legal Examiners, which was to establish rules and procedures for attorney selection in the Federal Government. Subsection 3(d) set forth the functions of the Board as follows:

> The Board, in consultation with the Civil Service Commission, shall determine the regulations and procedures under this section governing the recruitment and examination of applicants for attorney positions, and the selection, appointment, promotion, and transfer of attorneys in the classified service.

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[5] Urging Plan A were Justice Reed, the committee's chairman, Justice Frankfurter, Attorney General Jackson, and Mr. Gano Dunn. Justice McReynolds, Leonard D. White, and General Robert E. Wood, urged Plan B.

The order also directed the Commission to establish a register of eligibles from which attorney positions were to be filled. And, § 3(f) provided that:

> registers shall not be ranked according to the ratings received by the eligibles, except that persons entitled to veterans' preference * * * shall be appropriately designated thereon.

Thus, while an examining procedure was established to determine minimum attorney qualifications, a rating system was prohibited.

"The examination consisted of a written test, an evaluation of the applicant's records, and oral examinations before the state and local boards." U.S. Board of Legal Examiners, *Report to the President, 1941–1944,* p. 34. The report further stated at p. 36:

> Numerical grades were not assigned upon the examination as a whole, but only upon the written test. The applicants who were recommended for inclusion upon the register were, however, given ratings of "Outstanding," "Excellent," "Good," and "Fair" on the basis of recommendations from the various examining boards. These descriptive ratings were shown upon the register list. The list also showed the length of professional experience of each individual included.

The examination score determined who would be placed on the register of eligibles. The register was distributed to all government agencies and, as appointing agencies, they were given "unrestricted choice from among the eligibles" with respect to beginning attorney positions. *Id.* at 37. *See also, Hearing on H.R. 1025, a bill to create a Board of Legal Examiners in the Civil Service Commission, before a subcommittee of the Senate Committee on Civil Service,* 78th Cong., 1st sess., at 57–59 (1943). But at the same time the register directed the attention of appointing officers to their duty to prefer preference eligibles in making appointments. *Id.* at 47–48. However, no guidance was provided for the appointing officers to fulfill this duty, and thus veterans preference points were added to the written examination score as a third of the total examining process. Moreover, the preference points were used only in the determination of the applicants' placement on the register. Consequently, the points clearly benefitted only those preference eligibles who received marginal examination scores and needed the points to qualify for listing on the register. Preference points were not used in the most important aspect of the employment process—the actual appointment. Appointing agencies were merely instructed to "prefer" preference eligibles over other applicants. Preference at the appointing stage could only have been implemented by considering it as a positive factor in the employment decision.

The Board of Legal Examiners was destined to operate for but a short time. In 1942 the Senate proposed the following amendment to the Independent Offices Appropriation Act of 1943:

> [N]o part of any appropriation in this act shall be available for the salaries and expenses of the Board of Legal Examiners created in the Civil Service Commission by Executive Order

No. 8743 of April 23, 1941. [88 CONGRESSIONAL RECORD 3822.] However, this language was deleted as part of a House-Senate compromise. In lieu of the amendment, the appropriation available for the board was limited to $80,000 "with the understanding that such authorization [was] not to be regarded as giving permanent status to this activity and that appropriations for future years [would] be dependent upon passage by the Congress of substantive law authorizing a Board of Legal Examiners." H. Rept. 2259, 77th Cong., 2d Sess. (1942); statement of House Managers 88 CONGRESSIONAL RECORD 5541.

As the above-quoted language indicates, this restriction was sought by those Members of Congress who believed that the Board should have been created by legislation rather than by Executive order. Although such legislation later passed the House (89 CONGRESSIONAL RECORD 3565), it subsequently died in the Senate Civil Service Committee. *See* 90 CONGRESSIONAL RECORD 2659–60.

Whether the board created by Executive Order No. 8743 should be continued was debated in the legislative consideration of the Independent Offices Appropriation Act of 1944. It is there made clear that the intent of the restriction was to prohibit "any" civil service examination of "lawyers." 90 CONGRESSIONAL RECORD 2659 (1944); *see also* 90 CONGRESSIONAL RECORD 2660–61. The prohibition was based largely on the view that the Commission has no business in determining the "relative qualifications" of lawyers. 90 CONGRESSIONAL RECORD 2661. The underlying premise was that the Commission was not competent to pass on their professional qualifications. 90 CONGRESSIONAL RECORD 2661 (1944).[6] The restriction thus became law. It reads as follows:

> [N]o part of any appropriation in this Act shall be available for the salaries and expenses of the Board of Legal Examiners created in the Civil Service Commission by Executive Order Numbered 8743 of April 23, 1941. [57 Stat. 173 (June 26, 1943)][7]

A virtually identical restriction has been included in each subsequent Commission appropriation since 1944. The 1979 appropriation governing OPM's present activities includes the following:

> No part of the appropriation herein made to the Civil Service Commission shall be available for the salaries and expenses of the Legal Examining Unit of the Commission, established pursuant to Executive Order 9358 of July 1, 1943 [8 F.R. 9175], or

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[6] Although it was suggested that a legal examining board for Executive branch attorney positions be established in the Justice Department (90 CONGRESSIONAL RECORD 2661 (1944)), this has never been done.

[7] This restriction placed attorney positions in a peculiar situation. They were, pursuant to Exec. Order No. 8743, in the competitive service. However, because of the restriction the Commission could not conduct attorney examinations. The restriction was included in each subsequent Commission appropriation and finally, in 1947, President Truman, by Exec. Order 9830, placed all attorney positions in the excepted service.

any successor unit of like purpose. [Pub. L. No. 95–459, 95th Cong., 2d Sess. (1978), 92 Stat. 1007.][8]

Thus, it is plain that OPM may not, in light of the continuing appropriation restriction, require examinations for attorneys.[9] A rating system such as has been suggested for attorney-hiring is one form of an examination, and was frequently used to "examine" for attorney positions. This procedure is denominated an "unassembled examination."

> The unassembled examinations, long used for skilled-trades positions, were adopted for use in examinations for high-grade administrative and professional positions. In the unassembled examination the competitor does not take a written examination, but is rated instead on his knowledge and experience as evidenced by his education and by the positions he has previously held. [U.S. Civil Service Commission, *History of the Federal Civil Service: 1789 to the Present* (1941), at p. 77]

The Board of Legal Examiners itself recognized such examinations for attorney positions in the civil service. *U.S. Board of Legal Examiners Report, supra,* pp. 14, 27, and Appendix H. In fact, one phase of the Board's examining procedures—the evaluation of the applicant's records—was an unassembled examination. Therefore, an attorney-rating system amounts to a civil service examination and for that reason may not be required by OPM.

The participants in the debate on the 1944 appropriations restriction did not fail to discern its effect on veterans preference. Senator Burton, for example, stated that the termination of civil service examinations for attorneys would "do away with veterans' preference." 90 CONGRESSIONAL RECORD 2660–61 (1944). Although we agree with Senator Burton insofar as the ban on examination of attorneys denies the ability to impose a numerical rating system, we do not agree that implementation of the Veterans Preference Act is possible without such a system.

II. The Department's Present Attorney-Hiring Procedures

The Department routinely applies the Veterans Preference Act in a meaningful fashion to attorney-hiring. All Justice Department employment applications ask whether the applicant is claiming veterans preference. That an applicant is a preference eligible is weighed as a

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[8] The reference to the "Legal Examining Unit of the Commission" rather than the Board of Legal Examiners was occasioned by Exec. Order No. 9358, which vested the power of the Board in the Commission. Some Members of Congress had questioned whether the Board should be continued absent specific legislation. Thus, Exec. Order No. 9358 (1943), transferred the Board's authority to the Commission "[p]ending action by the Congress with respect to the continuance of the Board."

[9] It might be argued that OPM would not be imposing selection procedures if it merely required that agencies establish their own procedures. However, if OPM purports to possess the power of approval or rejection of such procedures, this would be tantamount to its imposition of selection procedures for attorneys.

positive factor in the Department's attorney-hiring program,[10] and the veteran is often selected over other attorney applicants. When the veteran's other qualifications place him or her in close competition, the veteran is preferred over other applicants with substantially equal qualifications.

This procedure is consistent with the application of the Veterans Preference Act in regard to attorney-hiring since 1941. As stated above, Executive Order No. 8743, in prohibiting an attorney-rating system, created a situation in which veterans preference could be implemented only by considering it positively in the employment decision. Congress, in response to the Executive order, rather than requiring a rating system, further restricted Commission control over attorney selection by barring the Commission from examining attorneys even to determine minimum qualifications. Thus, Congress implicitly sanctioned the implementation of the Veterans Preference Act with regard to attorney-hiring by use of a procedure such as ours.

We believe that our attorney-hiring procedure gives full effect to the Veterans Preference Act. OPM may not require the Department to implement a numerical-rating system, since this is a form of civil service examination that OPM is prohibited by its appropriation restriction from requiring.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

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[10] The Department is experimenting with a numerical rating system in its Honor Program that is geared toward the hiring of attorneys directly out of law school and accounts for approximately 15 percent of the Department's attorney recruitment. In this experimental program, veterans do receive additional rating points. In this connection it should be noted that, while OPM is barred by its appropriation legislation from implementing attorney-examination systems, this bar does not extend to other agencies, not similarly restricted, that might wish to implement or experiment with rating or other examining systems in their own attorney-hiring procedures.

April 10, 1979

79-23 MEMORANDUM FOR THE GENERAL COUNSEL, GENERAL SERVICES ADMINISTRATION

Military Officer—Appointments to Civil Office—Administrator of General Services—Effect on Military Office—10 U.S.C. § 973; 40 U.S.C. § 751(c)

This responds to your letter of March 27, 1979, inquiring: first, whether a commissioned military officer can retain his commission if he accepts a Presidential designation as Acting Administrator of General Services; and second, whether the officer can retain his commission if subsequently appointed as Administrator. In our opinion, both questions must be answered in the negative; indeed, we believe that he may not be designated as Acting Administrator. Section 973(b) of Title 10 U.S. Code, provides:

> (b) Except as otherwise provided by law, no officer on the active list of the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard may hold a civil office by election or appointment, whether under the United States, a Territory or possession, or a State. The acceptance of such a civil office or the exercise of its functions by such an officer terminates his military appointment.

(We assume that the officer in question is on the active list.) The acceptance of a civilian office or the exercise of its functions by such an officer thus terminates his military appointment unless otherwise provided by law.

With respect to your first question, the legal memorandum of law of your office takes the position that such an exception is found in § 101(c) of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 751(c). It provides in substance that, in the event of a vacancy in the Office of the Administrator of General Services, the Deputy Administrator shall be Acting Administrator of General Services unless the President shall designate "another officer of the Government."

Although you have not raised the issue, a threshold question is whether a commissioned military officer on the active list is "another officer of the Government" within the meaning of § 101(c). Your memorandum points to the close relationship between § 101(c) and the provisions of the Vacancy Act, 5 U.S.C. §§ 3345–3349, in particular 5 U.S.C. § 3347. That section authorizes the President to fill a vacancy in an executive or military department on a temporary basis by directing an officer in an Executive or military department, appointed by the President by and with the advice and consent of the Senate, to perform the duties of the office during the vacancy.[1] While it is true that the Vacancy Act itself is not applicable to the General Services Administration,[2] the interpretation given of the phrase in § 3347 "officer in an executive or military department" has a significant bearing on the meaning of "officer of the Government" in § 101(c).

Attorney General Wickersham ruled in 1909 that not every commissioned military officer is "an officer in a department" eligible to be designated by the President under R.S. § 179, the predecessor of 5 U.S.C. § 3347. 28 Op. A.G. 95. He concluded that the only military officers eligible for designation under R.S. § 179 are those who hold statutory offices in a department, such as the chiefs of its several bureaus, whose appointments are provided for by law (pp. 97–98). Again, in 1919 Attorney General Palmer ruled that while the War Department is an executive department, the Army is not a part of the War Department, so that an officer in the Army is not by virtue of that fact alone an officer in the Department of the Army. 31 Op. A.G. 471. This distinction between the military departments and the military services was also recognized by the Comptroller of the Treasury and the Comptroller General. 19 Comp. Dec. 834 (1913); 17 Comp. Gen. 1066 (1938).

We realize, of course, that 5 U.S.C. § 3347 uses the term "officer in an Executive or military department," while the corresponding language of § 101(c) reads "another officer of the Government." Both statutes, however, deal with the same subject matter—the temporary filling of vacancies in the executive branch. Hence, they are *in pari materia* and should be interpreted in a manner consistent with one another. *United States* v. *Jefferson Electric Co.*, 291 U.S. 386, 396 (1934); *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 116 (1949). We cannot impute to Congress the intent that a commissioned military officer on active duty cannot serve in an acting capacity in any of the executive or military departments,

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[1] We also assume that the officer in question has been appointed by the President with the advice and consent of the Senate. Pursuant to 5 U.S.C. § 3348 such a direction cannot endure for more than 30 days beginning with the date when the vacancy occurred. It should be noted that § 101(c) does not contain a time limitation.

[2] The General Services Administration is not one of the executive or military departments enumerated in 5 U.S.C. §§ 101, 102, but an independent establishment as defined in 5 U.S.C. § 104. Moreover, we believe that the special provisions of §101(c) supersede the general provisions of the Vacancy Act.

but is nevertheless qualified to serve as an Acting Administrator of General Services. We therefore conclude that the phrase "officer of the Government" in § 101(c) must be given the same meaning as "officer in an Executive or military department" used in 5 U.S.C. § 3347. It follows that a commissioned military officer can be designated Acting Administrator of General Services only if he holds a statutory position in a military department. As far as we know, the military officer here involved does not hold such a position.

But even if § 101(c) were to be construed to the effect that a military officer is an officer of the Government within the meaning of that provision, it would not constitute a provision to the contrary within the meaning of 10 U.S.C. § 973(b). That section embodies an important policy designed to maintain civilian control of the Government. In *Riddle* v. *Warner*, 522 F. (2d) 882, 884 (1st Cir. 1975) the court, while commenting on the history of the legislation from which 10 U.S.C. § 973(b) is derived, pointed out:

> A comment by the chairman of the reporting committee, however, shows that a principal concern of the bill's proponents was to assure civilian preeminence in government, i.e., to prevent the military establishment from insinuating itself into the civil branch of government and thereby growing "paramount" to it. *See* Cong. Globe, 41st Cong., 2d Sess. App. 150 (1870).[3]

That policy cannot be overcome implicitly by a broad and vague statutory authority to designate an Acting Administrator in the absence of express language stating that such designation is to be effective notwithstanding the mandate of 10 U.S.C. § 973(b). Where Congress wishes to permit a military officer to occupy a civilian position on an acting basis without forfeiting his commission, it has done so explicitly. *See* 10 U.S.C. §§ 3017(b), 5036(c), 8017(b). We therefore are compelled to conclude that even if § 101(c) were to be construed to authorize the President to designate a military officer to be Acting Administrator of General Services, his acceptance of that office[4] or the exercise of its functions would result in the termination of the officer's military appointment.

We therefore conclude that a military officer who does not occupy a statutory office in a military department is not eligible for designation as Acting Administrator of General Services and that, in any event, acceptance of that office or the exercise of its functions would result in the termination of his military commission.

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[3] For the legislative history of that bill, *see also* CONGRESSIONAL GLOBE 41st Cong., 2d Sess., pp. 3394–3404.

[4] The position of an acting officer may not comply with the formal requirements of tenure, duration, emoluments, and duties postulated as the elements of an "office" in *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868). The Attorneys General, however, have ruled that if the prohibitions of the predecessor statute 10 U.S.C. § 973(b) "are to have any substantial operation," the term "officer" must be given a nontechnical interpretation and that the policy of the statute points to a very broad interpretation of the term "civil officer." 15 Op. A.G. 551, 553 (1876); 18 Op. A.G. 11, 12 (1884); 35 Op. A.G. 187, 189 (1927).

Your second question asks whether a military officer could be appointed Administrator of General Services without forfeiting his commission. Your request and the memorandum of law attached to it do not contain any authority in support of that proposition. We are also not aware of any pertinent exceptions to the prohibition of 10 U.S.C. § 973(b). I therefore am constrained to answer the question in the negative.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

April 12, 1979

79-24 MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Presidential Appointees—Resignation Subject to the Appointment and Qualification of a Successor

This responds to your inquiry whether the head of an executive agency can submit a resignation to become effective only upon confirmation and appointment of his or her successor. We believe that he can.

The submission of such a resignation effective only upon the confirmation and appointment of a successor does not limit, or impinge on, the President's powers. The head of an executive agency is an executive officer; he serves at the pleasure of the President and is subject to the President's illimitable removal power. *Myers* v. *United States*, 272 U.S. 52 (1926). A resignation effective only upon the confirmation and appointment of the successor, therefore, does not affect the President's power to remove the resigning officer prior to the appointment of his successor.

An officer serving at the pleasure of the President is removed by operation of law when the President appoints his successor by and with the advice and consent of the Senate. *Blake* v. *United States,* 103 U.S. 227, 237 (1881); *Parsons* v. *United States,* 167 U.S. 324, 327 (1897); *Quackenbush* v. *United States,* 177 U.S. 20, 25 (1900); 39 Op. A.G. 437, 439 (1940). This, however, does not render a resignation effective upon the confirmation and appointment of a successor a meaningless tautology. To the contrary, this form of resignation obviates a period of vacancy in the office between the resignation and the appointment of a successor.

Article II, section 2, clause 1, of the Constitution provides that the President shall nominate and appoint by and with the advice and consent of the Senate officers of the United States; Article II, section 3, provides that the President shall commission all such officers. In *Marbury* v. *Madison,* 1 Cranch 137, 155–157 (1803), Chief Justice Marshall expounded on the three-step appointment process envisaged by the constitutional provisions. First, there is the nomination by the President; second, the Senate gives its advice and consent to the proposed appointment (confirmation); third, the President, having obtained the advice and consent of

the Senate, makes his appointment of the officer, who is then commissioned. It is apparent that the appointment process may consume a considerable length of time.

We have in the past examined the questions whether a prospective appointee to an office can be nominated and confirmed while the incumbent is still in office, and whether a resignation may be submitted to take effect at a future date. Both questions were answered in the affirmative. A copy of the memorandum on the subject is attached.

Beginning with the earliest days of the Republic, Presidents have submitted nominations to the Senate and the Senate has given its advice and consent to appointments while the incumbent was still in office. Attached memorandum and Appendix III. Moreover, the President's power to nominate and the Senate's power to confirm are not dependent on the existence of an actual vacancy. Resignations were submitted and intended to be effective at some future date. Memorandum and Appendix III. Judges have submitted their resignations effective upon the appointment of their successors at least since the resignation of Mr. Justice Gray of the Supreme Court in 1902. Memorandum Appendix I. Also, this type of resignation was not unusual in judicial resignations in the 1960s.

In 1975, President Ford accepted the resignations of the Secretary of the Interior and of the Secretary of Defense "effective upon the appointment and qualification of your successor."

We conclude that there is no legal obstacle to the resignation of the head of an executive agency in the manner you suggest. In order to avoid a vacancy in the office if, subsequent to the appointment and with the advice of the Senate, there should be a delay in the commissioning or the taking of the oath of office, we would suggest that the resignation be conditioned on the appointment and qualification of the successor.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

Attachments

July 11, 1968

MEMORANDUM

Re: Power of the President to Nominate and of the Senate to Confirm Mr. Justice Fortas to be Chief Justice of the United States and Judge Thornberry to be Associate Justice of the Supreme Court.

On June 13, 1968, Chief Justice Warren advised President Johnson of his "intention to retire as Chief Justice of the United States effective at your pleasure." In his reply, dated June 26, the President stated, "With your agreement, I will accept your decision to retire effective at such time as a successor is qualified." On the same day Chief Justice Warren sent to the President a telegram in which the Chief Justice referred to the President's "letter of acceptance of my retirement," and expressed his deep appreciation of the President's warm words.[1]

On June 26, the President also submitted to the Senate the nominations of Mr. Justice Fortas to be Chief Justice of the United States vice Chief Justice Warren, and of Judge Thornberry, of the United States Court of Appeals for the Fifth Circuit, to be Associate Justice of the Supreme Court vice Justice Fortas. 114 CONGRESSIONAL RECORD (daily ed. June 26, 1968) S7834.

Questions have been raised as to the power of the President to make and of the Senate to confirm these nominations. The primary objection is based upon the assertion that there is at present no vacancy in the office of Chief Justice, and that nomination and confirmation of Mr. Justice Fortas is therefore improper. Secondarily, there seems to be an objection that nomination and confirmation of Judge Thornberry cannot be accomplished in these circumstances because the office to which he has been named is not yet vacant.

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[1] *See* Appendix I, Nos. 1-3 for the texts of the letters and telegram exchanged between Chief Justice Warren and the President. The letters appear in 4 Weekly Compilation of Presidential Documents 1013-14.

Neither objection appears to be well taken. The terms of Chief Justice Warren's retirement, established in the correspondence between him and the President, are that the Chief Justice's retirement will take effect upon the qualification of his successor.[2] Judge Thornberry has been nominated in anticipation of the elevation of Mr. Justice Fortas. As this memorandum will show, it is well established that the President has power to nominate, and the Senate power to confirm, in anticipation of a vacancy. This power exists where it has been agreed that retirement of an incumbent Justice or judge will be effective upon the qualification of his successor. Such power also exists where an incumbent Justice or judge is simultaneously nominated for elevation to a higher position.

I.

It is not unusual for a Justice or judge to advise the President of his intention to retire and to leave it to the President to propose a timing best suited to prevent an extended vacancy and the resulting disruption of the operation of the court on which he sits. Nomination of a successor in such circumstances is but one example of the power to fill anticipated vacancies.

The more general power will be analyzed below, but it is instructive first to consider two directly pertinent instances for which documentation is available.

Mr. Justice Gray of the Supreme Court advised President Theodore Roosevelt on July 9, 1902, that he had decided to avail himself of the privilege to resign at full pay, and added:

> * * * I should resign to take effect immediately, but for a doubt whether a resignation to take effect at a future day, or on the appointment of my successor, may be more agreeable to you.

President Roosevelt's acceptance, two days later, contained the following passage:

> It is with deep regret that I receive your letter of the 9th instant, and accept your resignation. As you know, it has always been my hope that you would continue on the bench for many years. If agreeable to you, I will ask that the resignation take effect on the appointment of your successor.[3]

Mr. Justice Gray died in September, before his successor, Mr. Justice

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[2] The term "qualification" or "qualifies" refers in this context to the taking of the two oaths prerequisite to holding Federal judicial office, (1) the oath to support the Constitution required by Article VI, Clause 3 of the Constitution of all officers of the United States, and (2) that required by 28 U.S.C. 453 of each Justice or judge before performing the duties of his office.

[3] *See* Appendix I, Nos. 4–5 for the pertinent passages of the Gray-Roosevelt correspondence.

Holmes, took office (187 U.S. iii).[4] The Memorial Proceedings in honor of Mr. Justice Gray pointed out that "he submitted his resignation to take effect upon the appointment and qualification of his successor. So he died in office." *See also* Lewis, *Great American Lawyers*, Vol. 8, p. 163.

More recently, Circuit Judge Prettyman advised President Kennedy on December 14, 1961, that he intended to take advantage of the statutory retirement provisions of section 371(b), Title 28, United States Code, and continued:

> The statute prescribes no procedure for retiring; accordingly I simply hereby retire from regular active service, retaining my office.
>
> The statute provides that you shall appoint a successor to a judge who retires. Hence I am sending you this note.

President Kennedy replied on December 19:

> It was with regret that I received the notification that you were retiring from 'regular active service.' The way in which you phrased your letter left me with no alternative but to accept your decision.

A few days later, however, President Kennedy sent the following additional note to Judge Prettyman:

> As you know, I have announced that I intend to fill the vacancy which will be created when you retire from active service. However, I hope you will continue in regular active service on the Court of Appeals for the District of Columbia until your successor assumes the duties of office. Your letter does not specifically mention when your retirement from regular active service takes effect, but I have been informed that you have no objection to continuing in your present capacity until your successor is sworn in.
>
> I appreciate your willingness to continue for this limited period in order that the Court may not be handicapped for any time during which a vacancy might otherwise exist.

Judge Prettyman replied to the President that he was "glad to comply with your preference in respect to the date upon which my retirement takes effect. My notice to you was purposely indefinite."[5]

Judge J. Skelly Wright was nominated on February 2, 1962, confirmed on February 28, and appointed March 30. He qualified on April 16, and Judge Prettyman retired as of April 15.

The exchange of communications between Chief Justice Warren and the President must be understood in the light of these precedents. The Chief Justice advised the President of his intention to retire, leaving it to the

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[4] The circumstances surrounding the Holmes appointment will be discussed *infra*.

[5] *See* Appendix I, Nos. 6-9 for the pertinent passages of the Kennedy-Prettyman correspondence.

President to suggest terms of retirement which would be suitable in allowing sufficient time for nomination and confirmation of a successor without the disruption and over-burdening of the remaining Justices which might result from an extended vacancy, in particular such a vacancy in the office of the Chief Justice. The President suggested that the Chief Justice's retirement should take effect upon the appointment and qualification of his successor. The Chief Justice agreed to this condition.

It is a condition of retirement that was used with respect to the Supreme Court in the case of Mr. Justice Gray. It has been frequently resorted to in the case of other judicial retirements. (For a partial list of retirements by Federal judges effective upon the appointment and qualification of their successors, *see* Appendix II.)

The effect of this form of retirement is that the Chief Justice remains in office until the condition occurs; *i.e.*, until his successor qualifies by taking the oaths of office.

II.

The power of the President to appoint Justices of the Supreme Court, by and with the advice and consent of the Senate, is specified in Article II, Section 2, Clause 2 of the Constitution. It provides that the President shall

> nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law * * *.

Article II, section 3 provides additionally that the President shall "Commission all the Officers of the United States."

As explained in *Marbury* v. *Madison*, 1 Cranch 137, 153–157 (1803), the constitutional appointment process consists of three major steps:

> The nomination by the President;
> the Senatorial advice and consent (confirmation); and
> the appointment by the President, of which the Commission is merely the evidence.

See also 4 Op. A.G. 218, 219–220.

There is no indication in this early analysis of the constitutional appointment process that a matured vacancy is a necessary prerequisite. Nomination and confirmation to fill anticipated vacancies are consistent with the constitutional plan, and have been frequent occurrences in our history.

It should be noted that anticipated vacancies may be grouped into two categories: First, those that will take effect on a day certain; *e.g.*, when a resignation is submitted as of a specific date, or a statutory term is about to expire. Second, those that will take effect upon fulfillment of a condition; *e.g.*, when the removal or elevation of the incumbent takes effect, or the appointment and qualification of his successor. Nothing in the Constitution prevents advance nomination and confirmation to fill either

category of anticipated vacancies. Logic and experience, running from the earliest years of the Republic to the present, support this conclusion.

If the Senate's power to confirm were conditioned on the present effectiveness of the vacancy, there would continually be gaps in the holding of important offices. In all cases, nomination, confirmation and appointment would have to wait until the incumbent leaves office. Interruptions in the discharge of public business would necessarily result. The needs of prudent administration suggest the unsoundness of a constitutional interpretation that would force this result upon every resignation or retirement of Presidential appointees.

As a matter of fact, from the earliest years the Senate has exercised the power to confirm nominations to offices in which a vacancy in the near future is anticipated to take effect, by action of the incumbent or of the President, as the case may be. The first volume of the EXECUTIVE JOURNAL OF THE SENATE, covering the years from 1789 to 1805, gives instances in which the Senate confirmed nominees in the following situations: To fill a vacancy to be created by the promotion of the incumbent; to replace an official who desired to be recalled; to rename an officer whose term was about to expire; to replace an official who had resigned as of a day certain; and to replace an official about to be superseded. (For details as to these nominations, *see* Appendix III.)

This practical interpretation of the Constitution by the early Presidents and the Senate has been judicially supported in a number of Supreme Court decisions holding that an officer who serves at the pleasure of the President is ousted from his office when the President appoints a successor by and with the advice and consent of the Senate. *McElrath* v. *United States,* 102 U.S. 426; *Blake* v. *United States,* 103 U.S. 227, 237; *Mullan* v. *United States,* 140 U.S. 240, 245. These rulings clearly presuppose that the Senate has the power to confirm a nomination while the incumbent is still in office.

The history of the Supreme Court contains several examples of actions, by Presidents and the Senate, to fill positions of Justices and the Chief Justice in advance of the effective date of the resignation or retirement of the incumbent:

1. Mr. Justice Grier submitted his resignation on December 15, 1869, to take effect on February 1, 1870. President Grant nominated Edwin M. Stanton in his place on December 20, 1869. Stanton was confirmed and appointed the same day, and his commission read to take effect on or after February 1. However, due to his death on December 24, Stanton never ascended to the Bench. *See* Warren, *The Supreme Court—United States History* (1937 Edition) Vol. 2, pp. 504, 506.

2. Mr. Justice Gray resigned on July 9, 1902, effective on the appointment of his successor (*see, supra,* pp. 4–5). On August 11, the newspapers announced that Oliver Wendell Holmes had been "appointed" to succeed Mr. Justice Gray. Bowen, *Yankee from Olympus,* 346. President Roosevelt had in fact on that day given Holmes a recess commission, which

subsequently was cancelled. Holmes, who then was Chief Judge of the highest court of Massachusetts, apparently did not want to serve without prior confirmation by the Senate. *Holmes-Pollock Letters,* Vol. I, p. 103.[6]

As shown above, Mr. Justice Gray died on September 15. The President nominated Holmes on December 2, the day after the Senate reconvened. The nomination was confirmed two days later. JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE, Vol. XXXIV, pp. 5, 21. There can be no question but that President Roosevelt would have submitted the Holmes nomination to the Senate prior to Justice Gray's death, had the Senate then been in session.

3. Mr. Justice Shiras submitted his resignation to take effect on February 24, 1903. On February 19, President Roosevelt nominated (a) Circuit Judge Day to be Associate Justice of the Supreme Court, vice Mr. Justice Shiras; (b) Solicitor General Richards to be Circuit Judge, vice Judge Day; and (c) Assistant Attorney General Hoyt to be Solicitor General, vice Solicitor General Richards. All three nominations were confirmed on February 23, one day prior to the effective date of Justice Shiras' resignation. JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE, Vol. XXXIV, pp. 202, 215.

4. On September 1, 1922, Associate Justice Clarke tendered his resignation as of September 18. On September 5, President Harding nominated George Sutherland to succeed Mr. Justice Clarke. The Senate confirmed his nomination on the same day. 260 U.S. iii. The records of the Department of Justice indicate that Justice Sutherland's commission was dated September 5, "commencing September 18, 1922."

5. On June 2, 1941, Chief Justice Hughes announced that he would retire from active service on July 1. 313 U.S. iii. On June 12, President Franklin D. Roosevelt nominated Associate Justice Stone to be Chief Justice, and Attorney General Robert H. Jackson "to be an Associate Justice of the Supreme Court, in place of Harlan F. Stone, this day nominated to be Chief Justice of the United States." 87 CONGRESSIONAL RECORD 5097. The Senate confirmed Chief Justice Stone's nomination on June 27, and Associate Justice Jackson's nomination on July 7. 314 U.S. iv.[7]

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[6] *See also* a letter of August 21, 1902, from President Roosevelt to Holmes:

> After consulting one or two people, I feel that there is no necessity why you should be nominated in the recess. Accordingly I withdraw the recess appointment which I sent you, and I shall not send you another appointment until you have been confirmed by the Senate, which I think will be two or three days after it meets. Meanwhile, I strongly feel that you should continue as Chief Justice of Massachusetts.

[7] Chief Justice Stone took his oath on July 3 (314 U.S. iv), but the delay in Justice Jackson's confirmation until July 7 had no relation to that fact. The Jackson hearings, which commenced on the same day as the Stone hearings, took place over several days, June 21-30, and the Judiciary Committee reported on the nomination June 30. On the same day the Jackson confirmation by arrangement was put over until the next session for conducting substantial business of the Senate, which was July 7. 87 CONGRESSIONAL RECORD 5701, 5756, 5759 (1941).

These precedents relating to Supreme Court appointments thus show instances in which the Senate confirmed judicial nominations which were made in anticipation of a vacancy, either where a resignation or retirement was to take effect on a day certain (Stanton; Day; Sutherland; Stone), or where the nomination was vice an Associate Justice nominated to be Chief Justice (Jackson) or vice a judge nominated to be a Justice (Richards).[8]

As noted earlier, in recent years a very sizable number of Federal judges have retired subject to the appointment and qualification of their successors. The Senate has confirmed their successors in the same way it acts on other nominations which are submitted in anticipation of a vacancy. (*See* examples in Appendix II.) The same is true of the situations, very frequent in the lower Federal courts, in which nominations have been made and confirmed to replace incumbent judges being elevated to higher posts at the same time. Thus, acceptance of the assertion that the Senate lacks the power to confirm Mr. Justice Fortas on account of the condition affecting the timing of Chief Justice Warren's retirement, or that it lacks the power to confirm Judge Thornberry at this time to replace Justice Fortas, would create serious doubt about the validity of the appointments of a sizable portion of the Federal judiciary.

There is nothing inconsistent with the Constitution in the practice of anticipatory nomination and confirmation in the present circumstances. To the contrary, this practice is sanctioned by the Constitution and the experience under it throughout our history. As President Kennedy wrote to Judge Prettyman in 1961, it has the beneficial effect that the "Court may not be handicapped for any time during which a vacancy might otherwise exist."

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[8] Recently, in connection with a nomination elevating a judge to a higher court and a simultaneously submitted nomination designed to fill the vacancy caused by that elevation, the Senate confirmed the judge who was to fill the vacancy ahead of the one who was to be elevated. These were the nominations, dated October 6, 1966, of John Lewis Smith, Jr., Chief Judge of the District of Columbia Court of General Sessions, to the United States District Court for the District of Columbia, and of Harold H. Greene, vice the elevation of Judge Smith. 112 CONGRESSIONAL RECORD 25524. The confirmation of Judge Greene occurred on October 18, 1966, and that of Judge Smith on October 20. 112 CONGRESSIONAL RECORD 27397, 28086.

Appendix I

1. Letters from Chief Justice Warren to President Johnson, dated June 13, 1968:

a. My Dear Mr. President:

Pursuant to the provisions of 28 U.S.C., Section 371(B), I hereby advise you of my intention to retire as Chief Justice of the United States effective at your pleasure.

Respectfully yours,
Earl Warren

b. My Dear Mr. President:

In connection with my retirement letter of today, I desire to state my reason for doing so at this time.

I want you to know that it is not because of reasons of health or on account of any personal or associational problems, but solely because of age. I have been advised that I am in as good physical condition as a person of my age has any right to expect. My associations on the court have been cordial and satisfying in every respect, and I have enjoyed each day of the fifteen years I have been here.

The problem of age, however, is one that no man can combat and, therefore, eventually must bow to it. I have been continuously in the public service for more than 50 years. When I entered the public service, 150 million of our 200 million people were not yet born. I, therefore, conceive it to be my duty to give way to someone who will have more years ahead of him to cope with the problems which will come to the Court.

I believe there are few people who have enjoyed serving the public or who are more grateful for the opportunity to have done so than I. I take leave of the Court with the warmest of feelings for every member on it and for the institution which we have jointly served in the years I have been privileged to be part of it.

With my every best wishes for your continued good health and happiness, I am

Sincerely,
Earl Warren

2. Letter from President Johnson to Chief Justice Warren dated June 26, 1968:

My Dear Mr. Chief Justice:

It is with the deepest regret that I learn of your desire to retire, knowing how much the nation has benefited from your service as Chief Justice. However, in deference to your wishes, I will seek a replacement to fill the vacancy in the office of Chief Justice that will be occasioned when you depart. With your agreement, I will accept your decision to retire effective at such time as a successor is qualified.

You have won for yourself the esteem of your fellow citizens. You have served your nation with exceptional distinction and deserve the nation's gratitude.

Under your leadership, the Supreme Court of the United States has once again demonstrated the vitality of this nation's institutions and their capacity to meet with vigor and strength the challenge of changing times. The Court has acted to achieve justice, fairness, and equality before the law for all people.

Your wisdom and strength will inspire generations of Americans for many decades to come.

Fortunately, retirement does not mean that you will withdraw from service to your nation and to the institutions of the law. I am sure that you will continue, although retired from active service as Chief Justice, to respond to the calls which will be made upon you to furnish continued inspiration and guidance to the development of the rule of law both internationally and in our own nation. Nothing is more important than this work which you undertook so willingly and have so well advanced.

Sincerely,
Lyndon B. Johnson

3. Telegram from Chief Justice Warren to President Johnson, dated June 26, 1968:

THE PRESIDENT
THE WHITE HOUSE

DEAR MR. PRESIDENT: MY SECRETARY HAS READ TO ME OVER THE PHONE YOUR LETTER OF ACCEPTANCE OF MY RETIREMENT. I AM DEEPLY APPRECIATIVE OF YOUR WARM WORDS, AND I SEND MY CONGRATULATIONS TO YOU ON THE NOMINATIONS OF MR. JUSTICE FORTAS AS MY SUCCESSOR AND OF JUDGE HOMER THORNBERRY TO

SUCCEED HIM. BOTH ARE MEN OF WHOM YOU CAN WELL BE PROUD, AND I FEEL SURE THEY WILL ADD TO THE STATURE OF THE COURT.

EARL WARREN

4. Letter from Mr. Justice Gray to President Theodore Roosevelt, dated July 9, 1902:

Dear Mr. President,

Being advised by my physicians that to hold the office of Justice of the Supreme Court for another term may seriously endanger my health, I have decided to avail myself of the privilege allowed by Congress to judges of seventy years of age and who have held office more than ten years. I should resign to take effect immediately, but for a doubt whether a resignation to take effect at a future day, or on the appointment of my successor, may be more agreeable to you.

Wishing that the first notice of my intention should go to yourself, I have not as yet mentioned it to any one else.

Very respectfully and truly yours
Horace Gray

5. Letter from President Roosevelt to Mr. Justice Gray, dated July 11, 1902:

My dear Judge Gray:

It is with deep regret that I received your letter of the 9th instant, and accept your resignation. As you know, it has always been my hope that you would continue on the bench for many years. If agreeable to you, I will ask that the resignation take effect on the appointment of your successor.

It seems to me that the valiant captain who takes off his harness at the close of a long career of high service faithfully rendered, holds a position more enviable than that of almost any other man; and this position is yours. It has been your good fortune to render striking and distinguished service to the whole country in certain crises while you have been on the court - and this in addition of course to uniformly helping shape its action so as to keep it up on the highest standard set by the great constitutional jurists of the past. I am very sorry that you have to leave, but you go with your honors thick upon you, and with behind you a career such as few Americans have had the chance to leave.

With warm regards to Mrs. Gray, believe me,

Faithfully yours,
Theodore Roosevelt

6. Letter from Judge Prettyman to President Kennedy, dated December 14, 1961:

Dear Mr. President:

On October 17th last, I had been on the court sixteen years. In August I was seventy years old. Being thus qualified I wish to take advantage of the statute (Sec. 371(b) of Title 28, U.S. Code) which says a judge with such qualifications "may retain his office but retire from regular active service." The statute prescribes no procedure for retiring; accordingly, I simply hereby retire from regular active service, retaining my office.

The statute provides that you shall appoint a successor to a judge who retires. Hence I am sending you this note.

With great respect I have the honor to be

Yours sincerely,
E. Barrett Prettyman

7. Letter from President Kennedy to Judge Prettyman, dated December 19, 1961:

Dear Judge Prettyman:

It was with regret that I received the notification that you were retiring from "regular active service." The way in which you phrased your letter left me with no alternative but to accept your decision.

I was pleased, however, that you were retaining your office and would be available to continue your distinguished service on the Bench. Your record for justice and humanity, your efforts in behalf of more efficient administration of the law, and your legacy of sound precedent entitle you to some relaxation from the demands of regular active service.

I am happy that you have elected to continue in the capacity of chairman of the Administrative Conference. I am looking forward to receiving the recommendations and suggestions which flow from the meetings of the Conference. It seems to

me that this offers an opportunity to make a major contribution toward the improvement of the regulatory agency procedures. Under your leadership I am sure that the Conference will take advantage of that opportunity.

With every good wish, I am

Sincerely yours,
JOHN F. KENNEDY

8. Letter from President Kennedy to Judge Prettyman, dated December 26, 1961:

Dear Judge Prettyman:

As you know, I have announced that I intend to fill the vacancy which will be created when you retire from active service. However, I hope you will continue in regular active service on the Court of Appeals for the District of Columbia until your successor assumes the duties of office. Your letter does not specifically mention when your retirement from regular active service takes effect, but I have been informed that you have no objection to continuing in your present capacity until your successor is sworn in.

I appreciaste your willingness to continue for this limited period in order that the Court may not be handicapped for any time during which a vacancy might otherwise exist.

Sincerely,
JOHN F. KENNEDY

9. Letter from Judge Prettyman to President Kennedy, dated January 2, 1962:

My dear Mr. President:

I have your note of December 26th. I am glad to comply with your preference in respect to the date upon which my retirement takes effect. My notice to you was purposely indefinite. I shall advise the keepers of the records to enter my retirement upon the date when my successor qualifies.

May I take advantage of this opportunity to express to you my deep appreciation of your generous remarks regarding my service.

With great respect, I am

Yours sincerely,
E. BARRETT PRETTYMAN

Appendix II

By letter dated February 24, 1968, Judge Wilson Warlick, North Carolina, Western, retired effective upon the appointment and qualification of his successor. James McMillan was nominated on April 25, appointed June 7, and entered on duty June 24. Judge Warlick retired June 23.

By letter dated March 30, 1967, Judge Frank M. Scarlett, Georgia, Southern, retired effective upon the appointment and qualification of his successor. To date no one has been appointed and he is still on the bench in regular service.

By letter dated November 28, 1966, Judge Frank A. Hooper, Georgia, Northern, retired effective upon the appointment and qualification of his successor. Newell Edenfield was nominated May 24, 1967, appointed June 12, and entered on duty June 30. Judge Hooper retired June 29.

By letter dated September 21, 1965, Judge William G. East, Oregon, retired effective upon the appointment and qualification of his successor. Robert Belloni was nominated February 21, 1967, appointed April 4, and entered on duty April 10. Judge East retired April 9.

By letter dated March 12, 1965, Judge William C. Mathes, California, Southern, retired effective upon the appointment and qualification of his successor, or not later than June 30, 1965. Irving Hill was nominated May 18, appointed June 10, and entered on duty June 25. Judge Mathes retired June 9.

By letter dated February 19, 1964, Judge Walter M. Bastian, D. C. Circuit, retired effective upon the appointment and qualification of his successor. Edward A. Tamm was nominated March 1, 1965, appointed March 11, and entered on duty March 17. Judge Bastian retired March 16.

NAME	COURT	ANNOUNCEMENT OF RETIREMENT	EFFECTIVE DATE OF RETIREMENT
Reid, Silas	Alaska	6/14/09	7/1/09
Cooley, Alford	New Mexico	6/6/10	7/10/10
Brawley, Wm.	S. Carolina	4/18/11	6/14/11
Donworth, George	Washington	1/24/12	7/8/12
Locke, James	Florida, So.	7/9/12	9/2/12
Peele, Stanton	Court of Claims	1/2/13	2/11/13
Stuart, Thomas	Hawaii	8/8/16	11/23/16
Whitney, Wm.	Hawaii	1/25/17	3/19/17
Shepherd, Seth	D.C. Ct. Appeals	5/1/17	9/30/17
Dyer, David	Missouri, E.	5/15/19	11/3/19
Batts, Robert	Fifth Circuit	8/22/19	4/9/20
Davis, John	New Jersey	6/5/20	6/12/20
Riner, John	Wyoming	10/13/21	10/31/21
Rudkin, Frank	Washington	1/17/23	1/18/23
Anderson, Albert	Seventh Circuit	10/31/29	11/6/29

Appendix III

Examples in Vol. I of the JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE, of Senatorial Confirmations in Anticipation of a Vacancy.

I. Nominations vice an incumbent who is being elevated at the same time.

December 21, 1796, p. 216.[1]

I nominate the following persons to fill the offices annexed to their names, respectively, which became vacant during the recess of the Senate:

[1] The page numbers refer to the pages of Volume I of the JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE.

* * *

Jonathan Jackson, of Massachusetts, to be Supervisor for the district of Massachusetts, vice Nathaniel Gorham, deceased.

John Brooks, of Massachusetts, to be Inspector of Survey No. 2, in the district of Massachusetts, vice Jonathan Jackson, appointed Supervisor.

Samuel Bradford, of Massachusetts, to be Marshal for the district of Massachusetts, vice John Brooks, appointed Inspector of Survey No. 2, in that district.

* * *

Confirmed December 22, 1796, p. 217. A number of similar nominations and confirmations took place in February, 1801, in connection with the staffing of the circuit courts. pp. 381–385.

II. Nominations vice incumbents who desire to be relieved of their duties.

May 19, 1796, p. 209

I nominate Rufus King, of New York, to be Minister Plenipotentiary of the United States at the Court of Great Britain, in the room of Thomas Pinckney, who desires to be recalled.

David Humphreys, of Connecticut, to be the Minister Plenipotentiary of the United States at the Court of Spain; William Short, the resident Minister to that Court having desired to be recalled.

Confirmed, May 20, 1796, p. 209

III. Nominations to fill terms about to expire.

1. January 10, 1798, p. 258

I nominate the following persons to be Marshals of the United States;

John Hobby, for the district of Maine; Philip B. Bradley, for the district of Connecticut; Thomas Lowry, for the district of New Jersey; Samuel McDowell, Jr., for the district of Kentucky: each for the term of four years, to commence on the twenty-eighth of January, current, when their present terms will expire.

Confirmed, January 12, 1798, p. 258.

2. December 9, 1799, p. 325

I nominate * * * David Mead Randolph the present Marshal of the district of Virginia, for the term of four years, to commence on the 15th instant when his existing commission will expire.

Confirmed, December 6, 1799, p. 326.

3. February 4, 1803, p. 441

I nominate * * * William Henry Harrison, to be Governor of the Indiana Territory from the 13th day of May next, when his present commission as Governor will expire.

Confirmed February 8, 1803, p. 442.

IV. Nominations to fill vacancy which will be caused by a resignation on a future day certain.

May 7, 1800, p. 352

I nominate the Honorable John Marshall, Esq. of Virginia, to be Secretary of the Department of War, in the place of the Honorable James McHenry, Esq., who has requested that he may be permitted to resign, and that his resignation be accepted to take place on the first day of June next.

May 12, 1800, p. 353

I nominate the Honorable John Marshall, Esq., of Virginia, to be Secretary of State, in place of the Honorable Timothy Pickering, Esq. removed.

The Honorable Samuel Dexter, Esq. of Massachusetts, to be Secretary of the Department of War, in the place of the Honorable John Marshall, nominated for promotion to the Office of State.

Confirmed, May 13, 1800, p. 354.

V. Nomination to fill office, the incumbent of which is to be superseded.

December 23, 1799, p. 329

I nominate Ambrose Gordon, of Georgia, to be marshal of the district of Georgia, in the place of Oliver Bowen, to be superseded.

Confirmed, December 24, 1799, pp. 329–330.

April 13, 1979

79-25 MEMORANDUM OPINION FOR THE ADMINISTRATOR OF VETERANS AFFAIRS

Federal Advisory Committee Act (5 U.S.C. App. § 1 *et seq.*)—Duration of Veterans Administration Advisory Committees

The Attorney General has asked this Office to reply to your letter to him of January 10, 1979, concerning the duration under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. § 1 *et seq.* (1976), of four statutorily created Veterans Administration (VA) advisory committees. We conclude that the duration of advisory committees may be determined by implication from the particular statute involved, and thus be "otherwise provided for by law," within the meaning of the FACA. This would permit such committees to survive the FACA's 2-year cutoff provisions, 5 U.S.C. App. § 14(a)(1)(B) and (2)(B), notwithstanding the absence of any statute providing expressly for their termination. Under the above standards, Congress has so provided by law for the continuing duration of two VA advisory committees and for the extended duration of two other VA advisory committees for limited purposes only.

I. Background

The VA is currently served by four statutorily created advisory committees: the Advisory Committee on Cemeteries and Memorials (Cemeteries Committee), 38 U.S.C. § 1001 (1976); the Advisory Committee on Structural Safety of Veterans Administration Facilities (Structural Safety Committee), 38 U.S.C. § 5001 (1976); the Special Medical Advisory Group (SMAG), 38 U.S.C. § 4112(a) (1976); and an advisory committee on vocational rehabilitation and educational assistance (Education Committee), 38 U.S.C. § 1792 (1976). The first two were created in 1973, subsequent to the 1972 enactment of FACA; SMAG was created in 1946; the Education Committee was first established in 1952.

None of the acts establishing these committees specifies whether the committee it creates shall exist for a certain term or indefinitely.

Under § 14(a),

> (a)(1) Each advisory committee which is in existence on the effective date of this Act shall terminate not later than the expiration of the two-year period following such effective date unless—
>
> * * *
>
> (B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.
>
> (2) Each advisory committee established after such effective date shall terminate not later than the expiration of the two-year period beginning on the date of its establishment unless—
>
> * * *
>
> (B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

As you suggest, because the statutes that created the four VA committees do not specify their terms of existence, they are governed by the automatic cutoff provisions quoted above unless their duration is, by implication, "otherwise provided for by law."

Since the enactment of the FACA, this Office has been frequently called upon by executive agencies to construe § 14(a) as applied to particular advisory committees. Because the offices responsible for promulgating guidelines for the management of Federal advisory committees[1] have themselves issued no interpretation of the phrase "duration * * * otherwise provided for by law," we have consistently applied an interpretation of the FACA that we reached in 1973 (in consultation with the Office of Management and Budget) based on the manifest intent and legislative history of the FACA.

In our view, the duration of a statutorily created advisory committee may be "otherwise provided for by law" either expressly or by implication. Such duration is provided for by implication if the statute that creates or assigns functions to an advisory committee provides for it a specific function that is continuing in nature and is an integral part of the implementation of a statutory scheme. The statutory assignment to a committee of some regular and well-defined participation in an agency's administrative process would be sufficient to overcome the rebuttable presumption that, unless the statute that creates a committee deals expressly with termination, the committee is to terminate automatically in 2 years. Such an assignment must be more specific than the rendering of general

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[1] The FACA established a Committee Management Secretariat under the Director of the Office of Management and Budget, 5 U.S.C. App. § 7(a). A 1977 Executive order transferred to the Administrator of General Services (GSA) certain functions under the FACA, including the maintenance of the Secretariat. Exec. Order No. 12024, 3 CFR 158 (1978).

advice to an agency with regard to some program area, which is the general function of most advisory committees.

The interpretation just described, centering on a rebuttable presumption of committee termination, is compelled as a necessary middle ground between narrower and more lenient interpretations, both of which would fail to give effect to Congress' intent in enacting the FACA.

Under a more lenient interpretation, the duration of a committee would be deemed to be otherwise provided for by law if the committee is assigned by statute any specific ongoing function. The interpretation would effectively nullify the automatic termination provisions and undermine the clear purpose of § 14(a), because the general task of all advisory committees to give advice could itself be characterized as a specific ongoing function.

Under a narrower interpretation, a committee's duration would be provided for only if its terms of existence were expressly specified in an Act of Congress. We reject this approach for three reasons. First, it would sweep more broadly than Congress' expressed intent of getting rid of "inactive, meaningless, obsolete and redundant advisory committees," S. Rept. 1098, 92d Cong. 20 (1972), by imposing a rule under which the functions assigned by Congress to an advisory committee would be irrelevant in determining Congress' intent with respect to the duration of the advisory body. Such an approach would be especially troublesome with respect to statutory committees created prior to the enactment of the FACA. Prior to the FACA, Congress, not anticipating any need to specify expressly the term of an advisory committee's existence, would likely have expressed its intent concerning the duration of any committee only by implication, if at all, through the functions and structure established for the committee. Second, the narrower rule would create irrationally different regimes for the perpetuation of statutory and nonstatutory committees.[2] Finally, it would give no effect to the unexplained substitution of the word "duration" for "termination" in the conference version of § 14(a); in speaking of "*duration* otherwise provided by law," instead of "*termination* otherwise provided for by law," Congress may have intended to establish a more flexible approach to determining the longevity of advisory committees [emphasis added].

Because the legislative history of the FACA indicates that uniformity of treatment for Federal advisory committees is a "major objective," S. Rept. 1098, *id.*, 8-9, we believe that the presumption of automatic termination can be rebutted, if at all, by specific statutory language, and not by references to legislative history or administrative practice. Otherwise, our suggested test would be highly uncertain in its application.

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[2] Nonstatutory committees may simply be renewed, prior to expiration, by action of the President or of the Government officer who established the committee. 5 U.S.C. App. § 14(a).

Although our approach, in sum, is partly functional, we do not believe that Congress intended the importance an agency or department attaches to a particular committee to be sufficient in itself to establish the committee's continuing duration as a statutory committee. By creating a test of termination that relies on statutory language, Congress has created a system whereby certain statutory committees may well terminate despite their demonstrable usefulness to the agencies they advise. Congress has nonetheless reserved to itself the option of perpetuating important committees by statute beyond 2 years, leaving the option to each agency head of establishing, after consultation with GSA and the furnishing of public notice, a statutorily created committee as a nonstatutory body. 5 U.S.C. App. § 9(a)(2). Presumably, the ease of recreating important advisory committees whose duration is not provided for by law other than by the FACA will obviate the problems created in such cases if the committees serve truly important functions.

II. Post-FACA Committees

Applying our interpretation of § 14(a) to both of the VA committees established subsequent to the enactment of the FACA, we conclude, as discussed below, that the statute establishing each committee sets forth specific functions, continuing in nature, that are integral parts of the implementation of a statutory scheme, and thus provides for each committee's continuing duration.

A. Structural Safety Committee

Under 38 U.S.C. § 5001, the Administrator, subject to Presidential approval, is authorized to establish hospitals, domiciliaries, and outpatient dispensary facilities that shall be constructed under standards to be prescribed by the Administrator. Section 5001(b) directs the Administrator to appoint an Advisory Committee on Structural Safety of Veterans Administration Facilities, "which shall approve regulations" prescribed under § 5001. This assigned function is, on its face, specific, ongoing, and integral to the implementation of the statutory program for acquiring and operating medical and domiciliary facilities.

B. Cemeteries Committee

Section 1001 of title 38 directs the appointment of an Advisory Committee on Cemeteries and Memorials. It provides that the Administrator "shall advise and consult" with the committee concerning various functions, including the selection of burial sites and the erection of appropriate memorials. Consultation with respect to these particular activities is a specific function, ongoing in nature, that is integral to those activities. The committee is further required by statute "to make periodic reports and recommendations to the Administrator and to Congress." We have uniformly interpreted the statutory requirement of periodic reports to Congress as a specific continuing function that Congress deems

integral to those statutory schemes of which such reports are a part.

We thus conclude that the duration of both the Structural Safety and Cemeteries Committees is "otherwise provided for by law" within the meaning of § 14(a) of the FACA, and thus both committees survive the 2-year automatic cutoff provision of § 14(a)(2)(B).

III. Pre-FACA Committees

Applying our interpretation of § 14(a) to both of the VA committees established prior to the enactment of the FACA, we conclude, as discussed below, that the statute establishing each committee fails to set forth functions implying each committee's indefinite duration. Congress, however, has passed subsequent legislation, giving at least some extended duration to each committee for particular purposes.

A. Education Committee

Section 1792 of title 38 directs the Administrator to form an advisory committee composed of experts from various fields and veterans to advise the VA with respect to its vocational rehabilitation and educational assistance programs. Its functions are described as follows:

> The Administrator shall advise and consult with the committee from time to time with respect to the administration of this chapter and chapters 31, 34, and 35 of this title, and the committee may make such reports and recommendations as it deems desirable to the Administrator and to the Congress.

This provision is substantially the same in wording as § 262 of the Veterans Readjustment Assistance Act of 1952, 66 Stat. 679, under which the committee was originally created.

On its face, § 1792 designates no particular decisionmaking process in which the committee will play a specified role. There is no requirement that the committee act in any particular instance. It is permitted but not required to report to the Administrator and to Congress, and no indication appears that the committee is to provide its advice on a regular basis. Consequently, the duration of the Education Committee is not provided for by implication by its statute.

Congress did, however, in § 304(b)(1) of the G.I. Bill Improvement Act of 1977 (the 1977 Act), Pub. L. No. 95-202, 91 Stat. 1442 (to be codified at 38 U.S.C. note following § 1792) provide:

> The Administrator of Veterans' Affairs, in consultation with the Advisory Committee formed pursuant to section 1792 of title 38, United States Code, shall provide for the conduct of an independent study of the operation of the programs of educational assistance carried out under chapters 34 and 36 of title 38, United States Code * * *. A report of such study shall be submitted to the President and the Congress not later than September 30, 1979.

This wording is problematic because it might be read to imply the understanding of Congress that the "Advisory Committee formed pursuant to section 1792" still existed on November 23, 1977, the date the section was enacted. That implication might contradict our conclusion that § 14(a) operated to terminate the Education Committee 2 years after the enactment of the FACA on October 6, 1972.

Such an interpretation would, in our view, be incorrect. First, it is elementary that statutes concerning the same subject are to be read in a consistent manner, if possible. That 1977 Act may reasonably be read as re-forming the Education Committee until September 30, 1979, for the limited purpose of advising the Administrator concerning an independent study of VA educational assistance programs. This would effect the purpose of the 1977 Act without contradicting the FACA. Second, the FACA itself proscribes any implied repeal of its termination provisions:

> The provisions of this Act * * * shall apply to each advisory committee except to the extent that any Act of Congress establishing such advisory committee specifically provides otherwise. [5 U.S.C. App. § 4(a).]

Nothing in the statutes relevant to the Education Committee specifically provides that the same test of implied duration that applies to other committees should not be applied to it.

Interpreting the 1977 Act is necessarily difficult because Congress seems itself to have overlooked the FACA problem. The provision regarding the Education Committee's role in the VA study was apparently added in conference, from which no report issued. The original House bill made no reference to the Education Committee. H.R. Rept. 586, 95th Cong., 1st Sess. (1977). The original Senate bill would have amended § 1792 to provide that the Administrator would meet with the advisory committee "on a regular basis," and at least semiannually. S. Rept. 468, 95th Cong., 1st Sess. 10 (1977).

In its discussion of the Education Committee, the Senate Committee on Veterans' Affairs, at 118–119, manifests its unawareness of the FACA problem.[3] However, its discussion does buttress the conclusion that Congress, in establishing the committee in 1952, had not provided for it a specific continuing role that is integral to VA administration:

> Unfortunately, the advisory committee—established by Congress specifically to assist the Veterans' Administration in establishing channels of communication with these [representatives from education associations] and other concerned individuals—has met sporadically. Apparently, little emphasis has been placed by the

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[3] The Senate committee noted disapprovingly that the Education Committee had not met since October 17, 1975. S. Rept. 468, 95th Cong., 1st Sess. 119 (1977). Our conclusion, however, is that the committee should have been deemed terminated as a statutory committee on October 6, 1974.

> Veteran's Administration upon the helpful role that the committee could play in the mutual exchange of information and ideas.
>
> * * *
>
> The Committee also notes, as it did last year, that in the 10 years that the section 1792 committee has existed, it has yet to make any reports or recommendations to the Congress under the discretionary authority granted under section 1792; it has reported only in response to a specific mandate of law to do so. [*Ibid.*]

Although Congress, in 1977, gave a new function to the Education Committee, the 1977 Act does not alter our conclusion that, as created in 1952, the Education Committee was assigned no specific ongoing function integral to VA administration that implied its continuing duration. Consequently, the presumption of the committee's automatic termination after 2 years under § 14(a) of the FACA stands unrebutted. The effect of the 1977 Act was merely to reconstitute the committee for the limited purpose of consulting with the Administrator regarding the study authorized by the Act. The committee will terminate, under the 1977 Act, on September 30, 1979, unless reauthorized by Congress or rechartered by the Administrator under § 9(a)(2) of the FACA.

B. SMAG

Section 4112 of title 38 directs the Administrator to establish a special medical advisory group (SMAG) composed of various professionals nominated by the Chief Medical Director—

> whose duties shall be to advise the Administrator, through the Chief Medical Director, and the Chief Medical Director direct [sic], relative to the care and treatment of disabled veterans, and other matters pertinent to the Department of Medicine and Surgery.

This provision is worded substantially the same as § 12 of the Act of January 3, 1946, 59 Stat. 678, under which SMAG was originally formed.

Like the Education Committee statute, § 4112 designates no particular decisionmaking process in which the committee will play a specified role. There is no requirement under this law that SMAG act in any particular instance. SMAG meets at the pleasure of the Administrator[4] and is required to give no particular reports. Consequently, the duration of SMAG is not impliedly provided for by its establishing statute, notwithstanding SMAG's genuine usefulness to the VA.

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[4] As originally mandated, SMAG was to conduct "regular calendar quarterly meetings." Act of January 3, 1946, § 12, 59 Stat. 678. Congress, in 1966, amended this wording, providing:

> The special medical advisory group shall meet on a regular basis as prescribed by the Administrator. [Veterans Hospitalization and Medical Services Modernization Amendments of 1966, Title I, § 109(a), 80 Stat. 1370.]

Congress did, however, give SMAG additional functions. In 1966, it enacted 38 U.S.C. § 5055, establishing a SMAG Advisory Subcommittee on Programs for Exchange of Medical Information to advise the Administrator regarding the statutory scheme of grants to medical institutions exchanging medical information with the VA. § 5055(a). The Administrator is authorized to make grants under § 5055(b) "upon the recommendation of the Subcommittee." Further, under § 5055(d):

> The Administrator, after consultation with the Subcommittee shall prescribe regulations covering the terms and conditions for making grants, under this section.

These specific ongoing functions, integral to the statutory grant-making process, do imply the continuing duration of the SMAG subcommittee for as long as the statutory program remains authorized. They do not, however, amend § 4112, and do not, by themselves, extend the duration of SMAG for its other functions longer than 2 years after the enactment of the FACA.

In 1972, however, Congress enacted 38 U.S.C. § 5070, establishing a system of grants to new State medical schools, VA-affiliated medical schools, and health manpower training institutions. Under § 5070(c), the Administrator is empowered to promulgate regulations covering agreements and grants under title 38, chapter 82 "after consultation" with SMAG. The specific, ongoing, and integral nature of this function implies the continued duration of SMAG to perform this function as long as agreements and grants are made under this statute. No indication appears, however, that § 5070(c) is to be deemed an amendment of § 4112 or to extend the life of SMAG for any purpose other than consulting with regard to grants and agreements under chapter 82.

No other provision or amendment to § 4112 implies the continuing duration of SMAG beyond October 6, 1974, for any purpose other than those named in §§ 5055 or 5070.[5] SMAG and its authorized subcommittee thus are no longer authorized to perform general functions under § 4112, and SMAG will terminate in its entirety upon the termination of the VA's programs under § 5055 and chapter 82, unless reauthorized by Congress or rechartered by the Administrator under § 9(a)(2) of the FACA.

IV. Conclusion

In sum, as we interpret § 14(a) of the FACA, it creates a rebuttable presumption that, unless a statute creating an advisory committee deals

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[5] In 1972, Congress enacted 38 U.S.C. § 4124, under which the Chief Medical director, after consultation with SMAG, is to carry out the provisions of subchapter II of chapter 73 of title 38, regarding supervision, staffing, and personnel training for regional medical education centers. Congress did not, however, designate for SMAG a specific, ongoing, integral role in the implementation of this subchapter. In 1976, Congress amended 38 U.S.C. § 4112 to add new members to SMAG: its 1976 amendment, however, did not affect the functions or duration of the committee. Veterans Omnibus Health Care Act of 1976 §§ 110(8), 209(b)(3), Pub. L. 94-581, 90 Stat. 2849, 2861.

expressly with its termination, the committee terminates 2 years after the enactment of the FACA or after the creation of the committee, whichever comes later. This presumption may be rebutted by a showing that Congress, in creating a committee, assigned to it a specific ongoing function that is integral to a particular statutory scheme. Such a showing can be made with respect to the Cemeteries and Structural Safety Committees. Congress has implied the continuing duration of SMAG only to perform functions under 38 U.S.C. §§ 5055 and 5070 for the life of the relevant VA programs. It has provided for the reformation of the Education Committee to consult with respect to a particular study to be completed on September 30, 1979.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

April 18, 1979

79-26 MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

Immigration and Nationality Act (8 U.S.C. § 1101 (a)(15))—Nonimmigrant Aliens—Strikes and Other Labor Disputes—Status of Nonimmigrant Alien Soccer Players During Strike in the North American Soccer League

This responds to the oral request for our views whether nonimmigrant aliens currently employed by teams in the North American Soccer League (NASL) may lawfully continue to work in the United States notwithstanding a strike called by the North American Soccer League Players Association, and whether the nonimmigrant aliens who continue to work and those who choose not to do so may lawfully remain in the United States. We conclude that the Immigration and Nationality Act and applicable regulations of the Immigration and Naturalization Service (INS) neither bar this class of alien workers from continuing to work nor require their deportation if they honor or refuse to honor the strike.

Under the Immigration and Nationality Act, the term "immigrant" means every alien except an alien who falls within one of a number of specific classes of nonimmigrants set forth in 8 U.S.C. § 1101(a)(15). Included among the classes of nonimmigrants are the so-called "H-1" and "H-2" aliens:

> (H) an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability * * *; or (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country * * *. [8 U.S.C. § 1101(a)(15)(H).]

The Act provides that the "question of importing any alien as a nonimmigrant under § 1101(a)(15)(H) * * * shall be determined by the

Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer." 8 U.S.C. § 1184(c). We understand that INS, after consulting with the Secretary of Labor, approved petitions filed by the NASL to admit 210 nonimmigrant aliens under 8 U.S.C. § 1101(a)(15)(H)(ii) (H-2 aliens). We also understand that a few players of distinguished merit and ability may have been admitted pursuant to 8 U.S.C. § 1101(a)(15)(H)(i)(H-1 aliens).

When an employer's petition has been approved, the alien beneficiary may be admitted into the United States to work for the employer. The authorized period of his admission is governed by the period of established need for his services, not to exceed the period for which the employer's petition is valid. 8 CFR 214.2(h)(9). The petitions in the present situation are, as we understand it, valid through the current NASL season. However, 8 CFR 214.2(h)(10) provides:

> A petition shall be denied if a strike or other labor dispute involving a work stoppage or layoff of employees is in progress in the occupation and at the place the beneficiary is to be employed or trained; if the petition has already been approved, the approval of the beneficiary's employment or training is automatically suspended while such strike or other labor dispute is in progress.

Because the NASL's petitions have already been approved for the duration of the NASL season, the question is whether the approval of employment for each nonimmigrant alien player already employed by an NASL team is "automatically suspended" while the present strike is in progress. We do not believe the regulation may be interpreted in this manner.

The regulation, promulgated in 1965, was apparently issued pursuant to 8 U.S.C. § 1184(a), which provides that the admission of an alien as a nonimmigrant "shall be for such time and under such conditions as the Attorney General may by regulations prescribe." Such a regulation must, however, be rationally related to the purposes and ends of the Immigration and Nationality Act. *Cf., Fook Hong Mak* v. *INS*, 435 F. (2d) 728, 730 (2d Cir. 1970).

We understand that INS has no information regarding the original purpose of the regulation, and that there is no helpful history of application of the regulation. Its apparent purpose, however, is to prevent an employer involved in a labor dispute from importing nonimmigrant aliens as "strike breakers"—*i.e.*, to replace the employer's current employees who have gone on strike. Such a restriction may, in our view, be rationally related to the purposes of the Act, at least as applied to H-2 aliens. H-2 aliens may only be admitted "if unemployed persons capable of performing [the requested] service or labor cannot be found in this country." It could, in general, reasonably be concluded that persons on strike are capable of performing services for the struck employer, or at least that the requisite determination could not be made while a strike is in progress, and that the statutory requirement for admitting H-2 aliens could therefore not be met when the petitioning employer's need for employees arises from

a strike. As applied to aliens whose employment would begin after commencement of the strike, 8 CFR 214.2(h)(10) merely gives particular content to the statutory requirement.

We have serious doubt, however, that the regulation may properly be interpreted to require the automatic suspension of the employment approval of nonimmigrant aliens who are already employed as beneficiaries of an approved petition filed under 8 U.S.C. §§ 1101(a)(15)(H) and 1184(c) at the time of the strike or other labor dispute. Any such aliens in the H-2 category were presumably admitted after a finding that unemployed workers capable of performing the duties could not be found in this country. The mere existence of a strike or other labor dispute does not suggest that capable unemployed workers can be found, thereby warranting suspension of approval of the alien's employment. The automatic suspension of work approval upon the occurrence of a strike or other labor dispute therefore would not be rationally related to the purposes of 8 U.S.C. § 1101(a)(15)(H)(ii). Nor have we been able to identify any other provision of the Immigration and Nationality Act to which this interpretation could be tied.

A second reason for interpreting the regulation as not barring continued employment of these classes of nonimmigrant aliens may be based on the National Labor Relations Act. Section 7 of that Act, 29 U.S.C. § 157, grants to aliens the right to decide for themselves whether they will or will not engage in concerted activities, *i.e.,* whether, among other things, they will engage in or honor a strike. If the INS regulation were interpreted to require the automatic suspension of the employment approvals for H-visa alien employees whenever a labor dispute involving their employer occurs, this class of employees would be deprived of the freedom to decide whether to engage in these protected activities. In effect, they would be required to honor the strike. We do not believe that the regulation may be interpreted in such manner, absent a firm basis of support in the Immigration and Nationality Act itself.[1] *See, Sam Andrews' Sons* v. *Mitchell,* 457 F. (2d) 745, 748–49 (9th Cir. 1972).

Similarly, we are not aware of any requirement in the Immigration and Nationality Act or of any implementing regulation that a nonimmigrant who honors a strike and therefore does not work must be deported. The duration of each beneficiary's admission into the United States is conditioned upon the need for his services, up to the length of time for which the petition is valid. 8 CFR 214.2(h)(9). As pointed out above, the NASL petitions are valid for the current NASL season. A player's going on strike does not automatically eliminate the employer's need for his services or suggest that capable unemployed workers are available in the United States. Moreover, the striking alien remains an employee of the struck

[1] This interpretation is consistent with the meager prior history of the application of the regulation, under which INS has apparently taken no action against aliens already employed at the time of a labor dispute.

employer within the meaning of § 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3), and automatically to institute deportation proceedings against an alien who honors a strike would interfere with the employee's rights under that Act to participate or not to participate in the strike.

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Office of Legal Counsel

April 19, 1979

79-27 MEMORANDUM OPINION FOR THE ACTING LEGAL ADVISER DEPARTMENT OF STATE

Foreign Service—Retirement—Amount of Annuity (22 U.S.C. § 1076)

Assistant Attorney General Harmon has asked me to respond to your request for our opinion regarding the proper construction of certain statutory provisions relating to the Foreign Service Retirement and Disability System.

Congress, by § 406 of Pub. L. N. 95–426, approved October 7, 1978, 92 Stat. 979, liberalized retirement provisions for certain Foreign Service personnel. Section 821(a) of the Foreign Service Act of 1946, 22 U.S.C. § 1076(a), provides that one of the factors in computing the amount of an annuity under the Foreign Service Retirement and Disability System (Retirement System) is the annuitant's "average basic salary for his highest three consecutive years of service." Section 406 allowed any participant in the Retirement System whose salary was limited by 5 U.S.C. § 5308 to compute his or her annuity based on his or her highest single annual salary instead of the average 3-year formula.[1] This benefit was to accrue only to eligible persons retiring between October 1, 1978, and December 31, 1979. In simple terms, § 406 permitted those whose annual salaries were frozen at $47,500 to retire after 1 year at that salary level, and to have that amount factored into the annuity formula as if they had served 3 years at that level. The stated and obvious purpose of § 406 was to induce early retirement among senior Foreign Service personnel during the operative period of the provision.[2]

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[1] Section 5308 limits the Federal pay-comparability system (5 U.S.C. §§ 5301–5308) to the basic rate of pay for level V of the Executive Schedule, which at all relevant times was $47,500.

[2] The House International Relations Committee, in H. Rept. 1160, p. 29, 95th Cong., 2d Sess. (1978), stated that, "It is hoped that this temporary annuity provision will help alleviate the overcrowding in the Foreign Service * * *." *See also* H. Conf. Rept. 1535, 95th Cong., 2d Sess., at 52–53 (1978).

However, immediately after Pub. L. No. 95–426 was reported out of conference, Congress reconsidered the wisdom of § 406 and set the legislative machinery in motion to stop it from becoming operative.[3] One effort took the form of an appropriation restriction passed as part of Pub. L. No. 95–481, approved October 18, 1978. The other effort, in more conventional terms, was a simple repeal of § 406, which was included in Pub. L. No. 95–482, approved October 18, 1978. We understand that during the 11-day period § 406 was in effect, 64 persons retired who were eligible to receive the liberalized retirement benefits.

It is clear that persons retiring after October 18, 1978, cannot take advantage of § 406. The question is whether the 64 retirees are entitled to the "high one" benefit of § 406. For the reasons that follow we believe that they are.

I.

Public Law 95–426 is the Foreign Relations Authorization Act for fiscal year 1979. As stated above, § 406 was intended as an early retirement inducement for certain Foreign Service personnel. The House International Relations Committee in H. Rept. 1160, 95th Cong., 2d Sess. (1978), explained § 406 and the reasons leading to its enactment as follows:

> [It] provides a special retirement annuity for those Foreign Service officers and other participants in the Foreign Service retirement system who retire between October 1, 1978 and December 31, 1979 equal to 2 percent of the basic salary for the highest single year of service multiplied by the number of years of service credit obtained. Current law computes annuities on the basis of the highest three years of service.
>
> The committee wishes to note that this provision is not intended to be a precedent for Federal employees generally or for Foreign Service personnel other than those to whom this section applies. The problems which gave rise to this solution are unique to the Foreign Service. It is hoped that this temporary annuity provision will help alleviate the overcrowding in the Foreign Service which has been caused by the President's personnel ceiling and the 1977 District Court decision in *Bradley* v. *Vance* holding the mandatory retirement age for Foreign Service officers unconstitutional.[4]

The conference report, H. Rept. 95–1535, elaborated on this explanation as follows (p. 53):

> The civil service system has authority for both reduction-in-force and early retirement inducements to handle similar personnel problems. Temporary and specific retirement inducements are

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[3] The legislative history of Congress' reaction to § 406 is set forth more fully *infra*.

[4] The District Court opinion in *Bradley* v. *Vance* 436 F. Supp. 134 (D.D.C. 1977) (*per curiam*), was reversed by the Supreme Court. *Vance* v. *Bradley*, 440 U.S. 93 (1979).

used in civil service-staffed agencies when such agencies face difficult personnel problems such as that now confronting the Foreign Service.

This section [§ 406] is necessitated by the separate personnel system of the Foreign Service which has neither reduction-in-force nor special retirement inducement authority.

The Administration voiced strong opposition to § 406, asserting that it would set an unacceptable precedent for other retirement systems and contribute to inflation. It was also claimed that § 406 would frustrate the Administration's pending effort to freeze executive pay by compensating for the freeze with higher annuities.[5] The President, however, approved Pub. L. No. 95–426 despite his strong opposition to § 406's "high one" retirement benefit. In his signing statement he stated that he did so because Pub. L. No. 95–426 authorized "urgently needed appropriations" for the Department of State, the International Communication Agency, and the Board of International Broadcasting. 14 Weekly Comp. of Pres. Doc. 1734–1735.

II.

Shortly after § 406 became law, two separate provisions were enacted: one to prohibit the expenditure of appropriated funds for § 406 purposes (Pub. L. No. 95–481), and the other to repeal it (Pub. L. No. 95–482). These provisions raise the question whether those Foreign Service personnel who retired after § 406 was passed but before these provisions came into effect are entitled to receive the liberalized retirement benefits of § 406. More precisely, the issue is whether these provisions should be construed to apply prospectively, *i.e.*, so as not to divest those who timely took advantage of § 406's "high one" benefit, or whether they should be given retrospective effect. The general rule concerning such an issue was dealt with in *Greene* v. *United States*, 376 U.S. 149 (1964). There the Court quoted with approval (*id.*, at 160) from *Union Pac. R. Co.* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913):

> * * * the first rule of construction is that legislation must be considered as addressed to the future, not to the past * * * [and] a retrospective operation will not be given to a statute which interferes with antecedent rights * * * unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.

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[5] These views are set forth in a June 26, 1978, letter from Secretary of State Vance and in a July 18, 1978, letter from the Director of the Office of Management and Budget, both addressed to the Chairman of the Senate Foreign Relations Committee. The letters are printed at 124 CONGRESSIONAL RECORD S15725 (daily ed. Sept. 21, 1978), and in S. Rept. 1194, 95th Cong., 2d Sess., at 75–77 (1978), on the 1979 Foreign Assistance and Related Programs Appropriation bill.

The presumption against retrospectivity is designed to protect reasonable reliance on prior settled law. At bottom, the rule is basically one of fairness. Prospective construction is also presumed because retrospective application in some cases would raise serious constitutional issues and courts will not lightly infer a congressional intent fraught with such difficulties. *United States* v. *Larionoff,* 431 U.S. 864, 879 (1977). We believe that retrospective construction in this case would present a constitutional problem. We need not resolve it here because we conclude that Congress did not intend a retrospective repeal of § 406.

III.

As we have already noted, even before § 406 became law, Congress was moving on two fronts to negate it. One such effort was enacted as part of Pub. L. No. 95–481. We deal with that effort below.

Congress in the 1979 Foreign Assistance and Related Programs Appropriations Act, Pub. L. No. 95–481, appropriated funds to the Foreign Service Retirement and Disability Fund. However, this appropriation provided (92 Stat. 1592):

> That none of these funds or other funds available to the Foreign Service Retirement and Disability Fund shall be available to carry out the provisions of section 406 of the Foreign Relations Authorization Act, Fiscal Year 1979.

The appropriation restriction, literally read, would preclude funding for any payments made pursuant to § 406's "high one" provision. This, in effect, constitutes a repeal with retroactive effect, at least for fiscal year 1979, of § 406's benefit. However, the restriction, despite its seemingly plain language, was intended to be no more than a simple 1-year repeal of § 406. The general rule against retrospective construction thus requires that this action, absent a clear congressional intent to the contrary, apply only prospectively.

The Supreme Court has recently stated that however clear statutory language may appear, resort to the statute's legislative history to discern Congress' intent is proper. *Train* v. *Colorado Pub. Int. Research Group,* 426 U.S. 1, 10 (1976). The legislative history of the appropriation restriction demonstrates, in our view, that it was, no doubt, intended as a repealing provision but that the language was used because the restriction's sponsors seemed to believe that to employ more conventional repealing language would undermine the conference report and delay the urgently needed authorization bill. Senator Inouye, the restriction's sponsor, explained this as follows (124 CONGRESSIONAL RECORD S15725):

> [I]t might be said that the most logical and direct challenge to [§ 406] would have been a move to reject the conference report, which was adopted yesterday by the Senate, but that would have necessitated a reconvening of the conference and a further delay on an already too-long delayed authorization bill. Therefore, in the effort to focus direct attention on the "high-one" retirement,

> the [Senate Appropriations] committee chose another route readily available to it, which was to restrict the funding of this Foreign Service retirement fund.

It seems plain that Senator Inouye urged the restriction route in order to accomplish the same result as a direct repeal. Other legislative history supports this view. In the House, Representative Fascell stated that the restriction was intended "to repeal [§ 406] of the authorizing act." 124 CONGRESSIONAL RECORD H12629 (daily ed. Oct. 12, 1978). The term "repeal" was used repeatedly to refer to the restriction. *Id.* Viewing the restriction as a simple repeal, the general rule against retrospective construction should apply. That is, unless Congress manifestly intends retrospective repeal, a repeal should apply only prospectively. Here, no such intent was expressed. Indeed, there is no indication that Congress specifically concerned itself with this aspect of the matter.

Although it is true that the legislative history referred to persons whose § 406 entitlement had vested, these references do not take on the color of a manifest intention that they would be divested of their entitlements. Representative Buchanan, in opposing the restriction, stated (124 CONGRESSIONAL RECORD H12628):

> But let us look for a moment to see whether this amendment will accomplish what the Senate intends. The retirement provision is law, the President signed it. It is an entitlement. Thus those planning to take advantage of this provision—and it is my understanding that 45 individuals have already done so—could, and no doubt would, take the United States to court to obtain the money to which they are entitled.

Representative Fascell stated (124 CONGRESSIONAL RECORD H12629):

> [The appropriation restriction] has the direct legal effect of simply complicating an issue which has already taken place and *upon which people have relied.* The proper process would be to submit a direct repealer or some other modification of the issue in a proper legislative vehicle. [Emphasis added.]

By these remarks, the speakers in arguing against the restriction expressed doubt as to whether it would have any legal effect. Of course, this doubt was unfounded since it is well settled that Congress, where it clearly intends to do so, can in an appropriation act suspend, repeal, or otherwise amend a statute. *See, United States* v. *Dickerson*, 310 U.S. 554, 555 (1940); *City of Los Angeles* v. *Adams*, 556 F. 2d 40, 48–49 (D.C. Cir. 1977).[6]

Section 109 of Pub. L. No. 95–482, the Continuing Appropriations Act for Fiscal Year 1979, reads as follows: "Section 406 of Public Law 95–426 is repealed." But we find no legislative history suggesting that § 109 was

[6] We do not mean to say that every appropriation restriction must be applied only prospectively. However, we stress that in this case the restriction was intended to function only as a repeal.

intended to have retrospective effect. *See* 124 CONGRESSIONAL RECORD 18862 for the brief Senate consideration. There was no debate in the House.

We also note that retrospective application of § 406's repeal by Pub. L. No. 95–482 or retrospective application of the appropriation restriction in Pub. L. No. 95–481 would result in a particularly harsh and inequitable situation for those who retired while § 406 was in effect. They were induced to end their status as Government employees in exchange for a designated benefit. Now that the Government has induced such action it would, at a minimum, be unseemly to renege on the "high one" promise. That result, with its harsh consequences, should not lightly be presumed to have been Congress' intent.

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April 20, 1979

79-28 MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF COMMERCE, AND THE SOLICITOR, DEPARTMENT OF THE INTERIOR

Coastal Zone Management Act (16 U.S.C. § 1456(c)(1))—Outer Continental Shelf Lands—Applicability of Section 307(c)(1) to Department of the Interior Preleasing Activities Directly Affecting the Coastal Zone—Repeals by Implication

This responds to your request that we address the issue whether the preleasing activities of the Secretary of the Interior relating to the Outer Continental Shelf[1] are subject to the consistency requirement of § 307(c)(1) of the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1). Section 307(c)(1) provides:

> Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

The Department of the Interior (Interior) asserts that its preleasing activities relating to the Outer Continental Shelf lands do not directly affect the Coastal Zone, and that the applicability of § 307(c)(1) to those activities was superseded by the Coastal Zone Management Act Amendments of 1976 and the Outer Continental Shelf Lands Act Amendments of 1978. The Department of Commerce disagrees. In its view, the statutory language "*directly* affecting the coastal zone" [emphasis added] must be read as "significantly affecting the coastal zone;" the significance of these

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[1] The preleasing activities of the Secretary of the Interior include calls for nominations (ascertainment of tracts that the industry would like to have offered for lease, and that other parties believe should not be leased), tract selection, the preparation of an environmental impact statement, consultation with the Governors, and individual tract selection.

activities must be considered in terms of "primary, secondary, and cumulative effects" on the Coastal Zone; and the two amendatory acts have no bearing on the scope of § 307(c)(1).

We have examined the materials submitted with your request, as well as the complex pertinent legislative histories. We conclude (1) that neither the Coastal Zone Management Act Amendments of 1976 nor the Outer Continental Shelf Lands Act Amendments of 1978 affect the application of § 307(c)(1) to Outer Continental Shelf land preleasing activities; (2) that § 307(c)(1) applies only to activities directly affecting the Coastal Zone; and (3) that the Attorney General is not authorized to resolve the factual question whether and to what extent any of the preleasing activities of the Department of the Interior under the Outer Continental Shelf Lands Act directly affect the Coastal Zone.

I.

The Coastal Zone Management Act, 86 Stat. 1285, 16 U.S.C. § 1451 *et seq.*, is primarily concerned with the effective management, beneficial use, protection, and development of the Coastal Zone. Section 302(a), 16 U.S.C. § 1451(a). The Coastal Zone extends seaward to the outer limit of the United States territorial sea, inland to the shore line, and to a limited extent to the adjacent shore lands. Section 304(1), 16 U.S.C. § 1453(1).[2] The Act is administered by the Secretary of Commerce. Section 304(15), 16 U.S.C. § 1453(15). The Act provides for the development and administration by the States of State management programs for the Coastal Zone. Those programs require the approval of the Secretary of Commerce. Sections 305, 306, 16 U.S.C. §§ 1454, 1455.

The Outer Continental Shelf Lands Act of 1953, as amended, provides that the Secretary of the Interior shall administer the program of oil and gas leasing on the Outer Continental Shelf. Sections 5 and 6, 43 U.S.C. §§ 1334, 1335. The Outer Continental Shelf consists generally of the submerged lands lying seaward of the Coastal Zone of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control. § 2(a), 43 U.S.C. § 1331(a).

The basic issue is whether and to what extent the preleasing activities of the Secretary of the Interior under the Outer Continental Shelf Lands Act are subject to the provisions of § 307(c)(1) of the Coastal Zone Management Act.

A. The Coastal Zone Management Act Amendments of 1976

Section 6 of the Coastal Zone Management Act Amendments of 1976

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[2] Section 2(e) of the Outer Continental Shelf Lands Act, as added by § 201(b) of the Amendments of 1978, 43 U.S.C. § 1331(e), uses the same definition.

added to § 307(c)(3) a new paragraph (B).[3] The Department of the Interior contends that this paragraph is intended to constitute the exclusive method by which, and the only stage at which, the consistency of all aspects of the Outer Continental Shelf Lands leasing process, including preleasing activities, with the State management programs is to be determined and that the new paragraph *pro tanto* supersedes the consistency requirement of §307 (c)(1). We cannot concur in that interpretation of the 1976 Amendments.

The enactment of § 307(c)(3)(B) originated from a dispute between the Department of the Interior and the Department of Commerce concerning the proper interpretation of § 307(c)(3), now § 307(c)(3)(A).[4] That

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[3] Section 307(c)(3)(B), as amended by the Outer Continental Shelf Lands Act Amendment of 1978, § 504, provides:

(B) After the management program of any coastal state has been approved by the Secretary under section 1455 of this title, any person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 *et seq.*) and regulations under such Act shall, with respect to any exploration, development, or production described in such plan and affecting any land use or water use in the coastal zone of such state, attach to such plan a certification that each activity which is described in detail in such plan complies with such state's approved management program and will be carried out in a manner consistent with such program. No Federal official or agency shall grant such person any license or permit for any activity described in detail in such plan until such state or its designated agency receives a copy of such certification and plan, together with any other necessary data and information, and until—

(i) such state or its designated agency, in accordance with the procedures required to be established by such state pursuant to subparagraph (A), concurs with such person's certification and notifies the Secretary and the Secretary of the Interior of such concurrence;

(ii) concurrence by such state with such certification is conclusively presumed as provided for in subparagraph (A), except if such state fails to concur with or object to such certification within three months after receipt of its copy of such certification and supporting information, such state shall provide the Secretary, the appropriate federal agency, and such person with a written statement describing the status of review and the basis for further delay in issuing a final decision, and if such statement is not provided, concurrence by such state with such certification shall be conclusively presumed; or

(iii) the Secretary finds, pursuant to subparagraph (A), that each activity which is described in detail in such plan is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security. If a state concurs or is conclusively presumed to concur, or if the Secretary makes such a finding, the provisions of subparagraph (A) are not applicable with respect to such person, such state, and any Federal license or permit which is required to conduct any activity affecting land uses or water uses in the coastal zone of such state which is described in detail in the plan to which such concurrence or finding applies. If such state objects to such certification and if the Secretary fails to make a finding under clause (iii) with respect to such certification, or if such person fails substantially to comply with such plan as submitted, such person shall submit an amendment to such plan, or a new plan, to the Secretary of the Interior. With respect to any amendment or new plan submitted to the Secretary of the Interior pursuant to the preceding sentence, the applicable time period for purposes of concurrence by conclusive presumption under subparagraph (A) is 3 months.

[4] Section 307(c)(3)(A) provides:

(3)(A) After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity affecting land or

(Continued)

paragraph provides that, after a State's management program has been approved by the Secretary of Commerce, an applicant for a Federal permit or license for an activity affecting the Coastal Zone must include in the application a certification that the proposed activity complies with the State's program, and that the activity will be conducted in accordance with that program.[5] The Department of the Interior contended that leases in the Outer Continental Shelf did not come within the purview of the provision; the Department of Commerce took the opposite position.

This dispute came to the attention of Congress during its consideration of the Coastal Zone Act Amendments of 1976. Both legislative committees concluded that § 307(c)(3) is intended, and indeed always was intended, to cover leases, and reported out bills amending § 307(c)(3) by adding the word "lease" to the words "license or permit" already included in the paragraph. S. Rept. 94-277, pp. 19, 36-37, 53, 59; H. Rept. 94-878, pp. 4, 52, 67-68, 48.

The Senate concurred in the committee report. The bill passed by it amended § 307(c)(3) to include the word "lease." 121 CONGRESSIONAL RECORD 23050, 23086.[6] When the bill reached the floor of the House it contained the same provision. 122 CONGRESSIONAL RECORD 6124. The amendment of § 307(c)(3), however, was stricken on motion of Congressman duPont because he felt, on the basis of testimony received from the Administration and the industry, that more time was needed to evaluate the full impact of the proposed amendment. He continued:

(Continued)

water uses in the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Each coastal state shall establish procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.

[5] State concurrence in the certification is presumed if it fails to object within 6 months after receipt of a copy of the applicant's certification. The permit or license may not issue unless the State concurs in the certification or is presumed to have concurred, or unless the Secretary of Commerce finds that the activity is consistent with the objectives of the Act or otherwise necessary in the interest of national security.

[6] *See also* the explanation of the provision by Senator Hollings, who was in charge of the legislation. 121 CONGRESSIONAL RECORD 23053.

> By striking it in the House bill and leaving it in the bill that has already passed the Senate we will be giving ourselves a little bit of flexibility in the conference to either adopt the language as the Senate put it in or adopt some other language we feel would be more beneficial and at the same time protect the rights of the States.
>
> So the purpose of this amendment is not to get rid of the word "lease" but to allow us time to work on the problem a little bit longer. [122 CONGRESSIONAL RECORD 6128.]

Representative Murphy, who was in charge of the legislation in the House, accepted the amendment, pointing out that even if an applicant were granted a lease the statute required permits and licenses to be subject to the consistency requirement of § 307(c)(3). *Ibid.* This observation appears to have been related to the position taken by the Department of the Interior concerning the interminable delays that would result if every lease and related permit and license were to be subject to the procedures of § 307(c)(3), a matter that could bring about repeated delays. *See* the letter from Secretary of the Interior Kleppe to the Director, Office of Management and Budget, dated May 24, 1976.

The conference report adopted by both Houses provided that § 307(c)(3) should be divided. The original paragraph became § 307(c)(3)(A), and the committee added a new paragraph (B). *See,* footnote 3, *supra.* The import of the new paragraph is that an individual or organization submitting to the Secretary of the Interior a plan for the exploration, development of, or production from, an area leased under the continental Shelf Lands Act must submit a certification similar to the one required under paragraph (A). If the State agreed to the certification or did not object within 6 months, or if the Secretary of Commerce made a finding of consistency, subsequent requests for permits or licenses required for activities described in detail in such plan would not have to go through the conformity procedures provided for in paragraph (A).

The conference report contains the following explanation of the amendment:

> Also, under the substitute, any subsequent OCS [Outer Continental Shelf] Federal license or permit required for activities specified in any exploration, development, and production plan are presumed to be consistent once the plan is certified as being so consistent. This important change will significantly expedite OCS oil and gas development. Under present Department of Interior regulations, Federal permits are required for a large number of individual activities, including geophysical exploration, bottom sampling, well drilling for exploration or production, pipeline right-of-way, structure placement, waste discharge, and dredging and filling operations. Thus, separate consistency determination on each activity, described in detail in an exploration, development or production plan, will not be necessary. [H. Rept. 94–1298, pp. 30–31.]

The explanation of the conference report on the floor of the Senate by Senator Hollings contained the following observation:

> Third, a new incentive for expediting determination of whether particular off-shore energy activity is consistent with a coastal State's approved management program, on an overall plan basis rather than on an individual license/permit by license/permit basis; * * *. [122 CONGRESSIONAL RECORD 21230.]

The amendment was thus designed to overcome the difficulties adverted to by Secretary Kleppe, namely, that a new conformity review under § 307(c)(3), involving a 6-month delay, would be required every time the lessee of Outer Continental Shelf Lands had to apply for a new license or permit.

The Department of the Interior believes that paragraph (B) embodies an exclusive provision concerning the consistency requirement of the Outer Continental Shelf lands leasing process with Coastal Zone State management plans, and that it therefore supersedes § 307(c)(1) with respect to the entire process, including the preleasing stage. It relies on the doctrine of repeal by implication. The Supreme Court, however, has consistently applied the rule that a repealing intention of the legislation to repeal must be clear and manifest; that every attempt must be made to reconcile the statutes involved; and that a repeal by implication will be found only where there is a "positive repugnancy" between the statutes. *Morton* v. *Mancari*, 417 U.S. 535, 549–551 (1974); *Borden* v. *United States*, 308 U.S. 188, 198–199 (1939).

In our view, the relationship between § 307(c)(1) and 307(c)(3)(B) does not meet these rigorous standards, at least not for the preleasing period.[7] The two provisions can readily coexist during that period and there is no "positive repugnancy." There is nothing explicit or implied in the 1976 Amendments to the effect that the procedure set forth in § 307(c)(3)(B) provides the only consistency requirement for the Outer Continental Shelf land leasing process. Paragraph (B) is designed to relieve the lessee of the burdens and delays resulting from successive consistency determinations for the many license and permit applications that may follow the grant of a lease and the approval of an exploration, development, or produciton plan. Under § 307(c)(3)(B) there will be a single consistency review following the submission of the plan and that review will cover any future activities described in detail in the plan. Section 307(c)(3)(B) thus simplifies the regulatory process during the postleasing period. It has no bearing on the consistency requirements antedating that stage of the leasing process. It is well possible that some of the preleasing activities of Interior will give

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[7] We need not examine the question, not presented by your inquiry, whether once a plan for the exploration, or development, or production envisaged by § 307(c)(3)(B) has been filed, that paragraph becomes the exclusive procedure for the determination of the consistency requirement, covering both the Department of the Interior and the lessee, or whether the Department of the Interior remains subject to the additional consistency requirement of § 307(c)(1).

rise to consistency problems that cannot be reviewed at all under the paragraph (B) procedure, or for which such review comes too late. It is our opinion that with respect to preleasing activities § 307(c)(1) and § 307(c)(3)(B) can both be given effect, and accordingly that the enactment of § 307(c)(3)(B) does not disclose any clear and manifest legislative intent to supersede, and does not supersede, the applicability of § 307(c)(1) to those preleasing activities of Interior relating to the Outer Continental Shelf lands that come within the scope of that section.

B. The Outer Continental Shelf Lands Act Amendments of 1978

The second statute that according to Interior supersedes § 307(c)(1) regarding leases is the Outer Continental Shelf Lands Act Amendments of 1978. Section 208 of that Act adds to the Outer Continental Shelf Lands Act of 1953 a number of new sections containing specific procedures for the Outer Continental Shelf lands leasing program. Some of those provisions are expressly adjusted to the Coastal Zone Management Act. (*See especially* the repeated references to §§ 306 and 307(c)(3)(B) of the Coastal Zone Management Act in § 25 of the Outer Continental Shelf Lands Act, added by the 1978 Amendments, 43 U.S.C. § 1351.)

The most significant apparent conflict between the 1978 Amendments and § 307(c)(1) appears in § 19 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1345, entitled "Coordinaton and Consultation with Affected State and Local Governments." Pursuant to § 19(c), the Governor of a State, or the executive officer of an affected local government, may submit to the Secretary of the Interior recommendations regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development or production plan. It provides that the Secretary of the Interior shall accept those recommendations unless he decides that they do not provide for a reasonable balance between the national interest [in increasing oil production] and the well-being of the citizens of the affected State. The pertinent committee reports say that no "State should have a veto power over OCS [Outer Continental Shelf] oil and gas activities." S. Rept. 95-284, p. 78; H. Rept. 95-590, p. 153.

Although we might be inclined to find a clear legislative intent that the recommendations referred to in § 19(c) were designed to take the place of the conformity requirement of § 307(c)(1) of the Coastal Zone Management Act, the language and legislative history of the 1978 Amendments refute that intent.

Section 608(a) of the 1978 Amendments provides expressly that:

> Except as otherwise expressly provided in this Act, nothing in this Act shall be construed to amend, modify, or repeal any provision of the Coastal Zone Management Act of 1972 * * *.

More specifically, the section-by-section analysis of § 19 in the House report contains the following footnote expressly disclaiming any congressional intent to modify by implication the consistency requirements of the Coastal Zone Management Act:

> The committee is aware that under the Coastal Zone Management Act of 1972, as amended in 1976 (16 U.S.C. 1451 *et seq.*), certain OCS [Outer Continental Shelf] activities including lease sales and approval of development and production plans must comply with "consistency" requirements as to coastal zone management plans approved by the Secretary of Commerce. Except for specific changes made by Titles IV and V of the 1977 Amendments, nothing in this Act is intended to amend modify or repeal any provision of the Coastal Zone Management Act. Specifically, nothing is intended to alter procedures under that Act for consistency once a State has an approved Coastal Zone Management Plan. [H. Rept. 95-590, p. 153, fn. 52.][1]

We conclude that neither the Coastal Zone Management Act Amendment of 1976 nor the Outer Continental Shelf Lands Act Amendments of 1978 affect the application of the consistency requirement of § 307(c)(1) of the Coastal Zone Management Act to the preleasing activities of the Department of the Interior.

II.

Having determined that the preleasing activities of the Secretary of the Interior are subject to the conformity requirement of § 307(c)(1) of the Coastal Zone Management Act, we reach the second question posed in the submission. Interior contends that, if § 307(c)(1) applies at all to its preleasing activities, it applies only to those activities which, according to the plain statutory language of the paragraph, directly affect the Coastal Zone.

The implementing regulations issued by the Department of Commerce in 1978, however, substitute the term "significantly" for the statutory word "directly" and define "significantly" in terms of "primary, secondary, and cumulative effects." 15 CFR §§ 930.30, 43 F.R. 10518-10519. The Department explains its departure from the statutory language on the ground that, while the various provisions relating to the consistency requirement are not uniform in language, the legislative history is "replete" with statements that Congress intended to cover all Federal activities capable of significantly affecting the Coastal Zone. *See* 43 F.R. 10511. In our view, the legislative history does not justify the departure.

Prior to the conference, the text of § 307(c)(1), as passed by both Houses of Congress, subjected all Federal activities in the Coastal Zone, to the consistency requirement. Senate: 118 CONGRESSIONAL RECORD 14190 (§ 314(b)(1)); House: 118 CONGRESSIONAL RECORD 26502 (§ 307(c)(1)). The conference committee changed Federal activities "in the Coastal

[1] The House report was submitted in 1977. Title V of the 1978 Amendments contains express amendments to the Coastal Zone Management Act. Section 504 modifies § 307(c)(3)(B)(ii).

Zone" to the present statutory language of "directly affecting the Coastal Zone." The explanatory statement in the conference report does not explain why the committee departed from the language common to the bill as it had passed both Houses.[9] The statement, however, indicates a full awareness that the different paragraphs of § 307(c) applied different standards of Federal impact on the Coastal Zone: § 307(c)(1), "directly affecting;" § 307(c)(2), "in the Coastal Zone;"[10] § 307(c)(3), "similar consideration."

In the light of this history of the words "directly affecting," we are unable to accept an interpretation that would dilute "directly," first to "significantly" and then to "primarily, secondarily, and cumulatively."

Finally, in our discussion of the question of repeal by implication we have pointed out that § 307(c)(1) and § 307(c)(3)(B) are separate provisions dealing with different stages of the leasing process. We have concluded that the provision concerning the postleasing process does not necessarily repeal a provision addressed to the preleasing stage. Similarly, when the statute provides for different impact requirements at different stages of the leasing process, there is no need, and indeed no justification, for an attempt to obliterate those express statutory differences by regulation. It is our opinion that the conformity requirement of § 307(c)(1) applies only to the preleasing activities of the Department of Interior directly affecting the Coastal Zone. The question whether those activities or any of them directly affect the Coastal Zone is essentially one of fact which the Attorney General is not authorized to address. *See* 28 Op. Att'y Gen. 218, 22 (1910); 39 Op. Att'y Gen. 425, 428 (1940).

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

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[9] "They (the conferees) also agreed that as to Federal agencies involved in any activities *directly affecting* the State coastal zone and any Federal participation in development projects *in the coastal zone*, the Federal agencies must make certain that their activities are to the maximum extent practicable consistent with approved State management programs. In addition, *similar consideration* of State management programs must be given in the process of issuing Federal licenses or permits for activities affecting State coastal zones." H. Rept. 92-1544, p. 14. [Emphasis added.]

[10] The regulations issued by the Department of Commerce extend the "significantly affect" tests even to § 307(c)(2), which in terms applies only to activities "in the Coastal Zone."

May 2, 1979

79-29 MEMORANDUM OPINION FOR THE CHIEF, COMMERCIAL LITIGATION BRANCH, CIVIL DIVISION

Garnishment—Federal Employees—Consumer Credit Protection Act (15 U.S.C. § 1673)—Social Security Act (42 U.S.C. § 659)

This responds to your request for our opinion whether the percentage limits on wage garnishment for alimony and child support (hereafter "support") in § 303(b)(2) of the Consumer Credit Protection Act, 15 U.S.C. § 1673(b)(2) (hereafter "CCPA"), apply to the total of multiple garnishments. The question has been presented by multiple garnishments of a Federal employee's wages for unpaid support under § 459(a) of the Social Security Act, 42 U.S.C. § 659(a). For the reasons that follow, it is our opinion that the total of multiple garnishments for support may not exceed the percentage of disposable income set by § 303(b)(2) of the CCPA. When the total proposed wage garnishments exceed this percentage, § 461(c) of the Social Security Act, 42 U.S.C. § 661(c), requires that the garnishments be satisfied on a first-come, first-served basis within that limit.

Under § 459(a), a Federal employee's salary is subject to garnishment for support "in like manner and to the same extent as if the United States * * * were a private person." Section 303(b)(2) of the CCPA limits garnishment "to enforce any order for the support of any person" to between 50 percent and 65 percent of the individual's disposable income.[1] A garnishment order beyond this limitation is unlawful.[2] In addition, § 461(c) of the Social Security Act, as amended, 42 U.S.C. § 661(c)

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[1] The exact percentage depends on whether the individual is supporting another spouse or dependent and whether the underlying debt is more than 12 weeks old. 15 U.S.C. § 1673 (b)(2).

[2] Consumer Credit Protection Act, § 303(c), 15 U.S.C. § 1673(c). *See, Hodgson* v. *Cleveland Municipal Court,* 326 F. Supp. 419 (N.D. Ohio 1971).

(Supp. 1978), provides that when two or more garnishment orders are received for a Federal employee's salary, they will be satisfied on a "first-come, first-served basis," with the later garnishments satisfied out of "such moneys as remain available" after satisfying the former.[3]

Section 459 of the Social Security Act first made Federal salaries subject to garnishment for support in 1975. At that time, the CCPA placed no limit on the percentage of income that could be garnisheed for support.[4] As a result, there were several instances of Federal employees garnisheed for up to all of their disposable earnings.[5] In order to meet this problem, Congress amended § 303(b) of the CCPA and added § 461 to the Social Security Act. *See* Pub. L. No. 95-30, 501, 91 Stat. 158. While there is no direct discussion of this precise issue in the legislative history, the general purpose of the amendment, and the discussion of that purpose, indicates Congress' intent not to allow garnishments that would—in the aggregate—exceed a reasonable percentage of an individual's income.

These provisions originated in a floor amendment by Senator Nunn. After stating that existing law permitted 100 percent garnishment, resulting in possible "financial ruin" for the individual and his present spouse and family, he stated that the amendment would place a percentage limit on garnishment for support in order to leave the individual a reasonable amount for his current needs.[6] There was no other discussion on this point. The Conference Report reiterates Senator Nunn's explanation.[7] Thus, the legislative intent underlying § 303(b)(2) was to ensure that a portion of his disposable income would remain available to an individual garnisheed for unpaid support.[8] If the percentage limit applied only to single garnishments, a wage earner could be deprived of substantially all his disposable income by multiple garnishments. In order to comply with Congress' intent to protect a core of disposable income,[9] the percentage

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[3] Although you have requested our advice with respect generally to the application of the percentage limitations in the CCPA, we understand that there is at least one case in point as to which immediate action must be taken. The Department of Commerce has been served with two garnishment orders for an employee's salary, one on behalf of each of his former spouses. If both are complied with 95 percent of the employee's disposable income will be garnisheed. The Department of Commerce has withheld 95 percent of his disposable income for the last pay period but has not yet paid it out.

[4] *See* 15 U.S.C. § 1673(b) (1970).

[5] *See* S. Rept. 1350, 94th Cong., 2d sess., at 2-3 (1976); 122 CONGRESSIONAL RECORD 29822 (1976).

[6] 123 CONGRESSIONAL RECORD S. 6726, S. 6728 (daily ed., April 29, 1977). *See also* S. Rept. 1350, 94th Cong., 2d sess., at 2-3, 9-10.

[7] H. Conf. Rept. 263, 95th Cong., 1st sess., at 35 (1977).

[8] We note that for other debts, no more than 25 percent of disposable income is subject to garnishment. Consumer Credit Protection Act, § 303(a), 15 U.S.C. § 1673(a) (1970). The higher percentage subject to garnishment for support shows that Congress balanced the relative needs of the wage earner and support creditor differently from those of the commercial creditor. *See* 122 CONGRESSIONAL RECORD 29822 (1976) (Senator Allen).

[9] It is, of course, a familiar principle of construction that a statute should not be construed in a manner that will frustrate its basic purpose. *See, e.g., Philbrook* v. *Glodgett* 421 U.S. 707 (1975); *United States* v. *Sisson*, 399 U.S. 267 (1970); *United States* v. *American Trucking Assn.*, 310 U.S. 534, 543 (1940).

limit of § 303(b)(2) of the CCPA must be applied to the total of multiple garnishments.

Accordingly, it is our view that § 303(b)(2) of the CCPA prohibits any agency from paying more than the applicable percentage limitation on account of multiple garnishments. Apportionment of the amount that may be garnisheed is governed by § 461(c) of the Social Security Act. Under that section, the garnishment first served on the employer agency must be satisfied insofar as possible. Remaining funds within the percentage limit can then be applied to the second garnishment.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

May 11, 1979

79-30 MEMORANDUM OPINION FOR THE GENERAL COUNSEL, FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Tax Returns—Disclosure (26 U.S.C. § 6103; 18 U.S.C. § 1905)

This responds to your request for our opinion whether the Federal Mine Safety and Health Review Commission (Commission) is prohibited by 26 U.S.C. §§ 6103, 7213, 7217 (1976), or by 18 U.S.C. § 1905 (1976), from publishing, in an opinion or an order, financial information about a mine operator derived from a copy of an income tax return produced and submitted as evidence by the operator and entered of record in a proceeding within the Commission's jurisdiction. We find no such prohibition in the statutory provisions cited. Neither will such a publication subject the Commissioners to civil or criminal liability under either the title 26 provisions or § 1905 of title 18 of the United States Code.

I. Title 26

Section 6103 of title 26 makes tax returns and tax return information confidential. It prohibits an officer or employee of the United States from disclosing any return or return information "obtained by him in any manner in connection with his service as such an officer or an employee or otherwise," except as authorized by title 26. Complementary provisions, 26 U.S.C. §§ 7213 and 7217, subject officers and employees who disclose information or documents made confidential by § 6103 to criminal and civil liability, except as to disclosures authorized by title 26.

It is important to note that §§ 7213 and 7217 are restricted in their application to the disclosure of "any return or return information (*as defined in section 6103(b)*)." [Emphasis added.] And, of course, the confidentiality rule of § 6103 itself applies only to returns and return information that are within the relevant statutory definitions of those terms. Crucial to

our consideration is that a return, as defined by § 6103(b)(1), is "any tax or information return * * * *which is filed with the Secretary* [of the Treasury]" and that the term "return information" means "a taxpayer's identity * * * or any other data, *received by, recorded by, prepared by, furnished to, or collected by the Secretary.*" § 6103(b)(2). [Emphasis added.] Thus, the confidentiality rule and the civil and criminal liability provisions of title 26, even read most broadly, apply only when there is a nexus between the information disclosed and information that has been in the possession of the Secretary of the Treasury. The requisite nexus is absent when, as with the information that the Commission proposes to publish, the source document is one that has never been within the custody or control of the Secretary.

It is immaterial that a layman might view the source document as an income tax return. It is also immaterial that the document is a copy (produced by the taxpayer) of a return that actually was filed with the Secretary. Section 6103 and its complementary provisions protect the confidentiality of information filed with or collected or generated by the Secretary of the Treasury in connecton with his administration of the tax system and information so filed, collected, or generated that has been distributed under the authority of § 6103. By its terms it does not and was not intended to shield from disclosure a tax return, or information derived from a tax return, produced by the taxpayer and given voluntarily to the Government in a proceeding unconnected with the administration of the tax laws. Such a document (even if a copy of a return actually filed) and such information cannot reasonably be said to have been "filed with" or "received by, recorded by, prepared by, furnished to, or collected by" the Secretary of the Treasury.

Our conclusion, stated simply, is that § 6103 and §§ 7213 and 7217 of title 26 are inapplicable to the issue of the disclosure of financial information derived from a copy of an income tax return produced by the taxpayer and voluntarily filed as evidence in an administrative proceeding.

II. 18 U.S.C. § 1905

Section 1905 provides:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person,

> firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

You have informed us that the Commission proposes to publish in its opinion information derived from an income tax return.[1] Moreover, the information to be published includes, *inter alia,* the gross income of the operator company for 1 year and the total compensation paid by the company to three of its officers in 2 different years. Such information would appear to be within the scope of information protected from disclosure by § 1905.[2] It, however, prohibits only disclosures made "in any manner or to an extent not authorized by law." Thus, its bar is not absolute.

The Attorney General has opined that, as used in § 1905, the phrase "authorized by law" does not require that an otherwise prohibited disclosure be specifically authorized by law. "[I]t is sufficient if the activity is 'authorized in a general way by law' " (citation omitted). This includes an authorization that is reasonably implied. 41 Op. Att'y Gen. 166, 169 (1953).

There is no statute that specifically authorizes the Commission to publish, in its opinions or orders, information within the scope of the prohibitions of § 1905. However, the Commission is a quasi-judicial body with the authority both to hold hearings in the first instance and to review decisions made by its administrative law judges. 30 U.S.C. § 823 (1978 Supp.). As is normally the case with such bodies, its decisions, whether initial or appellate, must be based upon the record as well as the law. *See* 30 U.S.C. §§ 823(d)(2)(C), 815 (c)(2) and (d) (1978 Supp.). It is authorized and directed to make findings of fact, *id.,* which must be sustained on judicial review if supported by substantial evidence. 30 U.S.C. § 816(a)(1) (1978 Supp.). Thus, the Commisison is, we believe, authorized by clear implication of law to include in its opinions and orders a recitation of evidence in the record upon which its findings and legal conclusions are

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[1] As used in § 1905, "income return" is not limited, as it is in 26 U.S.C. § 6103 (1976), to returns filed with the Secretary of the Treasury.

[2] An argument can be made that the intended scope of § 1905 is not as broad as its language would indicate. For an articulation of this argument, *see* D. Clement, "Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit," 55 Tex. L.R. 587, 602–617 (1977). In connection with the Clement article *see, Muniz* v. *Hoffman,* 422 U.S. 454 (1975). We need not here delimit the scope of § 1905 since we conclude that, even if the information that the Commission proposes to publish is within the intended scope, disclosure in an opinion of the Commission is nevertheless permissible.

are based. This is sufficient authorization by law, within the meaning of § 1905, to allow the Commission to publish in its opinions and orders evidence of record that would otherwise be protected from disclosure.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

May 14, 1979

79-31 MEMORANDUM OPINION FOR THE ASSISTANT DIRECTOR, LEGAL COUNSEL DIVISION, FEDERAL BUREAU OF INVESTIGATION

Federal Bureau of Investigation—Contractual Exemption from Liability for Agents' Negligence in FBI Law Enforcement Training (42 U.S.C. § 3744)

This responds to your request for our opinion whether Federal Bureau of Investigation (FBI) agents, providing training to State and local law enforcement officers, may require that the officers agree not to sue the FBI agents individually for injuries that might be caused by the agents' negligence in connection with such training.

Section 3744 of title 42, U.S. Code, 82 Stat. 204, reads in pertinent part as follows:

> (a) The Director of the Federal Bureau of Investigation is authorized to—
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> (1) establish and conduct training programs at the Federal Bureau of Investigation National Academy at Quantico, Virginia, to provide, at the request of a State or unit of local government, training for State and local law enforcement and criminal justice personnel;
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> * * * * * * *
>
> (2) assist in conducting, at the request of a State or unit of local government, local and regional training programs for the training of State and local law enforcement and criminal justice personnel * * *.
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> * * * * * * *
>
> (b) In the exercise of the functions, powers, and duties established under this section the Director of the Federal Bureau of Investigation shall be under the general authority of the Attorney General.

Your office has informed us that the relevant facts are as follows. The

training programs authorized by § 3744 are conducted by FBI Special Agent police instructors. Several of these instructors have asked whether they may require that persons, as a condition to receiving training, agree not to sue the instructors individually for injuries they may negligently cause the trainees. We understand that the suggested agreements would take the form of "covenants not to sue" and would in effect be exculpatory agreements for the benefit of the individual agents. Further, we have been informed that the FBI, as an agency, would not seek to compel such agreements, but rather that the agreements would be between the agents in their personal capacities and the trainees. It is contemplated, however, that those trainees who decline to enter into the agreements will be barred from participating in the programs.

You have stressed that the exculpation agreements would only relieve the individual agents from liability for their negligence, and that the United States would remain liable for any negligence covered by the Federal Torts Claims Act. Since double recovery is barred by that Act, 28 U.S.C. § 2676, the trainee would suffer no financial loss by proceeding solely against the United States.[1] Indeed, the United States' ability to pay a judgment makes it the more logical defendant. This is borne out by the fact that no agent has yet been sued in his personal capacity in connection with the FBI training program, although there have been training-related suits against the United States.

For the reasons that follow we conclude that such agreements are legally improper and therefore unenforceable.

First, it should be noted that the training programs are official FBI programs. Thus, the determination whether particular governmental units and their trainees will be permitted to participate in these programs is for the FBI to make. Accordingly, since exclusion from the program would require governmental action, it cannot be done by FBI agents in their personal capacities. In other words, it cannot be reasonably argued that restricting participation in the training would not be an official FBI act. This is for the simple reason that if the FBI did not, in fact, seek to compel such agreements there would be nothing to prevent persons refusing to enter the agreements from participating in the training programs.[2] Therefore, the short answer is that the agents, as individuals, are not empowered to set conditions for entry to a Federal program.

Apart from this consideration, we have serious doubt that the contemplated agreements would be enforceable as a matter of common law.

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[1] Further, you state that the agreements would only relate to ordinary negligence, that is, they would not cover gross negligence and willful conduct. The draft agreement that you sent to us, however, does not clearly make such a distinction. Thus, if the agreement were to operate as you state, it should include a sentence stating that gross negligence and willful conduct are not covered.

[2] We understand that instructors in the training programs volunteer for these assignments and thus retain the option of not serving as instructors for any reason, including fear of a suit against them personally.

When agents accept the instructor assignments, they assume a duty to the Government to serve as such. Thus, their agreement to train the participants in the programs in exchange for executing the covenant not to sue would appear to involve merely the performance of a preexisting duty, and for that reason would not be sufficient consideration to support a contract. *Compare, Davis* v. *Mathews*, 361 F. (2d) 899 (4th Cir. 1966). Section 132 of *Williston on Contracts* (3rd ed. 1957) explains this as follows:

> If a promisee is already bound by official duty to render a service, it is no detriment to him, and no benefit to the promisor beyond what the law requires the promisee to suffer or to give, for him to do or agree to do the service on request. Though the previous legal duty does not run to the promisor under the later agreement, it runs to the public of which the promisor is a member, and as such he has a right, even if not one enforceable at law, to the performance in question. Therefore, no contract can be based on such consideration. [Footnotes omitted.]

To the extent it might be argued that the contracts are supported by a valuable consideration, a further problem arises under 18 U.S.C. 209, providing in pertinent part as follows:

> Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States * * * from any source other than the Government of the United States * * * shall be fined not more than $5,000 or imprisoned not more than one year, or both.

See also 28 CFR § 45.735–8 (Department of Justice regulation embodying § 209's prohibition). This Office has interpreted these provisions as barring receipt of things of value by a Department employee if they are given in connection with the employee's Federal assignment. While we need not here decide whether § 209 and the Department regulation would be violated by individual agents exacting the subject agreements from trainees, they are not in keeping with the spirit of the cited provisions.

For these reasons it is our opinion that individual agents may not require that exculpatory agreements be executed as a condition of participation in the training programs.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

May 21, 1979

79-32 MEMORANDUM OPINION FOR THE SENIOR ASSOCIATE COUNSEL TO THE PRESIDENT

Three Mile Island Commission—Closed Meetings—Federal Advisory Committee Act (5 U.S.C. App.)—Government in the Sunshine Act (5 U.S.C. § 552b)

This memorandum is to confirm our advice that legislation that would grant the President's Commission on the Accident at Three Mile Island the power to issue subpoenas is sufficient also to allow the closing of its meetings under certain circumstances. We have reviewed the statement by Senator Kennedy made on the Senate floor last week and, assuming that no contrary indications arise when the House considers the Three Mile Island subpoena legislation, we conclude that it is sufficient to make reasonably clear that exemption (10) of the Government in the Sunshine Act's exemptions, 5 U.S.C. § 552b(c)(10), will be available when this Commission is to discuss its issuance of subpoenas.* Our reasons for so concluding are as follows.

I. Applicability of the Sunshine Act Exemptions in General

The Commission is an advisory committee subject to the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. I (1979 Supp.), Pub. L. No. 92–463. The principal purpose of that Act is to provide a unified set of procedures for advisory committees to agencies

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**Editor's Note:* This memorandum was written before the House of Representatives considered the resolution that ultimately became the Three Mile Island Commission subpoena legislation, Pub. L. No. 96–12, 96th Cong., 1st sess. (1979). The House debate, which occurred on the date this memorandum was transmitted (May 21, 1979), did not indicate a congressional intent contrary to that indicated by Senator Kennedy's remarks during the Senate debate. *See* 125 CONGRESSIONAL RECORD H. 3480–81 (daily ed., May 21, 1979). The resolution became law on May 23, 1979.

and to the President. As the Act's legislative history makes clear, the openness provisions of the FACA are to be liberally construed. *See* 5 U.S.C. App. I § 10(a)(1).[1] However, in the event that the President or his designee,[2] or the head of the agency to which an advisory committee reports, determines that one of the Sunshine Act exemptions applies, then the portion of a meeting to which it pertains may be closed so long as the required procedures are followed. *See* § 10(d) of the FACA; *see also* Office of Management and Budget Circular No. A-63.

II. The Difficulty with Utilizing Exemption (10)

The problem with utilizing exemption (10) of the Sunshine Act is that it refers to "the agency's" issuance of a subpoena as the predicate for its use. This suggests the following difficulty: for exemption (10) to be employed, it would have to be determined that "the agency's" action is to be discussed at a committee meeting. As a rule, an advisory committee is not itself an "agency."[3] Therefore, in the normal situation an advisory committee would have to show that some other entity, denominated an "agency" for purposes of the exemption, is to issue a subpoena before exemption (10) may be applicable. In the present case, that reasoning would mean that the commission's own issuance of a subpoena, all other things being equal, would not suffice as the basis for closing a meeting of the Commission.

It might be said that the purpose of Congress in providing an exemption for the closing of a meeting to discuss the issuance of a subpoena would be undermined by concluding that, when the subpoena is not issued by an entity which is clearly an "agency" in law, such entity cannot seek to rely on exemption (10). We recommended the inclusion of a specific provision in the subpoena legislation to clarify that ambiguity.

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[1] *See* S. Rept. 92-1098, 92d Cong., 2d sess. at 14: "* * * the intention of this legislation [the FACA] is that the standard of openness and public inspection of advisory committee records is to be liberally construed."

[2] Section 10(d) of the FACA provides that "the President, or the head of the agency to which the advisory committee reports," is to determine that a portion of a meeting may be closed in accordance with one of the Sunshine Act exemptions. In view of normal subdelegation doctrine, the President may delegate his express authority pursuant to the FACA to "the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate * * *." 3 U.S.C. § 301. In § 1-306 of Exec. Order No. 12130, the President delegated his functions under the FACA, except that of reporting annually to Congress and to the Administrator of General Services.

[3] The FACA provides that "agency" has the same meaning as it does in the Administrative Procedure Act. Section 551(1) of Title 5, United States Code, defines an "agency" as "each authority of the government of the United States whether or not it is within or subject to review by another agency." This definition has been judicially construed to require that an executive branch entity, to be deemed an "agency," have "substantial independent authority in the exercise of specific functions," *Soucie* v. *David*, 448 F. (2d) 1067, 1073 (D.C. Cir. 1971), or the "authority in law to make decisions," *Washington Research Project, Inc.* v. *HEW*, 504 F. (2d) 238, 248 (D.C. Cir. 1974). Such tests cannot normally be met by advisory committees, whose chief function is to make recommendations and not to exercise independent authority. *See, Wolfe* v. *Weinberger*, 403 F. Supp. 238, 241 (D.D.C. 1975); *Gates* v. *Schlesinger*, 366 F. Supp. 797, 799 (D.D.C. 1973).

III. Clarification of the Commission's Status

The following was stated on the floor of the Senate by Senator Kennedy, the sponsor of the subpoena legislation.

> Mr. President, originally, the resolution [calling for subpoena power for the Commission] proposed by the administration contained a provision specifying that the commission could close its meetings under certain circumstances. We have deleted that provision because we believe that the Commission already has the power to close its meetings under those circumstances pursuant to the Federal Advisory Committee Act if the President or agency head approves. We believe that if meetings are to be closed in connection with this vital matter of public concern it should only be done with the approval of the President or relevant agency head—and that the Commission should not have the power to close its meetings on its own. [125 CONGRESSIONAL RECORD § 6185 (daily ed., May 17, 1979.)]

The reference to the legislation proposed by the Administration makes plain that the exemption which the Administration sought to make applicable to the commission—in particular, exemption (10)—should be considered already available. Specifically, the Administration's proposal provided that the term "agency" for purposes of the Sunshine Act exemptions "shall be construed to apply to this Commission." Accordingly, the evident meaning of Senator Kennedy's comment is that what the Administration had sought to make clear already exists with respect to the Commission—that is, that this Commission can in appropriate circumstances be considered an "agency" for the purpose of exemption (10).[4]

An argument that Senator Kennedy's statement is not sufficient to establish that the Commission may utilize exemption (10) in particular—assuming no contrary indication by the House when it considers the legislation—would appear specious. It would be inappropriate to rely on the general proposition that, normally, advisory committees are not "agencies," because this Commission is in a special situation, given the legislative history discussed above. Also, in light of that clarification, to accept the contention that the Commission's meetings cannot be closed on the basis of exemption (10) is to frustrate the apparent aim of Congress in granting the commission subpoena power: namely, to make certain that the commission can conduct a thorough investigation, which at times may require closure of certain portions of meetings to consider the use of subpoena power.

The legislative history of the Sunshine Act is not to the contrary. The provision making Sunshine Act exemptions applicable to advisory

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[4] We should add that Senator Kennedy's reference to the determination by the President, or agency head, of the grounds for closing a Commission meeting simply restates the provision of § 10(d) of the FACA.

committees, which arose in a floor amendment, is based on the premise that the FACA, which deals with meetings, should have a set of exemptions that also refer to meetings, instead of ones that refer to documents. *See* 122 CONGRESSIONAL RECORD H. 24208-09, 94th Cong., 2d sess. (1976). Also, as the House conference report makes plain, that provision was intended to disapprove the use of exemption (5) of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), which deals with internal deliberative memoranda. As was said, "[t]he chief concern in this regard has been application of exemption (5) a provision intended to protect the confidentiality of purely *internal* governmental deliberations, as a basis for closing discussions with and among *outside* advisers." H. Conf. Rept. 1441, 94th Cong., 2d sess. 26 (1976). [Emphasis in original.] But the desire to end reliance on such a relatively broad exemption designed to protect "full and frank" discussions in general does not militate against the use, in present circumstances, of a much more precise exemption designed to protect frankness in the deliberations of an entity with subpoena power—particularly when the Congress has indicated explicitly that that entity has the power to use such an exemption.

IV. Conclusion

We conclude that the Commission's meetings dealing with its issuance of subpoenas may be closed on the basis of exemption (10), assuming that there is determined to be a need for so closing such meetings. Our conclusion is confined to the availability of exemption (10). In the context of other exemptions using the word "agency," such as exemption (2) ("internal personnel rules and practices of an agency") and exemption (9)(B) ("frustrate implementation of a proposed agency action"), we consider that the term "agency" should be interpreted to mean "President or agency." That is, to make the Sunshine Act exemptions consistent with the scheme of the FACA, it is necessary to read "agency" as including the President. But if, for example, a proposed Presidential or agency action is not likely to be frustrated within the meaning of exemption (9)(B) by an open meeting, exemption (9)(B) would not in our view apply. For although Senator Kennedy's language refers generally to "certain circumstances" in which closure of commission meetings would be justified, it seems most reasonable to limit those circumstances, insofar as they are arguably relevant to the subpoena context.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

May 21, 1979

79-33 MEMORANDUM OPINION FOR THE CHAIRMAN, BOARD OF CONTRACT APPEALS, GENERAL SERVICES ADMINISTRATION

Contract Disputes Act (41 U.S.C. § 601)—Effective Date of Act

This responds to your request for our opinion regarding the effective date of the Contract Disputes Act of 1978, Pub. L. No. 95-563, 41 U.S.C. § 601 *et seq.* Based on the language of the Act, its structure and legislative history, we conclude that the effective date is March 1, 1979.

Section 16 of the Act, 41 U.S.C. § 601 note, provides:

> This Act shall apply to contracts entered into one hundred twenty days after the date of enactment. Notwithstanding any provision in a contract made before the effective date of this Act, the contractor may elect to proceed under this Act with respect to any claim pending then before the contracting officer or initiated thereafter.

Since the section is entitled "Effective Date of the Act" and states that it applies to contracts entered into "one hundred twenty days after the date of enactment," it is clear that the effective date is distinct from the date of enactment—November 1, 1978.

This is supported by the structure and legislative history of the statute.[1] The Contract Disputes Act was enacted to bring order and uniformity to the disparate dispute resolution procedures that had developed in Government agencies. *See* S. Rept. 1118, 95th Cong., 2d sess. 2–4 (1978). An effective date 4 months after the date of enactment provides time to alter existing procedures and to issue the regulations required by the Act. As stated in the Senate report: "Section 16 provides that the effective date of

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[1] The Supreme Court has made clear that analysis of legislative history is proper for clarification of congressional intent even where the language of the statute appears unambiguous. *Train* v. *Colorado Pub. Int. Research Group,* 426 U.S. 1, 9–10 (1976).

the act will be 120 days after the date of enactment. *It is expected that the 120 days will be sufficient to manage the changeover from the current board system to the system of consolidation as proposed in this act.*" S. Rept., *supra*, at 35 (emphasis added).

The importance and purpose of the 120-day period is made clear in § 8 of the Act, providing for the continued existence or establishment of an agency board. As introduced, the bill provided that a contract appeals board could be established in an executive agency if the head of the agency and the Administrator for Federal Procurement Policy agreed that the volume of contract claims justified a five-member board. The Senate Governmental Affairs and Judiciary Committees added the requirement that a workload study be performed to justify establishment of a board. The committees also added a subsection 8(i), which required consolidation of smaller existing boards and the preparation of workload studies by larger boards within 120 days from the date of enactment. The Senate Report explained that this subsection was added

> to insure that specific actions will be taken *prior to the effective date of the act* by the agency heads for consolidation of boards that do not meet the requirements as identified in section 8(a). Also, workload studies justifying the existence of boards pursuant to the provisions in section 8(a) will need to be carried out during this same period. [S. Rept., *supra*, at 10 (emphasis added).]

Subsection 8(i) was amended on the floor of the Senate. 124 CONG. REC. S. 18640–41 (daily ed., Oct. 12, 1978). As enacted, it provides:

> Within one hundred and twenty days from [the date of enactment of this Act], all agency boards, except that of the Tennessee Valley Authority, of three or more full time members shall develop workload studies for approval by the agency head as specified in section 8(a)(1). [41 U.S.C. § 607(i).]

The clear purpose of the 120-day period, which was retained from the Senate committees' draft, is to provide sufficient time to carry out workload studies justifying the establishment or continued existence of appeals boards. That 120-day provision appears to have been carefully chosen to coincide with the 120 days provided in § 16 establishing the effective date of the Act.

In sum, it is plain that the effective date of the Contract Disputes Act of 1978 is March 1, 1979. This general conclusion permits us to answer the specific questions you have subsequently posed regarding (1) appointment of members of agency boards (§ 8(b)(1)), (2) use of subpoena power (§ 11), and (3) applicability of the Act to cases filed before and after March 1, 1979.

Section 8(b)(1) provides: "Full-time members of agency boards serving as such on the effective date of this Act shall be considered qualified [to be appointed to agency boards.]" Thus, any person who was a full-time agency board member on March 1, 1979 is qualified for appointment to boards established under the Act.

Although the effective date of the Act is March 1, 1979, that date does not automatically determine the legality of the exercise of authorities under the Act for two reasons. First, the effective date of the Act is keyed to the date of the contract: the section establishing the effective date provides that the Act "*shall apply to contracts entered into* one hundred twenty days after the date of enactment" (emphasis added). This language is distinct from typical effective-date language such as, "this Act shall take effect 120 days from enactment." Second, a contractor may elect to proceed under the Act on a claim arising out of a contract entered into before the effective date of the Act if the claim was pending before a contracting officer on or after the effective date.[2] We thus can foresee four permutations regarding the effective date and the applicability of the Act.

(A) *Contract date, pendency of claim before contracting officer and filing of case before appeal board all before March 1, 1979.* The Act does not apply because the contract was entered into prior to the effective date; the contractor may not elect to proceed under the Act because the claim was not pending before the contracting officer on or after the effective date.

(B) *Contract date and pendency of claim before contracting officer before March 1, 1979; case filed with appeal board on March 1, 1979.* Same answer as (A).

(C) *Contract date before March 1, 1979; pendency of claim before contracting officer on or after March 1, 1979 and case filed with appeal board after March 1, 1979.* The Act does not apply unless the contractor elects to proceed under it.

(D) *Contract date after March 1, 1979.* The Act applies.

Thus, the Act would not apply to any case filed with an appeal board before or on March 1, 1979, and would also not apply to some cases filed with an appeal board after March 1, 1979. Accordingly, the powers established under § 11 of the Act could not be exercised by an appeal board prior to March 1, 1979. They may be exercised after March 1, 1979 (1) in cases based on contracts entered into after March 1, 1979, or (2) in cases pending before a contracting officer on or after March 1, 1979, where the contractor so elects. The contractor may not elect the Act if his claim was before an appeal board before or on the effective date.[3]

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

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[2] *See;* § 16, quoted *supra.*

[3] *Cf.* S. Rept., *supra,* at 35: "It is not intended that upon the effective date of this act, a claim currently before an agency board can be switched to a court under this act's provisions."

May 22, 1979

79-34 MEMORANDUM OPINION FOR THE ACTING CHIEF, ORGANIZED CRIME AND RACKETEERING SECTION, CRIMINAL DIVISION

Office of Legal Counsel—Limitation on Opinion Function

This confirms the advice we gave orally concerning your May 18 memorandum concerning a requested Office of Legal Counsel opinion. You state that a Federal district judge has asked for our opinion on an issue that has arisen in connection with a pending grand jury investigation. That issue is whether the Department of Justice has the authority to investigate possible violations of title 18, involving pension plans covered by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* As I indicated orally to you previously, it would not be appropriate in this circumstance for us to render a legal opinion.

The Attorney General has delegated certain responsibilities to the Office of Legal Counsel, including the preparation of his formal opinions and advice to Government agencies. 28 CFR § 0.25. That delegation does not authorize us to provide legal advice at the request of the judicial branch. Moreover, the opinion function of the Attorney General himself is limited by statute to the provision of advice to the President, the heads of executive departments, and the Secretaries of military departments. 28 U.S.C. §§ 511-513.

In addition to those restrictions on our opinion function, we note that this Department has, as a matter of policy, consistently refrained from opining on questions presented to the courts for resolution. The Attorney General has stated, for example:

> [T]his Department has uniformly refused to consider any questions that have been committed to judicial review. To do so might bring this Department into conflict with a Judicial tribunal, and this has been held to be an adequate reason for a refusal to give an official opinion. [24 Op. Att'y Gen. 59, 60 (1902).]

Similar statements appear in numerous other opinions of the Attorneys General. *See, e.g.*, 41 Op. Att'y Gen. 266, 273 (1956); 38 Op. Att'y Gen. 149, 150 (1934); 37 Op. Att'y Gen. 34, 42 (1932). Since the question you have asked us is pending before the court, we do not believe it would be appropriate for us to respond to the request.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

May 22, 1979

79-35 MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

Right to Financial Privacy Act of 1978 (12 U.S.C. § 3401)—Banks—Disclosure of Customer Financial Records

This responds to your request for our opinion of April 30 on the following questions concerning the Right to Financial Privacy Act (Act):[1]

(1) To what extent does the Act affect the ability of a bank supervisory agency to report to the Department of Justice violations of the law that it uncovers?

(2) What kinds of information may be included as part of the notification that is explicitly permitted banks under § 1113(h)(5) (12 U.S.C. § 3413) or that may be impliedly permitted bank supervisory agencies?

(3) What is the interplay of § 1112 (12 U.S.C. § 3412) of the Act and the ability of bank supervisory agencies to notify the Department of possible offenses without giving notice to customers?

These issues arise because of the restrictions the Act has placed on Federal agencies' access to and dissemination of the financial records of bank customers.[2]

Our conclusions may be summarized as follows: first, a report that a customer's financial records may relate to a criminal offense, when based on a summary or analysis of the records, is itself a "financial record" within the meaning of § 1102(2); second, with the exception of § 1113(h),

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[1] The Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq.*, was enacted as Title XI of the Financial Institutions Regulatory Act of 1978, Pub. L. No. 95-630, 92 Stat. 3697. The section references in this opinion are to those in title XI.

[2] In § 1101(4)-(5) of the Act, a "customer" means an individual or a partnership of five or fewer individuals, who used or is using any service of a financial institution. The financial records of corporations, larger partnerships, or other legal entities are not covered and access to such records is not affected.

the procedures in § 1112 are the only ones expressly provided for a supervisory agency to make such a report to a law enforcement agency; third, notwithstanding § 1112, implied authority for a bank supervisory agency to make such a report exists in a narrow class of cases, namely, possible violations of criminal statutes that are part of the regulatory system enforced by the supervisory agency; fourth, the report of possible criminal offenses expressly permitted by §§ 1103(c) and 1113(h)(5), and impliedly permitted for "regulatory" crimes, may be specific enough to permit the law enforcement agency to request the primary records but may not be so detailed as to amount to a transfer of the substance of the original records.

We are informed by your staff that the background to your request is as follows. Before the enactment of the Act, a supervisory agency routinely inspected customer records in the course of examining the financial institutions under its charge.[3] When this led the agency to believe that a Federal offense might have been committed by the customer or others, it would report to the proper Federal enforcement agency. The report would begin with a summary of the reasons for believing that an offense had been committed and would proceed with a detailed analysis of the supporting customer records involved. The offenses tended to fall into two groups. The first involved misuse of authority by an officer or employee of the financial institution, whether or not in concert with a customer.[4] The second involved offenses not related to the management of the institution. We are informed that referrals by supervisory agencies of offenses not involving the financial institution were rare. Accordingly, this opinion will focus on the authority of the supervisory agencies to notify law enforcement agencies of offenses affecting the financial institution and the authority of the law enforcement agencies to receive such referrals.

The extent to which the Act affects the ability of a bank supervisory agency to report violations to the Department of Justice depends on four factors: the ability of the supervisory agency to report before the Act was passed; the Act's definition of financial record information; its restrictions on the supervisory agencies' access to records, and the Act's restrictions on their referral power.

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[3] Section 1101(6) of the Act defines "supervisory agency" to mean:

> with respect to any particular financial institution any of the following which has statutory authority to examine the financial condition or business operations of that institution—
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> (A) the Federal Deposit Insurance Corporation;
> (B) the Federal Savings and Loan Insurance Corporation;
> (C) the Federal Home Loan Bank Board;
> (D) the National Credit Union Administration;
> (E) the Board of Governors of the Federal Reserve System;
> (F) the Comptroller of the Currency;
> (G) the Securities and Exchange Commission;
> (H) the Secretary of the Treasury, with respect to the Bank Secrecy Act and the Currency and Foreign Transactions Reporting Act (Pub. L. No. 91-508, title I and II); or
> (I) any State banking or securities department or agency.

[4] *See, e.g.*, 18 U.S.C. §§ 656-657, 1005-1006.

The supervisory agencies are authorized by statute to examine the affairs of financial institutions under their jurisdiction.[5] The examining function has included reporting to the Department of Justice irregularities that may amount to violation of the criminal statutes applicable to financial institutions.[6] These statutes were originally enacted as part of the Federal regulatory system for financial institutions. Their purpose is to protect the solvency and integrity of the institutions against willful misuse of their funds.[7] It was considered an integral part of the supervisory agencies' duty to protect financial institutions and their depositors to inform the proper law enforcement authorities of those instances of mismanagement that appeared to be criminal. As stated in *Cooper* v. *O'Conner*, 99 F. (2d) 135, 140 (D.C. Cir. 1938):

> By reason of their performance of duties clearly assigned, the facts and evidence which suggest criminal conduct upon the part of bank officials are revealed to such [Federal] officers. It is the duty of all citizens to reveal such evidence, of which they may have knowledge, at the risk of being guilty of misprision of felony for failing to do so. In the case of an official, his failure to act under such circumstances would in addition, constitute serious malfeasance in office. In the present case, appellees were charged with responsibility for the collection and conservation of the assets of a bank. It would be absurd to contend that the duties of such an officer—so charged and so peculiarly aware of facts suggesting that certain persons were engaged in the spoliation of those very assets—should stop abruptly at the point where the initiation of criminal proceedings became necessary to protect such assets.

There was no statutory restriction on their power to report offenses. *See, Bank of America National Trust & Savings Assn.* v. *Douglas,* 105 F. (2d) 100, 103-104 (D.C. Cir. 1939); 29 Op. Att'y Gen. 555 (1912).

We must consider, then, the extent to which Congress has affected the previous power and duty of the supervisory agencies to report violations of law to this Department. The Act affects this power in three ways. First, §§ 1102 and 1113 restrict the conditions under which the supervisory agencies may obtain access to the records in the hands of the financial institution. Second, §§ 1112 and 1113(h) place express restrictions on disseminating information once access has been obtained. Third, § 1101(2) defines the term "financial record" broadly enough to include information derived from the primary records.

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[5] *See, e.g.,* 12 U.S.C. § 481 (Comptroller of the Currency); 12 U.S.C. § 1440 (Federal Home Loan Bank Board); 12 U.S.C. § 1756 (National Credit Union Administration); 12 U.S.C. § 1730(m)(1) (Federal Savings and Loan Insurance Corporation); 12 U.S.C. § 1820(b) (Federal Deposit Insurance Corporation).

[6] *See* 18 U.S.C. §§ 213, 215, 656-657, 1005-1006.

[7] *See, e.g., United States* v. *Darby,* 289 U.S. 224 (1933); *United States* v. *Corbett,* 215 U.S. 233 (1909); *United States* v. *Manderson,* 511 F. (2d) 179 (5th Cir. 1975); *United States* v. *Wilson,* 500 F. (2d) 715 (5th Cir. 1974); *Weir* v. *United States,* 92 F. (2d) 634 (7th Cir. 1937).

Initial access by a Government agency to records in the hands of a financial institution is governed by § 1102. It prescribes the general requirement that access must be obtained through one of the formal methods set out in §§ 1104–1108, subject to notice to the customer and to judicial supervision under §§ 1109–1110. It further provides that, notwithstanding the general requirement, initial access may be obtained through the exceptions contained in §§ 1103(c)–(d), 1113, and 1114. Of these, § 1113(b) and (h) are relevant to the functions of the supervisory agencies.

Section 1113(b) provides:

> Nothing in this title prohibits examination by or disclosure to any supervisory agency of financial records or information in the exercise of its supervisory, regulatory, or monetary functions with respect to a financial institution.

This is intended to give the supervisory agencies access to customer records in order to conduct examination.

In addition, § 1113(h)(1)(A) permits a Government authority to have access to customer records in connection with a lawful examination, inspection, or investigation of the institution or of a legal entity not a customer.[8] The investigating agency must certify that the investigation is lawful; transfer of the primary records to another agency is restricted. § 1113(h)(2), (4). However, under § 1113(h)(5) the agency in possession may notify another agency with proper jurisdiction "that financial records obtained pursuant to this subsection may relate to a potential civil, criminal, or regulatory violation by a customer," and the notified agency may then seek access under the procedures provided by the Act. By its terms, § 1113(h)(1)(A) may be used as authority to examine a financial institution, thereby expressly permitting a supervisory agency to notify a law enforcement agency under § 1113(h)(5). We are informed, however, that the supervisory agencies prefer to obtain access under § 1113(b) in order to avoid the certification process required by § 1103(b) and§ 1113(h)(2).

Unless one of the exceptions in § 1113–1114 applies, § 1112 of the Act provides the mechanism for disseminating financial records obtained from the acquiring agency to other agencies. Under subsection (a), the transferor agency must certify that the records are relevant to a legitimate law enforcement inquiry within the jurisdiction of the recipient agency. Under subsection (b)–(c), the transferor must notify the customer within 14 days unless a court authorizes delayed notice.[9] Subsection (d) expressly excludes from the Act's restrictions the exchange of information among supervisory agencies.

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[8] This means, in effect, a partnership of more than five individuals or a legal person not an individual. *See* note 2, *supra*.

[9] The reasons justifying delayed notice provided by § 1109(a)(3) are:

(3) there is reason to believe that such notice will result in—

(Continued)

As reported to the House, § 1112 of the Act provided:

> Nothing in this title prohibits any supervisory agency from exchanging examination reports or other information with another supervisory agency, *or from supplying information to a prosecution or enforcement agency concerning a possible violation of a regulation or statute administered by the supervisory agency.* [Emphasis added.][10]

This language would have expressly continued the existing referral practices of the supervisory agencies for offenses relating to the financial institution. It was deleted when the present § 1112 was introduced in an amendment offered by Representatives Goldwater and McKinney.[11] The effect of the amendment, Representative Goldwater explained, "is to force an agency to justify beforehand its request for information, leave a paper trail of the transaction, and only upon court agreement not notify an individual."[12] Representative McKinney introduced a letter from Assistant Attorney General Wald supporting the amendment; the letter did not distinguish referrals by supervisory agencies from other interagency transfers.[13]

The term "financial records" is defined by § 1101(2) of the Act to include "an original of, a copy of, *or information known to have been derived from*" any record held by a financial institution concerning its relationship with a customer. [Emphasis added.] The emphasized language was added on the House floor in an amendment by Representative Pattison, but is not discussed in the legislative history.[14] On its face, it is broad enough to include both summaries of customer records and analyses of the records showing that the customer may have engaged in any particular activity, including commission of a crime.

There are several reasons for a broad reading of this language. First, one principal purpose of the Act was to restrict the ability of the Government to reconstruct an individual's affairs from his financial records.[15] Derived information and its use are at the center of what Congress considered to be the threat to privacy under prior law. Second, §§ 1103(c)

(Continued)

(A) endangering life or physical safety of any person;
(B) flight from prosecution;
(C) destruction of or tampering with evidence;
(D) intimidation of potential witnesses; or
(E) otherwise seriously jeopardizing an investigation or official proceeding or unduly delaying a trial or ongoing official proceeding to the same extent as the circumstances in the preceding subparagraphs.

[10] 124 CONGRESSIONAL RECORD H. 11728 (daily ed., Oct. 5, 1978).
[11] 124 CONGRESSIONAL RECORD H. 11733, 11734 (daily ed., Oct. 5, 1978).
[12] 124 CONGRESSIONAL RECORD H. 11733 (daily ed., Oct. 5, 1978).
[13] 124 CONGRESSIONAL RECORD H. 11734 (daily ed., Oct. 5, 1978).
[14] 124 CONGRESSIONAL RECORD H. 11735 (daily ed., Oct. 5, 1978).
[15] *See* H. Rept. 1383, 95th Cong., 2d sess., at 33-35; 124 CONGRESSIONAL RECORD H. 11731-32 (Representatives Pattison, Rousselot), 11739 (Representative Cavanaugh), 11739 (Representatives Rousselot and Pattison), (daily ed., Oct. 5, 1978).

and 1113(h)(5) specifically permit a financial institution or a supervising agency to report to a law enforcement agency, in limited circumstances, that financial records show a crime may have been committed, without notifying the customer. This express grant of authority would not be necessary if the reports were not deemed to be disclosure of a "record" otherwise prohibited by the Act. Third, the Pattison amendment, as a whole, had the purpose of encouraging customers to seek judicial review and requiring agencies to justify access to records with greater particularity.[16] Although the scope of the phrase "information known to be derived from * * *" is not discussed, the phrase was enacted as part of an effort to make it more difficult for the Government to obtain or use financial information without notice to the customer.

The argument to the contrary is that the operation of § 1112 requires that a summary or analysis, if sufficiently general, need not be considered a "record." Representative Goldwater explained that § 1112's purpose was to require the agency receiving the financial information to justify its need.[17] The transferring agency is required to certify that the transfer is for a legitimate law enforcement purpose. To do so, the receiving agency must be able to explain to the transferring agency what it wants and why. This, in turn, requires that the transferring agency first have informed the receiving agency that it has available financial information that may be relevant to a legitimate law enforcement inquiry.

This argument, in our view, does not overcome the action of the House (under § 1103(c) and § 1113(h)(5)) in expressly permitting reports that a crime may have been committed and deleting similar express authority in § 1112(d). These actions would have been superfluous if such a report, based on examination and analysis of financial records, was not itself a record. It is consistent, moreover, with the Act's general purpose of limiting Government access to financial data to construe the statute to prevent one agency from informing another that an individual's financial records should make him an object of the latter's agency's suspicions without informing the individual. We therefore conclude that the definition of "financial record" in § 1102(2) includes a report that analysis of the primary records shows a customer to have possibly committed a crime.

Thus, the statement that a customer's records may relate to a Federal crime, when based on examination of those records, is itself a financial record under the Act. The Act expressly permits an agency that has obtained access to the primary financial records under § 1113(h) to notify a proper law enforcement agency of this conclusion, and it expressly permits transfer of any information among supervisory agencies. Otherwise, the procedures of § 1112(a)-(c) are the Act's only explicit mechanism

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[16] 124 CONGRESSIONAL RECORD H. 11735 (Representative Pattison) (daily ed., Oct. 5, 1978).

[17] 124 CONGRESSIONAL RECORD H. 11733 (daily ed., Oct. 5, 1978).

for disseminating customer record information, including derivative information, from one agency to another. The question thus becomes whether Congress intended a further, implicit method of transfer from the supervisory agencies.

As a general matter, the legislative history of § 1112 is clear that implicit exceptions to it were not intended. The House was aware that the "routine use" exception to the Privacy Act, 5 U.S.C. § 552a(a)(7), (b)(3), has been used to justify exchanges of information among Federal agencies based on implicit authority. In an exchange among Representatives Rousselot, Pattison, and Cavanaugh on this point, it was clearly stated that § 1112, as amended, contained no "routine use" exception, and that interagency dissemination could only be made with certification by the transferring agency and notice to the customer.[18] Without equally clear support derived from the purpose and legislative history of the Act, we are unable to say that Congress intended to preserve as implied exceptions to § 1112 any pre-enactment practices of transferring information.

We believe, however, that support for implied authority to transfer information can be found in the narrow circumstances in which the offense reported by a supervisory agency relates to the financial institution's operations. Representative Goldwater stated that his version of § 1112 did not apply "to supervisory agencies properly conducting their responsibilities."[19] The proper conduct of those responsibilities has long been considered to include reporting criminal violations of the banking laws to the law enforcement agencies.[20] Moreover, the Right to Financial Privacy Act was but one title of 20 in an omnibus statute that was primarily concerned with strengthening the powers of the supervisory agencies and tightening the restrictions on bank officers, directors, and shareholders.[21] The House Banking, Finance, and Urban Affairs Committee relied in at least one case on referrals from a supervisory agency to U.S. Attorneys as indications that a regulatory problem existed.[22] It would be anomalous to conclude that a statute intended on the whole to strengthen the regulation of financial institutions was also intended to deprive the regulators of one of their oldest and strongest weapons for dealing with the most serious cases of management abuse.

Considering the Financial Institutions Regulatory Act as a whole, we conclude that Congress did not intend to prohibit a supervisory agency from reporting to the proper law enforcement agency that it has discovered in a customer's records evidence that a criminal statute that is part

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[18] 124 CONGRESSIONAL RECORD H. 11739 (daily ed., Oct. 5, 1978).

[19] 124 CONGRESSIONAL RECORD H. 11733 (daily ed., Oct. 5, 1978).

[20] *See* p. 4, *supra.*

[21] *See generally* Pub. L. No. 95-630, Financial Institutions Regulatory and Interest Rate Control Act of 1978, Titles I-III, IV, VI-IX, 92 Stat. 3461; H. Rept. 1383, 95th Cong., 2d sess., at 4-22 (1978).

[22] H. Rept. 1383, 95th Cong., 2d sess., at 13 (1978).

of its regulatory system has been violated. Such reports are an integral part of the process of regulating financial institutions, and they further the regulatory agencies' primary mission of protecting the soundness of these institutions. Notwithstanding § 1112, the supervisory agencies have implicit authority to inform the proper law enforcement agency that their inspection of customer records shows that an individual may have violated a criminal statute governing the management of financial institutions they regulate.

We must, however, point out that the contrary argument is strongly grounded on the language and legislative history of the Act. We cannot say with certainty that the courts would not conclude that a supervisory agency that has obtained access under § 1113(b) must give notice under § 1112 even when reporting evidence of a crime relating to the management of the institution. Furthermore, we are not aware of anything in the language or legislative history of the Act that would lead to the conclusion that supervisory agencies have implied authority to report that crimes unrelated to their supervisory function may have been committed on the basis of an analysis of a customer's financial records.

The next question is the scope of the information that may be included in a report to a law enforcement agency under § 1103(c) or § 1113(h)(5), or in a report under the supervisory agencies' implied authority. These provisions permit notice to be given so that the law enforcement agency may then seek access to the records under the formal provisions of the Act, which require customer notice.

The permissible scope of referral therefore lies somewhere between two poles. On the one hand, a report cannot be so detailed as to effectively substitute for access to the records themselves. This would permit the formal access procedures to be bypassed.[23] On the other hand, the report must be sufficiently detailed in order to inform the law enforcement agency that reasonable grounds exist to believe that an individual has violated the law. Since the referral provisions contemplate access under the Act, it would be reasonable to identify the records and provide an explanation in sufficient detail to permit the law enforcement agency to support a formal proceeding for access. This requires a written statement giving a "demonstrable reason" to believe that the records are relevant to a legitimate law enforcement inquiry.[24] While the legislative history is silent on the amount of detail that must be provided, the language of § 1110(c) clearly contemplates a factual showing beyond mere conclusions. We suggest that this middle ground would be occupied by a description of the pattern of transactions shown in the customer records that does not discuss

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[23] Indeed, § 1113(h)(4) explicitly forbids transfer except to facilitate investigation of the institution or a legal entity not a customer.

[24] Act, § 1110(b)–(c).

particular, identifiable transactions, coupled with the supervisory agency's analysis of why this may relate to a potential violation.

MARY C. LAWTON
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Office of Legal Counsel

May 22, 1979

79-36 MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

Arbitration—Export-Import Bank—Sovereign Immunity—Representation of Bank by Department of Justice

This responds to your request for our opinion whether arbitration of a contract claim by a private commercial bank against the Export-Import Bank (hereinafter "Eximbank") is authorized by law and, if so, whether this Department is authorized to represent Eximbank before the arbitral tribunal.

We understand the facts to be as follows: Eximbank agreed with the First National Bank of Oregon (FNBO) to guarantee FNBO loans financing certain exports. The master guarantee agreement included a clause providing that disputes under the agreement "would be settled by arbitration in accordance with the Rules of the American Arbitration Association," and that any arbitration award may be judicially enforced. The FNBO has demanded arbitration of its claim of $976,514.23.

Eximbank's Authority to Arbitrate

The issue is whether the claim is one against the United States and, if so, whether the United States has waived its sovereign immunity in a way that permits arbitration.

For the purpose of sovereign immunity, FNBO's claim against Eximbank is one against the United States. Under 12 U.S.C. § 635, Eximbank is a wholly owned Government corporation and an agency of the United States. The Bank concededly has authority under 12 U.S.C. § 635(a) to guarantee loans it has made. The Attorneys General have repeatedly ruled that a guaranty by a Government corporation contracted within its statutory powers is a general obligation of the United States, payable from the Treasury as well as from the corporation's assets. 42 Op. Att'y Gen. 429 (1971); *id.*, 327 (1966); *cf.*, *id.*, 21 (1961); 41 Op. Att'y Gen. 365

(1958); *id.*, 403 (1959). Accordingly, claims arising under such guarantees are contract claims against the United States to which sovereign immunity applies unless waived. *See generally, FHA* v. *Burr,* 309 U.S. 242 (1940); *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U.S. 381 (1939); *Federal Land Bank* v. *Priddy,* 295 U.S. 229 (1935).

It is well settled that the immunity of the United States from suit on monetary claims may only be waived by statute. *See, e.g., Affiliated Ute Citizens* v. *United States,* 406 U.S. 128 (1972); *United States* v. *Shaw,* 309 U.S. 495 (1940). No Executive officer may waive sovereign immunity without statutory authority. *See, e.g., United States* v. *United States Fidelity & Guaranty Co.,* 309 U.S. 506 (1940). Whether Eximbank could lawfully consent to have claims against it resolved by an award of an arbitral tribunal is thus a question of statutory construction.

Eximbank's powers in this area are derived from 12 U.S.C. § 635(a)(1), providing in pertinent part as follows:

> (1) There is created a corporation with the name Export-Import Bank of the United States, which shall be an agency of the United States of America. The objects and purposes of the bank shall be to aid in financing and to facilitate exports and imports and the exchange of commodities between the United States or any of its Territories or insular possessions and any foreign country or the agencies or nationals thereof. In connection with and in furtherance of its objects and purposes, the bank is authorized and empowered to do a general banking business * * * to guarantee notes, drafts, checks, bills of exchange, acceptances, including bankers' acceptances, cable transfers, and other evidences of indebtedness; to guarantee, insure, coinsure, and reinsure against political and credit risks of loss * * * to sue and to be sued, to complain and to defend in any court of competent jurisdiction; to represent itself or to contract for representation in all legal and arbitral proceedings outside the United States; and the enumeration of the foregoing powers shall not be deemed to exclude other powers necessary to the achievement of the objects and purposes of the bank * * *.

This provision has an unusual history. According to the historical and revision note in the United States Code, the Bank was chartered as a District of Columbia banking corporation by Executive order and in 1935 made an agency of the United States by statute. Its status as a Government corporation was conferred by the enactment of the present version of 12 U.S.C. § 635(a) in 1947.[1] That statute also added the "sue and be sued" phrase. Its legislative history states that the purpose was to continue unimpaired

[1] *See* Act of June 9, 1947, ch. 101, § 1, 61 Stat. 130.

Eximbank's powers as a District of Columbia banking corporation while making express its previously implicit power to sue and to be sued.[2]

We know of no direct authority dealing with the question whether a wholly owned Government corporation with Eximbank's powers may resolve contract claims by arbitration. It is our opinion, however, that 12 U.S.C. § 635(a)(1) authorizes the Bank to do so. First, the statute is a grant of power to engage in the business of banking in essentially the same manner as a private corporation;[3] it states that it is to be construed in a manner that will not exclude the powers necessary to achieve the Bank's function, and its legislative history indicates that the Bank retained the powers of a District of Columbia banking corporation. Second, the National Railroad Passenger Corporation (Amtrak), a wholly owned Government corporation with statutory powers similar to Eximbank's,[4] has employed arbitration of contract claims connected with its functions. *See, National Railroad Passenger Corp.* v. *Chesapeake & Ohio Rwy.*, 551 F. (2d) 136 (7th Cir. 1977). Finally, the Supreme Court has stated as a general rule of construction that where Congress has authorized a corporate instrumentality to engage in commercial transactions, statutory authority to "sue and be sued" should be construed as a complete waiver of sovereign immunity for any suit not clearly shown to be inconsistent with the instrumentality's function. "In the absence of such showing," the Court stated, "it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be." *FHA* v. *Burr*, 309 U.S. 242, 245 (1940); accord, *Reconstruction Finance Corp.* v. *Menihan Corp.*, 312 U.S. 81 (1941); *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381 (1939).

Presumably, a banking corporation in the District of Columbia would be free to submit contract claims arising from its banking operations to arbitration. Eximbank was intended to have similar powers and the agreement in this case has clearly arisen out of its normal banking operations. We are aware of no reason why arbitration would be inconsistent with Eximbank's functions. Accordingly, when 12 U.S.C. § 635(a)(1) is read in the light of *Burr*, it is our opinion that the statute authorized Eximbank to enter into the arbitration agreement.

We must point out, however, that this opinion is primarily a construction of Eximbank's statutory authority. As your opinion request states, the judicial authorities and opinions of the Attorney General do not agree

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[2] *See* H. Rept. 393, 80th Cong., 1st sess., at 2 (1947); S. Rept. 104, 80th Cong., 1st sess., at 2 (1947).

[3] Eximbank is, of course, subject to the budgetary and auditing controls imposed on wholly owned Government corporations by the Government Corporation Control Act. 31 U.S.C. §§ 846–852.

[4] *See* 45 U.S.C. §§ 545(a), 562(a).

on the circumstances in which an agency of the United States may submit claims against it to arbitration.[5] In addition, the Comptroller General has held that clear statutory authority is required to arbitrate contract claims against the United States.[6] The power of each Government agency or instrumentality to submit a claim to arbitration must be considered on the facts of the particular case.

Participation by the Department of Justice

In a memorandum of December 20, 1977 to the Associate Attorney General, we expressed the opinion that 28 U.S.C. §§ 516, 519 required the Department of Justice to conduct the litigation of Eximbank within the United States. Your second question is thus whether this extends to arbitration proceedings. We conclude that the Department is authorized by the above statutes and 28 U.S.C. § 517 to represent Eximbank in any arbitration involving FNBO.

Section 517 reads as follows:

> The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

An arbitration proceeding is not, strictly, a suit pending in any court. However, any arbitration award against Eximbank would be judicially enforceable. *See generally, FHA* v. *Burr,* 309 U.S. 242 (1941). As you have pointed out, the award is ultimately payable by the United States. By representing the Bank in the arbitration, the Department will therefore be acting to protect a direct financial interest of the United States. Moreover, taking part in the arbitration may be crucial in protecting that interest. Although we have not considered the matter in detail, we note that judicial review of arbitration awards for errors of law, fact, or interpretation of the contract is extremely narrow. *See, e.g., National Railroad Passenger Corp.* v. *Chesapeake & Ohio Rwy.,* 551 F. (2d) 136, 141–44 (7th Cir. 1977); *see also* 9 U.S.C. §§ 10–11. In order effectively to represent Eximbank in court, it may be necessary for this Department to take part in the prelitigation proceedings that will essentially decide the controversy. We

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[5] *Compare, George J. Grant Construction Co.* v. *United States,* 109 F. Supp. 245 (Ct. Cl. 1953), and *United States* v. *Ames,* 24 Fed. Cas. No. 14,441 (C.C. Mass. 1845); 33 Op. Att'y Gen. 160 (1922); 17 Op. Att'y Gen. 486 (1882).

[6] *See* 32 Comp. Gen. 333 (1953); 19 Comp. Gen. 700 (1940); 8 Comp. Gen. 96 (1928).

therefore conclude that 28 U.S.C. §§ 516–17, 519 authorize the Department to represent Eximbank in the arbitral proceeding.[7]

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[7] This opinion does not consider the question whether or to what extent Eximbank is required to be represented by this Department in an arbitration.

May 25, 1979

79-37 MEMORANDUM OPINION FOR THE SECRETARY OF ENERGY

Emergency Petroleum Allocation Act of 1973 (15 U.S.C. § 751)—The President—Constitutional Law (Article II, Section 2, Clause 2)—Delegation of Authority to State Governors in End-user Gasoline Allocation Program

This responds to your request for our opinion regarding several questions arising from a proposed delegation of powers under the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. § 751 *et seq.*: First, whether the President may constitutionally delegate powers under EPAA to the Governors of the several States and whether the Governors can exercise these powers in the absence of any State enabling legislation or in the presence of State legislation affirmatively prohibiting the exercise of such powers; second, whether the substantive powers proposed to be delegated to the Governors are within the scope of power delegated to the President by EPAA. We conclude that delegation of specific powers to the Governors on a permissive basis would clearly be authorized except in situations in which constitutional provisions of the State prevented the exercise of such Federal powers by the Governor.

I. The Constitutionality of Delegating Federal Power to a Governor

The delegation of power by Executive order under the EPAA to the Governors of the several States raises two distinct constitutional issues. First, whether a Governor may constitutionally be delegated the power under a Federal statute in order to implement and enforce Federal law. Second, whether such a delegation is consistent with the "state sovereignty" values embodied in the Tenth Amendment in the absence of State legislation supportive of the delegations or in the presence of prohibitory State statutory or constitutional provisions.

The Governors of the several States may be delegated the power to

implement and enforce Federal substantive law. It is settled that State officers are under a constitutional obligation to abide by Federal law, *see, Cooper* v. *Aaron,* 358 U.S. 1 (1958), and that at least some Federal power may be delegated to private citizens, *see, Currin* v. *Wallace,* 306 U.S. 1 (1939). In addition, so long as the President retains the authority to withdraw power once delegated, as he has done here, his prerogatives under Article II, § 2, Cl. 2, to select and control those who will implement Federal law is preserved.[1] The only substantial question raised by the proposed delegation relates to the impact it might have on the sovereign status of the States in our federal system. *Cf., National League of Cities* v. *Usery,* 426 U.S. 833 (1976).

The salient feature of the delegation in regard to the Tenth Amendment is that each Governor will be free to decline the delegation for any or no reason at all. Thus, unlike the situation initially presented to the Supreme Court in *Environmental Protection Agency* v. *Brown,* 431 U.S. 99 (1977), the executive branch of any State is completely free to accept or reject the responsibilities attendant to any delegation of Federal power by the President. Given the permissive nature of the delegation, we do not believe that the concerns expressed by the several Courts of Appeals regarding the Tenth Amendment implications of the Clean Air Act and that Act's imposition of certain duties on the States are present here. *See, e.g., Brown* v. *Environmental Protection Agency,* 521 F. (2d) 827, 837–42, (9th Cir. 1975), *judgment vacated,* 431 U.S. 99 (1977). There, the Ninth Circuit suggested quite strongly that a Federal statute requiring a State to expend State funds and utilize State personnel to enforce certain provisions of the Clean Air Act would present substantial Tenth Amendment problems. We do not believe that the voluntary assumption of such Federal responsibilities by State officers stands on the same footing as the mandatory requirements of the regulations issued by the Environmental Protection Agency pursuant to the Clean Air Act.[2] Indeed, we believe there is a constitutional presumption that a State officer will enforce Federal laws when called upon to do so, *see, Cooper* v. *Aaron, supra.* Thus, at least where no State statutory or constitutional law is to the contrary, the chief executive of a State may be delegated the power to exercise the contemplated functions under § 5(b) of the EPAA.

Where, however, the executive authority of a State is explicitly prohibited by State law from assuming such functions, we doubt that a

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[1] Under 15 U.S.C. § 1827(a), the Secretary of Agriculture was empowered in 1970 "to utilize the officers and employees of any State, with its consent" in the carrying out of a Federal program for the protection of horses. Although such provisions are relatively novel, their usage has now been accepted for at least a decade by Congress and the executive branch.

[2] We note that prior to the Supreme Court's decision in *Brown,* the Environmental Protection Agency conceded that the mandatory provisions of its regulations for affirmative State action were invalid under the Clean Air Act. For this reason, the Supreme Court did not reach the merits of the statutory or constitutional arguments raised by several States quite successfully in the decisions considered by the Court in *Brown.*

Governor can accept a delegation to perform these Federal functions. The threshold inquiry is whether Congress would have intended State law to be preempted by the EPAA. Section 6(b) of that Act, 15 U.S.C. § 755(b), deals specifically with the subject of preemption, but does not suggest a congressional intent to preempt the kind of State law that would be involved here. Because the control of a State's executive branch by its legislature, including the devotion of State officers to duties other than those prescribed by the State legislatures, appears to us to be a fundamental aspect of State sovereignty under the Tenth Amendment. We believe that EPAA should not be read, and probably cannot be read, to effect such preemption. We think that the specificity of the preemption provision contained in the EPAA, which clearly does not contemplate the kind of preemption involved here, coupled with the substantial constitutional question that would be presented, were the EPAA read to preempt such State law, would be decisive on this point.[3]

We therefore conclude that although power under the EPAA may be delegated by Executive order to Governors on a permissive basis, such a delegation could not be effected in contravention of State law.

II. The Power to Require End-user Allocation of Gasoline Under EPAA

Under the proposed Executive order, a Governor would be empowered to require motor-gasoline retail sales outlets in his State or a locality thereof to supply gasoline to vehicles on an "odd-even plate number basis," to require purchasers of gasoline to purchase a specified minimum amount of gasoline, and finally to require retailers to be open or closed for the sale of gasoline at specified times of the day or on specified days. The question is whether EPAA authorizes the type of such end-user allocation controls.

This question can be subdivided into two parts: First, whether EPAA authorizes the application of mandatory allocation measures applicable to end-users; second, if EPAA does authorize these, whether it authorizes the specific type of powers proposed to be delegated.

End-user Allocation

Under § 4 of EPAA, 15 U.S.C. § 753, the President was directed to

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[3] The substantiality of the constitutional question presented is apparent under all the Courts of Appeals decisions consolidated for review in the Supreme Court in *Environmental Protection Agency* v. *Brown, supra.* Certainly, the requirement that the Governor of a State perform Federal duties is one that could detract substantially from his ability to perform State duties imposed on him by State law. Indeed, it is difficult to conceive of a more significant infringement on State authority than to conscript the Governor of a State, even a willing Governor, into the Federal service in contravention of State law reserving the services of the Governor to the people of his State.

establish a "mandatory allocation" program by regulation. As explained in the Conference Report on the Act:

> The mandatory allocation program will operate to compel the allocation of product throughout the various levels of the petroleum market. It may be necessary, in selective cases, to compel the allocation of product to particular end-users, such as hospitals, units of government, or persons engaged in energy production and transportation; but it is not generally expected that the regulation promulgated by the President will be burdened with the complexities of assigning fuels to users unless such assignment is necessary to carry out the purposes of the Act. When required, however, it is intended that the President would have full authority under this Act to identify permissible uses of covered fuels and to restrict the amounts which may be made available to such uses.[4]

In 1974, the Federal Energy Administration (now the Federal Energy Regulatory Commission), exercising the power granted by § 4 of EPAA, promulgated regulations specifically covering the allocation of certain petroleum products to end-users. *See* 10 CFR §§ 211.10–211.17, reprinted in 39 F.R. 35511–19 (Oct. 1, 1974). Thus, from an early date the agency charged with exercising the power of allocation clearly read that statute as authorizing allocation of various petroleum products covered by the Act to end-users. This evidence is significant because it is a familiar rule of statutory construction that an agency's contemporaneous interpretation of a statute is normally given great weight. *See, Maynard* v. *Elliott,* 283 U.S. 273 (1931). In connection with its consideration of what ultimately became the Energy Policy and Conservation Act, 42 U.S.C. §§ 6261 *et seq.,* the Congress reviewed in some detail the allocation regulations that had been issued by the Federal Energy Administration. *See* H. Rept. 94–340, 94th Cong., 1st sess., 65–69 and 185–203 (1975). The consequences of this review were the reenactment of EPAA and the addition to it of additional tools to be used by the President to deal with energy allocation and shortages. Under such circumstances, the contemporaneous interpretation of the EPAA in 1974 is "presumptively the correct interpretation of the law." *See* 2A Sutherland, *Statutory Construction* § 49.09 (4th ed. 1973); *Cammarano* v. *United States,* 358 U.S. 498, 508–09 (1959). We believe that the prior interpretations of the EPAA would be viewed as correct interpretations and clearly within the scope of EPAA.[5]

Specific End-user Controls

In its consideration of the proposed EPCA in 1975, the House

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[4] H. Rept. 93–628, 93rd Cong., 1st sess., 13 (1973).

[5] Although we believe that § 4 of EPAA is adequate support for the proposed Executive order, we would additionally note that §§ 15 and 16 of EPAA, added to EPAA by the enactment of the EPCA in 1975, would also appear to provide authority.

committee on Interstate and Foreign commerce expressly noted that measures instituted largely by the States on their own initiative during the 1973–1974 oil embargo had been successful. More particularly, the Committee Report noted that alternate day of the week purchases, requirements that motorists have less than one-half a tank of gas prior to purchase, and controlled gasoline station business hours had been very effective in dealing with that shortage. *Id.*, at 64. The response of Congress in the EPCA was an amendment to EPAA, adding to that latter Act new §§ 11 and 12, 15 U.S.C. §§ 760, 760a. Under § 11, the President was to review the prior regulations issued pursuant to § 4 of EPAA and to amend them under specified circumstances. Under § 12, the criteria for amendment were established. Basically, it was required that "the regulation, as amended, [must provide] for the attainment, to the maximum extent practicable of the objectives stated in § 4 of the Act."

This language, coupled with the broad authority conferred on the President by § 4 as explained by the language quoted above from the conference report, provides substantial support for a determination that the controls that would be authorized by the proposed Executive order were "necessary" to carry out the purposes of EPAA.[6]

LEON ULMAN
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[6] The Temporary Emergency court of Appeals suggested in dictum that § 4 would provide a basis for a regulation that would have provided for preferential treatment by gasoline retailers for identifiable commercial customers. *See, Reeves* v. *Simon*, 507 F. (2d) 455, 461 (1974), cert. denied, 420 U.S. 991 (1975). The *Reeves* case is necessarily grounded on the proposition that EPAA permits the regulation of gasoline retailers as part of a program of end-user allocation.

May 29, 1979

79-38 MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

(1) Conflict of Interest—Financial Interest (18 U.S.C. § 208)—Husband and Wife
(2) Executive Order No. 11222—Appearance of Conflict of Interest

This is in response to your memorandum of April 18, 1979, asking for our opinion on the conflict of interest questions that will soon be pertinent in relation to the service of Carol T. Foreman as Assistant Secretary of Agriculture for Food and Consumer Services. The questions stem from the pending merger of two large labor unions in one of which her husband is an official. The relevant facts, as we understand them, are summarized below.

The husband, a lawyer by training, has been employed by the Retail Clerks International Union for about 12 years and presently occupies the position of executive assistant to its president. He is also an elected vice president of the union and by virtue of holding that office is a member of its executive board. He receives a salary fixed by the president for his services as executive assistant but no additional compensation for his duties as vice president and board member.

The Retail Clerks Union will soon merge with the Amalgamated Meat Cutters and Butcher Workmen of North America. It appears that the president of the Retail Clerks will become the president of the combined organization and that Mr. Foreman will step into the same positions in it that he holds now with the Retail Clerks.

Mr. Foreman has decided not to act as the spokesman or representative of the merged union in any matter before the Department of Agriculture. In addition he has stated that he will refrain from participating in any matter in that union where necessary to avoid even the appearance of a conflict of interest for himself or his wife.

As for Ms. Foreman, she is of course a Presidential appointee. Her duties and powers are derived from formal delegations to her by the Secretary

of Agriculture of his authority under two clusters of statutes. One group, which is related to food safety and quality, charges the Secretary with the inspection, grading, and standardization of meat, poultry, eggs, dairy and other food products, the enforcement of standards for the humane slaughter of livestock, and the procurement of agricultural products and food for the school lunch program. 7 CFR 2.15(a). The second group, which is related to food and nutrition, requires the Secretary to administer the food stamp, school lunch and child-nutrition programs along with a number of others concerned with the distribution and donation of agricultural commodities and products. 7 CFR 2.15(b).

The Secretary's delegations are accompanied by a grant of power to Ms. Foreman to redelegate her authority to appropriate officers and employees. 7 CFR 2.7. In exercise of this power, she has in turn delegated all her functions under the two groups of statutes to the Administrator, Food Safety and Quality Service (FSQS), and the Administrator, Food and Nutrition Service (FNS), respectively. 7 CFR 2.92, 2.93. Although the two services thus carry on all the functions incident to her office, they nevertheless remain fully under her control because the Secretary's delegations to her are accompanied by a grant of authority to direct and supervise the employees of the two units. 7 CFR 2.7.

From this brief description of Ms. Foreman's jurisdiction it is apparent that the interests of the Meat Cutters component of the merged union, or its members, may on occasion be affected directly or indirectly by the actions of FSQS or FNS and that the union may become involved on behalf of that union in formal or informal proceedings before Ms. Foreman or the services. It is against this background that we consider the application of the pertinent conflict of interest statute and related administrative regulations.

The applicable conflict of interest law is 18 U.S.C. § 208, a criminal statute dealing with the conduct of a Government employee in his role as its servant or representative, as distinguished from his conduct in a private capacity. Section 208 does not disqualify anyone from holding a particular Government position; instead, it requires disqualification in certain governmental matters. Its restraint therefore comes into play on a case-by-case basis. In particular, subsection (a) of § 208 prohibits a Government employee from participating as such in any matter

> in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest.

The term "financial interest" is not defined.

It will be seen that although a Government employee who also has non-Government employment is barred by § 208(a) from participating in a matter in which his outside employer has a financial interest, he is not barred from a matter in which his spouse's employer has such an interest.

Therefore Ms. Foreman will not be disqualified by § 208(a) from a matter before her or her staff involving Mr. Foreman's new union unless it appears that he himself has a financial interest in the matter. Since he will be a salaried employee, it is unlikely that either the size of his salary or the continued existence of the position he occupies will be affected by any matter in Ms. Foreman's domain. However, if a situation did arise in which the outcome of a matter might have a direct and predictable effect on his income from the union or on any other personal financial interest, then Ms. Foreman would have to refrain from participating in it. *See, Federal Personnel Manual,* Ch. 735, App. C, at p. 4. It should be added that where a disqualifying financial interest is of an insignificant nature, the Government employee involved may receive a waiver under the provisions of § 208 (b). Accordingly, it would be possible for Ms. Foreman, in pursuance of the applicable Department of Agriculture procedures, to receive a waiver of a minor financial interest of her husband in a matter.

Executive Order No. 11222 of May 8, 1965, 3 CFR, 1965 Supp., picks up where 18 U.S.C. § 208 leaves off. It proscribes actions by Government employees that, although not necessarily running afoul of the statute, might result in, or create the appearance of, certain improprieties. Included are the use of public office for private gain, giving preferential treatment to any organization or person, and affecting adversely the confidence of the public in the integrity of the Government. § 201(c). The regulations of the Department of Agriculture repeat this admonition. 7 CFR 0.735-11.

It might be suggested that the mere association of Mr. Foreman with the Meat Cutters will create a problem of appearances for Ms. Foreman, not so much because of the public's fear of financial preference that is principally reflected in the Executive order and USDA regulations, but from the very fact of the marital relationship. However, Mr. Foreman's decision not to represent his union before the Department of Agriculture and not to participate in union matters where appearances of a conflict of interest might occur should dispel concerns of this nature because his noninvolvement will insure that he and Ms. Foreman do not participate in the same matter on behalf of potentially opposing entities.

For Ms. Foreman's part, she, along with her Department's ethics counsellor and on occasion perhaps the Secretary of Agriculture, will have to examine with a view toward the possible appearance as well as the reality of a conflict of interest each matter coming within the area of her responsibility in which the new union will be a party or otherwise advance an interest or express its views. If the disposition of a matter predictably may have a significant effect, whether beneficial or adverse, on the union's operations or financial position or on the livelihoods of an appreciable number of its members, we are of the opinion she should not participate. Self-disqualification may also be advisable on occasion in situations with less compelling facts. In considering such cases, Ms. Foreman and her colleagues should take into account, along with other

factors, the relative interest of the union in the matter when compared to that of other organizations or persons. In each instance where she determines not to take part in a matter, she should promptly make a record of that determination and make sure that her subordinates and all the parties and others known to have a formal interest in the matter are notified of her action.

The conclusions expressed above are consistent with the developing approach of the legal profession in applying ethical rules to the increasing number of cases in which husband-and-wife lawyers who are not practicing in association with each other find themselves or their law firms representing differing interests. The American Bar Association's Committee on Ethics and Professional Responsibility has issued an opinion on this subject, Formal Opinion 340 of September 23, 1975, which concludes that there is no *per se* rule prohibiting spouses from being employed by law firms with opposing interests in a matter. Rather, the opinion endorses a case-by-case approach, looking to such factors as whether one spouse's position may create a financial interest for the other and whether only one of the spouses will actually be working on the matter.

It might be added that Opinion 340 provides advice for Ms. Foreman even though she is not a lawyer. After stating that it "cannot assume that a lawyer who is married to another lawyer necessarily will violate any particular disciplinary rule, such as those that protect a client's confidences," the Committee, however, went on to note that the "relationship of husband and wife is so close that the possibility of an inadvertent breach of confidence * * * is substantial." It cautioned husband-and-wife lawyers to guard against such inadvertences. The committee's comments are apt in relation to the situation of Ms. Foreman after the Retail Clerks and Meat Cutters merge. She should take every precaution not to compromise her Department's confidences in her conversations with her husband.

As the American Bar Association's Committee on Ethics found nothing inherently improper in the lawyer-wife's and lawyer-husband's representation of clients with adverse interests, so do we conclude that it would not be inherently improper for Ms. Foreman to perform her usual functions and exercise her usual powers in the Department of Agriculture with regard to a matter affecting the employer of her husband. Neither statutory law nor the executive policy of avoiding appearances of conflicts of interest justifies the conclusion that she must disqualify herself in every matter of that kind. What is required by the executive policy is care in deciding for or against recusal in each case.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

May 29, 1979

79-39 MEMORANDUM OPINION FOR THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

Foreign Intelligence Surveillance Act (50 U.S.C. § 1801)—Interception of Radio Communication—Constitutional Law—Fourth Amendment—Privacy

You have asked this Office to consider whether, in specified circumstances, the Federal Bureau of Investigation (FBI) interception of radio transmissions[1] would constitute "electronic surveillance" as that term is defined by § 101(f) of the Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1785, 50 U.S.C. § 1801(f). We conclude, for reasons discussed below, that the interception of such transmissions is not "electronic surveillance" and does not require a warrant when conducted to gather foreign intelligence information.

I. Statutory Interpretation

As analyzed below, whether the interception of radio transmissions is "electronic surveillance" under FISA turns, in general, on whether the speaker has a constitutionally protected reasonable expectation of privacy with respect to his communications.

Under FISA, the interception of radio communications could potentially be classed as "electronic surveillance" under either of two subsections of § 101(f). Section 101(f) provides:

> "Electronic surveillance" means—
>
> (1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio

[1] References in this memorandum to "radio communications" include only two-way communications wholly between radio stations or one-way communications between a transmitter and a receiver, and not microwave or other radio communications that rely, in part, on wire, cable, or similar transmissions.

communications sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;

* * * * * * *

(3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; * * *.

The interception of the communications involved would typically fall within one of these subsections unless the person targeted, or whose communications were intercepted, had no "reasonable expectation of privacy." Congress meant to incorporate into FISA the standard for constitutionally protected privacy interests that is set forth in *Katz* v. *United States,* 389 U.S. 347 (1967). *Katz* held that the warrantless electronic surveillance of a telephone conversation initiated in a public telephone booth was unconstitutional because it "violated the privacy on which [the speaker] justifiably relied." *Id.* at 353. The Court found that the speaker "justifiably" relied on the privacy of his conversation because of both an objectively reasonable social expectation that people's phone conversations will be private and the speaker's own efforts to keep the world outside the phone booth from hearing his conversation. Congress did not specify in the language of FISA whether it meant to protect only such socially accepted, actively sought conditions of privacy or whether it intended to adopt a broader privacy concept. Both the House and the Senate, however, in reporting the bills that became FISA, said:

> The * * * definitions of "electronic surveillance" require that the acquisition of information be under circumstances in which a person has a *constitutionally* protected right of privacy. [H. Rept. 1283, Pt. I, 95th Cong., 2d sess. 53 (1978); S. Rept. 701, *id.*, at 37 (1978).]

Nothing in the Act or in the legislative history contradicts these statements that the privacy standard in FISA is the same as the Fourth Amendment standard.

The second factor determining whether an interception of radio communications constitutes "electronic surveillance" under FISA is whether "a warrant would be required for law enforcement purposes." Under the relevant statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.*, a warrant is required for the

interception, for law enforcement purposes, of radio communications only if the person speaking has a constitutionally protected reasonable expectation of privacy. This conclusion follows from the definitional sections of title III. The communications covered by title III are divided into two categories, "wire" and "oral." A "wire communication" is:

> * * * any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications * * *. [18 U.S.C. § 2510(1).]

An "oral communication" is:

> * * * any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation * * *. [18 U.S.C. § 2510(2).]

It is evident that, although radio transceivers use wires, a normal radio communication does not fall within the definition of "wire communications," which includes only those communications that are transmitted, in whole or in part, over the wire or cable facilities of a communications common carrier. An ordinary radio communication, on its face, is more directly analogous to an oral utterance, whose audible reach is extended through the open air mechanically through a device such as a megaphone. The Ninth Circuit Court of Appeals has held that radio communications, if covered at all by title III, are covered as "oral communications" as defined in that Act. *United States* v. *Hall,* 488 F. (2d) 193, 196–197 (9th Cir. 1973).

However, as indicated in the definition quoted above, title III requires a warrant to intercept oral communications only when uttered by persons possessing a justifiable expectation of privacy. 18 U.S.C. § 2510(2). Title III, like FISA, thus incorporates the constitutional privacy standard first set forth in *Katz.*[2] If, in particular circumstances, no justifiable expectation of privacy requiring a warrant for law enforcement purposes under the Fourth Amendment exists, title III imposes no warrant requirement for the interception of oral communications.

Because "electronic surveillance" of radio communications is defined under FISA to include only circumstances in which a constitutionally protected privacy interest exists, and because a warrant for law enforcement purposes would be required under title III or under the Constitution only where there is a constitutionally protected privacy interest, the

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[2] "In the course of the opinion [*Berger* v. *New York*, 388 U.S. 41 (1967)], the Court delineated the Constitutional criteria that electronic surveillance legislation should contain. Title III was drafted to meet these standards and to conform with *Katz* v. *United States*, 389 U.S. 347 (1967)." S. Rept. 1097, 90th Cong., 2d sess., 66 (1968). *See also, id.* at 28, 89–90.

existence of such an interest controls both definitional characteristics of "electronic surveillance" under FISA.

II. Expectations of Privacy and Radio Transmissions

Having concluded that the interpretation of "electronic surveillance" under FISA turns, in this instance, on a determination whether persons using radio have a constitutionally protected expectation of privacy, it is necessary to ascertain whether any such interest exists.

In *Katz,* the Supreme Court held that the Fourth Amendment protected not particular places, but certain privacy interests of persons:

> What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection * * *. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. [*Id.* at 351–2 (citations omitted).]

From this foundational statement, courts have deduced that the reasonableness of an expectation of privacy is to be judged by those factors affecting the person's subjective expectations, and by "understandings that are recognized and permitted by society" concerning privacy. *Rakas* v. *Illinois,* 99 S. Ct. 421, 430–431, n. 12 (1978). As explained below, we conclude from a review of such factors that no constitutionally protected expectation of privacy exists with respect to most radio communications.

First, a person using an ordinary radio is knowingly exposing the message transmitted to any member of the public who happens to be listening. The ease of interception, the widespread availability of the technology required for interception, and the ease of access for the user to more private means of communication all suggest that no subjective reliance on a privacy interest occurs in the case of a radio message.

The fact that a specific interception that actually takes place may not have been anticipated does not mean there is a constitutionally protected privacy interest. Case law clearly demonstrates that once a person exposes an otherwise private event to ready observation, the individual cannot legitimately rely on an expectation of privacy created by the possibility that the public will overlook what has been exposed. *See, e.g., United States* v. *Jackson,* 448 F. (2d) 963, 971 (9th Cir. 1971), cert. denied, 405 U.S. 924 (1972) (upholding the warrantless search of a trash can outside a hotel room); *United States* v. *Fisch,* 474 F. (2d) 1071 (9th Cir. 1973), cert. denied, 412 U.S. 921 (1973), and *United States* v. *Llanes,* 398 F. (2d) 880 (2d Cir. 1968), cert. denied, 393 U.S. 1032 (1969) (upholding warrantless eavesdropping, with the naked ear, of a conversation in an adjoining motel room or apartment); and *United States* v. *Wright,* 449 F. (2d) 1355 (D.C. Cir. 1971), cert. denied, 405 U.S. 947 (1972) (upholding warrantless visual search of a garage, using a flashlight, through partially open garage door).

The circumstances surrounding radio transmissions and analogies from

existing case law support the conclusion that a person transmitting a message by radio cannot reasonably rely on an expectation of privacy in the constitutional sense.[3] Nor does it appear that there are, with respect to radio, any "understandings recognized and permitted by society," *Rakas* v. *Illinois,* 99 S. Ct. 421, 430–31, n. 12 (1978), that create a constitutionally protected privacy interest.

It might be argued that § 605 of the Federal Communications Act of 1934, as amended, 47 U.S.C. § 605, creates a right of privacy that gives rise to a constitutionally protected expectation of privacy. Section 605 provides in part:

> No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.

Prior to its amendment in 1968, this provision referred to "any" communication "by wire or radio," and was interpreted by the Supreme Court to preclude the introduction into evidence of intercepted wire communications at a State or Federal trial. *Nardone* v. *United States,* 302 U.S. 379 (1937); *Lee* v. *Florida,* 392 U.S. 378 (1968). Reasoning from *Nardone,* the Ninth Circuit, in *United States* v. *Sugden,* 226 F. (2d) 281 (9th Cir. 1955), *aff'd per curiam,* 351 U.S. 916 (1956), held the exclusionary rule applicable to radio communications as well.

We conclude, however, that the prohibitions enacted in § 605 do not codify or create a constitutionally protected privacy interest for radio communications. First, those lower courts that ruled on the question prior to FISA held that § 605 does not bar warrantless electronic surveillance for the purpose of gathering foreign intelligence information, even from wire communications. *United States* v. *Butenko,* 494 F. (2d) 593, 602 (3d Cir. 1974), cert. denied, 419 U.S. 881 (1974); *United States* v. *Clay,* 430 F. (2d) 165, 171 (5th Cir. 1970), *rev'd on other grounds,* 403 U.S. 698 (1971); *United States* v. *Hoffman,* 334 F. Supp. 504 (D.D.C. 1971). In adopting FISA, Congress provided expressly that § 605 is not a bar to "electronic surveillance" conducted under the Act, or to the acquisition of foreign intelligence information by means other than electronic surveillance from international or foreign communications. FISA, § 201(b), 18 U.S.C. § 2511(2)(e) and (f). In view of the prior case law and because Congress

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[3] The fact that a transmission may be encoded would also not create a constitutionally protected privacy interest. With respect to communications, the Fourth Amendment protects persons against interceptions that cannot be reasonably anticipated, given the steps taken to protect the privacy of the communication. In circumstances in which the Fourth Amendment would not proscribe a particular recipient from *receiving* a communication, the recipient's *use* of the communication, *e.g.*, decoding, divulgence to a third party, etc., is not a matter of constitutional concern. *Hoffa* v. *United States,* 385 U.S. 293, 300–303 (1966); *United States* v. *Crowell,* 586 F. (2d) 1020 (4th Cir. 1978), cert. denied, 99 S.Ct. 1500 (1979) (permitting police to take and subject to chemical analysis defendant's trash "absent proof that [defendant] has made some special arrangement for the disposition of his trash inviolate").

stated expressly that § 605 does not bar domestic "electronic surveillance," which, by definition, occurs only when a constitutional privacy interest is at stake, it should follow that § 605 does not bar the acquisition of foreign intelligence information in cases in which a constitutionally protected privacy interest is not at stake. Assuming that § 605 is thus simply irrelevant to the gathering of foreign intelligence information, a person transmitting an ordinary radio message cannot justifiably rely on § 605 as protecting his privacy against investigators seeking such information.

Second, the Department of Justice has consistently interpreted § 605 not to bar the mere acquisition of radio communications, but only to proscribe their interception and divulgence outside the Government, *see* H. Rept. 1283, Pt. 1, 95th Cong., 2d sess. 15 (1978), and a person using radio could thus not rely on § 605 as guaranteeing privacy against mere interception.[4]

III. Conclusion

We conclude that no constitutionally protected privacy interest exists with respect to ordinary radio transmissions and, consequently, that no warrant is required for the interception of most radio communications for law enforcement purposes. Because there is thus, with respect to such communications, neither a "reasonable expectation of privacy" nor a warrant requirement for law enforcement purposes, the interception of radio communications does not constitute "electronic surveillance" within the definitional provisions of FISA.

KENNETH C. BASS, III
Counsel for Intelligence Policy
Office of Legal Counsel

[4] Our interpretation is consistent with *United States* v. *Hall,* 488 F. (2d) 193 (9th Cir. 1973), in which the court held that no constitutional right of privacy attaches to radio communications in a case in which the speaker recognizes the possibility of interception. The court regarded the 1968 revision of § 605 as exempting law enforcement officers from its coverage, and thus found § 605's ban on divulgence irrelevant to the introduction into evidence at trial of the contents of intercepted radio communications. Judge Ferguson dissented on the ground that § 605 did apply to law enforcement officers, and did proscribe the use of intercepted conversations at trial. He took no exception, however, to the majority's assumption that § 605 was irrelevant to the question whether a constitutional right of privacy attaches to radio-to-radio communications.

May 30, 1979

79-40 MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL, DEPARTMENT OF COMMERCE

Loans—Department of Commerce—Guarantee of Payment of Interest—42 U.S.C. § 3142

This is in response to your request of May 3, for our opinion on an aspect of the authority granted to the Secretary of Commerce by § 202 of the Public Works and Economic Development Act of 1965 (PWEDA), as amended, 42 U.S.C. § 3142, to issue 90 percent guarantees of payment of fixed asset and working capital loans made to private borrowers by private lending institutions. In particular, you asked whether the respective authorizing provisions of the statute, 42 U.S.C. § 3142(a)(1)(C) and § 3142(a)(3)(B), which speak only of the guarantees of "loans," permit the Secretary to include payment of interest on the loans within his assurances.

As you noted in the opinion that accompanied your letter, the Attorney General in 1971 concluded that the Export-Import Bank, which is explicitly given the power by § 2(a) of its enabling indebtedness, but not interest thereon, has the power to guarantee such interest despite the omission. 42 Op. A.G. 429, at 430–431 (1971). In reaching that result the Attorney General relied on *New Orleans* v. *Clark*, 95 U.S. 644, 651–652 (1877), where it was held that a contractual guarantee of certain bonds which did not by its terms extend to the interest on the bonds embraced both the principal and interest nonetheless. The Court was categorical in its explanation:

> The payment of bonds, without other designation, always implies a payment of the principal sum and its incident; and a guaranty in similar terms covers both. [*Id.*, at 651.]

In the absence of anything in PWEDA to the contrary, we view this statement as dispositive of the question you have posed.

It might be added that an earlier Attorney General's opinion, 42 Op. A.G. 417, at 418–419 (1969), dealt with two statutory provisions, 7 U.S.C.

§ 1928 and 42 U.S.C. § 1487(d), which give the Farmers Home Administration (FHA) the authority to ensure certain loans. Although 7 U.S.C. § 1928 simply authorizes the insurance of "loans," the other statute authorizes insurance of "the payment of principal and interest on loans." No doubt because the point was not in issue, the Attorney General assumed without discussion that FHA could properly ensure the payment of interest on the loans under the former law as well as the latter, with the result that its commitments to pay interest under both, like those to pay principal, are backed by the full faith and credit of the United States. This correct assumption, it seems fair to say, simply reflected the well understood, indeed almost axiomatic, principle expressed in the quotation from *New Orleans* v. *Clark*.

In short, we share your view that the Secretary of Commerce has the power to guarantee not only 90 percent of the principal of fixed asset and working capital loans made by private lending institutions under the provisions of PWEDA but also 90 percent of the interest payable on such loans.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

June 14, 1979

79-41 MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

Chairman of the Federal Home Loan Bank Board—Reorganization Plan No. 3 of 1977 (5 U.S.C. App.)—Resignations—The President's Authority to Redesignate a Member as Chairman

This responds to the oral request of your Office for our views on the President's power to redesignate a member of the Federal Home Loan Bank Board. The Board, established by Reorganization Plan No. 3 of 1947 (5 U.S.C. App.; *see also* 12 U.S.C. § 1437), consists of three members appointed by the President by and with the advice and consent of the Senate.

On April 20, 1979, the Chairman tendered his resignation effective June 1, 1979. On May 1, 1979, the President accepted the resignation as Chairman and as a member of the Board. In a letter dated June 1, 1979, he notified the President that he had submitted his resignation only as Chairman, but not as a member. However, he expressed his willingness to continue to serve as Chairman until June 29, 1979, or until such earlier date as his resignation as a member and Chairman would be tendered. By letter dated June 6, 1979, the President noted that the letter of resignation of April 20 had applied only to the position of Chairman and not to membership on the Board. The President thereupon redesignated the member as Chairman of the Board until such time as his resignation as a member and Chairman was tendered.

It is our opinion that the President was authorized to redesignate the member as Chairman because he still was a member of the Board at that time.

It is true that the President's letter of May 1, 1979 stated that he accepted the resignation as Chairman and member. But the resignation was only as Chairman and not as a member. The President, of course, has the power to remove a purely executive officer in the absence of a resignation. *Myers* v. *United States,* 272 U.S. 52 (1926). However, in view of the bipartisan nature and the regulatory functions of the Board, it is questionable

whether the President has the same unrestricted power with respect to the members of the Board. *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935); *Wiener* v. *United States,* 357 U.S. 349 (1958). In any event, an intent to remove the Chairman as a member of the Board would be inconsistent with the highly complimentary and appreciative nature of the President's letter of May 1, 1979. The "acceptance" of the resignation as a member, therefore, was at most in the nature of a misunderstanding without any legal effect and did not terminate membership on the Board. Accordingly, the member was eligible to be redesignated as Chairman.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

June 14, 1979

79-42 MEMORANDUM OPINION FOR THE ASSOCIATE DEPUTY ATTORNEY GENERAL

District of Columbia—Applicability of the Double Jeopardy Clause of the Fifth Amendment to the Constitution

You have asked whether, were Congress to establish within the government of the District of Columbia an office equivalent to that of a city or State prosecutor, the Double Jeopardy Clause of the Fifth Amendment would bar successive prosecutions by the United States and the District (under the United States and District Codes) of a single person for the same acts. It is our conclusion that, because there is an identity of sovereignty between the United States and the District of Columbia for Double Jeopardy Clause purposes, the bar of the Fifth Amendment would prevent such successive prosecutions.[1]

The Supreme Court has recently stated:

> [It is a] well established principle that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one. The basis for this doctrine is that prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment," subject [the defendant] for the same offence to be twice put in jeopardy." [*United States* v. *Wheeler*, 435 U.S. 313, 316–317 (1978) (footnote omitted).]

It is equally well established that "[t]he 'dual Sovereignty' concept does not apply, however, in every instance where successive cases are brought by nominally different prosecuting entities." *Id.* at 318. Thus, in cases of successive prosecution in which the Supreme Court has found an identity of sovereignty, as between a Federal territory and the United States,

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[1] We take it as given that, if applicable, the bar of the Double Jeopardy Clause prevents such dual prosecutions. The nature and scope of the bar, when applicable, is not the subject of this memorandum.

Puerto Rico v. *Shell Co.*, 302 U.S. 253 (1937); *Grafton* v. *United States*, 206 U.S. 333 (1907), or a city and a State, *Waller* v. *Florida*, 397 U.S. 387 (1970),[2] it has applied the bar of the Double Jeopardy Clause.

The Court has spoken unequivocally in identifying the single factor, which, for Fifth Amendment Double Jeopardy Clause purposes, determines whether there is unity or duality of sovereignty between nominally distinct prosecuting governments. It is neither the degree of control which the one has over the other, *United States* v. *Wheeler*, *supra*, at 319–320, 327–328, nor is it the authority of the one to legislate and to enforce its legislation independently of the other. *Waller* v. *Florida*, *supra*. Rather, the question to be asked is whether the ultimate source of the power of each to prescribe laws and punish infractions of those laws is the same or different. *Id.*; *United States* v. *Wheeler*; *Grafton* v. *United States*. If it is the same, there is identity of sovereignty for Double Jeopardy Clause purposes.

When the question is whether there is identity of sovereignty between the United States and another prosecuting government, the answer is, ultimately, constitutionally based. If the government in question is not nominally the United States but derives its power to legislate and to prosecute from a delegation by the United States of a constitutional power, there is unity of sovereignty between the two. *Cf.*, *United States* v. *Wheeler*, at 322 ("[T]he controlling question * * * is the source of this power * * * [i]s it a part of inherent * * * sovereignty, or an aspect of the sovereignty of the Federal Government which has been delegated * * * by Congress?"). Such is clearly the case with respect to a territory of the United States. *Grafton* v. *United States*. This is also the case as between the District of Columbia and the United States.

Article I, Section 8, Clause 17, of the Constitution vests in Congress the power "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * *." This power of Congress may permissibly be delegated, *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100 (1953), and much of it has been. *See* District of Columbia Self-Government and Governmental Reorganization Act, Public Law No. 93–198, 87 Stat. 774.[3] However, its source, whatever governmental entity

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[2] The Double Jeopardy Clause of the Fifth Amendment has been held applicable to the States. *Benton* v. *Maryland*, 395 U.S. 784 (1969).

[3] Although Congress has provided for home rule for the District of Columbia, it delegated the power of government "[s]ubject to the retention by Congress of the ultimate legislative authority over the Nation's Capital granted by article I, section 8, of the Constitution." District of Columbia Self-Government and Governmental Reorganization Act § 102(a). Moreover, it reserved, the Act notwithstanding, "the right, at any time, to exercise its constitutional authority as legislature for the District * * *." *Id.*, § 601. Thus, it is clear that, even if it could, without a constitutional amendment or a grant of statehood or independence, the United States has not chosen to divest itself of its sovereignty over the District of Columbia. It has only delegated power which is its own, to be exercised by the District government that it created.

exercises it, remains the same—the Constitution of the United States. With respect to identity of the ultimate source of the power to proscribe conduct and to prosecute violations, the relationship between the District of Columbia and the United States cannot be distinguished, for double jeopardy purposes, from either the relationship between a Federal territory and the United States or a city and a State. In each case the Double Jeopardy Clause is applicable because the nominally distinct governmental entities have as their source of power the same organic law. As between the United States and the District of Columbia that source is Article I, section 8, clause 17 of the Constitution.

The Supreme Court has not had occasion to rule on a double jeopardy question arising out of a dual prosecution under United States and District law. The District of Columbia Circuit Court of Appeals, however, has considered the relationship for double jeopardy purposes between the District and the United States and has opined that "[s]ince successive prosecutions on identical or lesser included D.C. and federal offenses emanate from the same sovereignty, they are precluded by double jeopardy considerations." *United States* v. *Jones,* 527 F. (2d) 817, 821 (D.C. Cir. 1975). *See also, United States* v. *Knight,* 509 U.S. F. (2d) 354, 360 (D.C. Cir. 1974). We believe that this statement of the law was correct when issued, still applies, and will continue to apply when the District adopts a criminal code without congressional enactment, and would apply were Congress to establish a prosecutor's office within the District government.

MARY C. LAWTON
Deputy Assistant Attorney General
Office of Legal Counsel

June 15, 1979

79-43 MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

Settlement of Litigation—Authority of the Postal Service (39 U.S.C. §§ 409, 2008)—Authority of the Attorney General (28 U.S.C. §§ 516, 519)

This responds to your memorandum of March 14, 1979, requesting our opinion concerning the settlement of litigation in which the U.S. Postal Service (Postal Service) is represented by the Department of Justice pursuant to 39 U.S.C. § 409(d).[1] You ask in particular whether this Office still adheres to the position taken in its memorandum of February 13, 1973. That memorandum concluded that although the matter was not free from doubt the better interpretation of the pertinent legislation is that the authority to settle is implicit in the power of the Attorney General to conduct litigation affecting the Postal Service; hence, that such litigation cannot be settled without the concurrence of the Attorney General.

For the reasons set forth below in detail, we are modifying the position taken in our earlier memorandum to the extent that where litigation involves a matter within the sole prerogative of the Postal Service, the Attorney General cannot settle the litigation over the objection of the Postal Service, nor can he block a settlement advocated by the Postal Service. Otherwise we adhere to our memorandum of February 13, 1973.

The issues underlying your inquiry and our 1973 memorandum are, first, whether 39 U.S.C. § 2008(c) gives the Postal Service final settlement

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[1] 39 U.S.C. § 409(d) provides:

(d) The Department of Justice shall furnish, under section 411 of this title, the Postal Service such legal representation as it may require, but with the prior consent of the Attorney General the Postal Service may employ attorneys by contract or otherwise to conduct litigation brought by or against the Postal Service or its officers or employees in matters affecting the Postal Service.

authority over its litigation,[2] and, second, whether the independent status of the Postal Service under the Postal Reorganization Act limits the controls normally exercised by the Attorney General over agency litigation pursuant to 28 U.S.C. §§ 516, 519.[3]

Our subsequent memorandum to the Special Assistant to the Solicitor General, dated September 28, 1973, took a more cautious position than the earlier memorandum and concluded that "given the language of 39 U.S.C. § 2008(c), it is far from clear that this Department could successfully maintain that in no instance may the Postal Service settle a case without the concurrence of this Department." The memorandum suggested that this problem might better be resolved on the basis of an agreement between the Department of Justice and the Postal Service.

Since then the Court of Appeals for the First Circuit handed down its decision in *Leonard* v. *United States Postal Service,* 489 F. (2d) 814 (1st Cir., 1974), holding that in the specific litigation before it the Postal Service had the authority to settle a law suit over the objection of the Department of Justice. The court stated that "the legislative history [of 39 U.S.C. § 2008(c)] pointed out to us does not indicate that the section was meant to have a reading not in accord with its literal language." At 817. The court, however, did not deem it necessary to provide a definitive delineation of the respective litigating powers of the Postal Service and the Department of Justice. It felt it sufficient to rule that in the case at bar the Department of Justice could not block a settlement concluded by the Postal Service affecting matters which, under the Postal Reorganization Act, were committed to the control of the Postal Service. The opinion also suggested that while the authority of the Department of Justice over litigation might empower it to refuse to entertain and possibly to settle litigation even over the objection of the Postal Service, the Department lacked the authority to block a settlement to which it agreed. Fn. 7, p. 817.

Although we do not agree with all the reasoning of the Court of Appeals, it may have reached the correct result in the case before it, assuming that the subject matter of the litigation truly was peculiarly within the

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[2] 39 U.S.C. § 2008(c) provides:

(c) Subject only to the provisions of this chapter, the Postal Service is authorized to make such expenditures and to enter into such contracts, agreements, and arrangements, upon such terms and conditions and in such manner as it deems necessary, *including the final settlement* of all claims and litigation by or against the Postal Service. [Emphasis added.]

[3] 28 U.S.C. §§ 516 and 519 provide:

Section 516. *Conduct of litigation reserved to Department of Justice.* Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

Section 519. *Supervision of litigation.* Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

autonomous sphere of the Postal Service.[4] In connection with its interpretation of 39 U.S.C. § 2008(c), we believe that it would have been possible for the Department to make a stronger case based on the legislative history of the subsection by showing that it was intended to cover only the relationship between the Postal Service and the Comptroller General.[5] Nevertheless, we would recommend relitigation of that issue if at all, only in an exceptionally strong case, for example, where the Postal Service position is clearly erroneous.

The second branch of the Court of Appeals opinion deals with the extent to which the control of the Attorney General over Government litigation conducted by the Department of Justice is modified by the "somewhat uneasy and unresolved tension between the dependent and independent aspects of the new [Postal] Service."[6] *Leonard,* at p. 815. While 39 U.S.C. § 201 establishes the Postal Service as an independent establishment in the "executive branch," § 202(a) provides for a bipartisan Board of Governors with fixed terms who can be removed by the President only for cause. In addition, the Postmaster General and the Deputy Postmaster General are appointed and removable not by the President but by the Board of Governors. § 202(c), (d).

An agency headed by a Board of Governors and by executive officers who are not freely removable by the President is not substantively within the executive branch of the Government as that term is commonly understood. Purely executive officers must be freely removable by the President, *Myers* v. *United States,* 272 U.S. 52 (1926), and their discretionary acts are subject to Presidential control. *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 166 (1803); *Congress Construction Co.* v. *United States,* 161

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[4] *See* fn. 11, *infra.*

[5] Section 2008(c) is located in a chapter entitled "Finance." Section 2008 itself is entitled "Audit and expenditures" and deals exclusively with the relationship between the Comptroller General and the Postal Service. The pertinent Committee report explains § 2008(c) as follows:

> Subsection (c);—Authorizes the Postal Service to make all expenditures and enter into all contracts and agreements it deems necessary, including final settlement of all claims against the Postal Service, expenditures cannot be disallowed by the *Comptroller General.* [(Emphasis added.) H. Rept. 1104, 91st Cong., 2d sess. 40 (1970).]

Moreover, § 2008(c) is virtually identical with § 9(c) of the Tennessee Valley Authority Act, 16 U.S.C. § 831h (b). H.R. 4, 91st Cong., 1st sess., a predecessor to the bill that ultimately became the Postal Reorganization Act, used the TVA as a model for the Postal Service. H. Rept. 988, 91st Cong., 2d sess. 19 (1970). The legislative history of a 1941 amendment to the TVA legislation from which the pertinent parts here of 16 U.S.C. § 831h(b) are derived shows that they were inserted in the legislation in response to complaints by the TVA that interference by the Comptroller General had prevented the TVA from entering into compromises that could have avoided litigation and from settling law suits on favorable terms. *See, Amending the Tennessee Valley Authority Act,* Hearing before the Committee on Military Affairs, House of Representatives, 77th Cong., 1st sess., on H.R. 4961, pp. 52–64, 115–116, 121–122, 132, and 87 CONGRESSIONAL RECORD 6199 (1941) (Representative May).

[6] This uneasy and unresolved tension is illustrated by the difference of approach taken by *Leonard* and *Butz Engineering Corp.* v. *United States,* 204 Ct. Cl. 561 (1974). The former case stressed the independence of the Postal Service, while the latter emphasized its dependence.

Ct. Cl. 50, 55–56 (1963), cert. denied, 375 U.S. 817 (1963); 7 Op. Att'y. Gen. 453, 469–470 (1855). Congress clearly did not intend Postal Service officials to have that status. The pertinent committee report (H. Rept. 91–1104) states that the Postal Service was taken completely out of the President's Cabinet and out of politics (at pp. 6, 12–13) and that the Board was to constitute a buffer between the management of the Postal Service and the possible influence of partisan politics. *Ibid.* In sum, the legislation was designed to remove "the day-to-day management of the Postal Service from both Presidential and Congressional areas of concern while still leaving the Postal Service subject to [their] broad policy guidance." At p. 13. Another important legislative consideration was the desire that the Postal Service function in a business-like manner, rather than as a government organization not subject in all respects to that standard. At pp. 11–12.

Section 410(a) of title 39 accordingly exempts the Postal Service from many of the laws dealing with Federal contracts, property, works, officers, employees, budgets, or funds, leaving, however, many important laws in those fields applicable to the Postal Service. 39 U.S.C. § 410(b).[7]

The peculiar status of the Postal Service exempting it to a large extent from Presidential control and from a substantial range of laws normally applicable to executive establishments necessarily has an impact on the control exercised by the Attorney General over postal litigation conducted by the Department of Justice. The Attorney General's power to control litigation under 28 U.S.C. §§ 516, 519 flows from several sources. Some result from his status as an officer of the court. Hence, it is his responsibility not to litigate cases that would unnecessarily burden the Federal courts,[8] and that responsibility applies to litigation by the Department conducted on behalf of independent regulatory agencies. *See, Federal Trade Commission* v. *Claire Furnace Co.,* 274 U.S. 160, 174 (1927); *Federal Trade Commission* v. *Guignon,* 390 F. (2d) 323, 330 (8th Cir. 1968).[9] It is also within his power to refuse to institute litigation and to terminate law suits, once he determines that to bring or to continue them would constitute unjust harassment against private parties. 2 Op. Atty. Gen. 482, 486 (1831). Finally, the Attorney General must be able to prevent action by an executive agency that would be illegal, such as a settlement prohibited by law. 22 Op. Att'y. Gen. 491 (1899).

Another source of the Attorney General's authority and responsibility to control litigation is a derivative of the President's power to control the discretion of the agencies referred to above. That power is vested in the Attorney General as the President's *alter ego*, so that uniform policies

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[7] For the laws of a governmental nature applicable to the Postal Service, *see, Butz Engineering Corp.* v. *United States,* 204 Ct. Cl. 561, 573–574, *supra.*

[8] *See, Leonard,* fn. 7, p. 817.

[9] In this context *see,* however, the amendment to § 16 of the Federal Trade Commission Act, 15 U.S.C. § 56, by § 204(a) of the Act of January 4, 1975, 88 Stat. 2199.

in the execution of the laws and the conduct of litigation will prevail. This source of the Attorney General's power is necessarily weakened with respect to an entity, such as the Postal Service.

In our view, the answer to the questions posed depends on the basis on which the Attorney General seeks to settle a case, and on the subject matter of the litigation. If the Attorney General acts in his capacity as an officer of the court, or for Government-wide policy reasons based on laws and regulations that cover the Postal Service, we do not believe that consent of the Postal Service is required. Moreover, since the power to dismiss includes the power to prescribe the terms on which the suit is to be dismissed, settlement negotiations are within his jurisdiction, 39 U.S.C. § 2008(c) notwithstanding. *See, Castell* v. *United States,* 98 F. (2d) 88, 91 (2d Cir., 1938), cert. denied, 305 U.S. 652 (1938); *Leonard, supra,* fn. 7, at 817–818; 22 Op. Att'y. Gen. 491, 494 (1899).[10]

On the other hand, where the subject matter of the litigation is of "parochial" interest to the Postal Service and involves its day-to-day management (H. Rept. 91–1004, p. 13, *supra*) without any impact on the general Federal law, or "policy decisions within the sole prerogative of the Postal Service" (*Leonard*, at 817), the spirit and purpose of the Postal Reorganization Act of 1970 indicate that a decision to settle and the conduct of settlement negotiations are both within the jurisdiction of the Postal Service.

Conversely, we do not believe that *Leonard* stands for the proposition that the Attorney General can never block a settlement the Postal Service seeks to conclude. As indicated, above, if the settlement is illegal or if it would create a precedent adversely affecting the Federal establishment as a whole, the Attorney General must be able to prevent it. *Leonard* does not hold to the contrary. That case was based rightly or wrongly[11] on the premise that the litigation involved only matters that were of concern to the Postal Service, and the court deliberately refrained from passing on problems relating to settlements not within those narrow confines.

In our view, our analysis applies equally to the question you pose as to cases pending in the Court of Claims.

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[10] As we read *Leonard,* § 2008(c) supersedes the statutory settlement authority of the Attorney General only in areas within the sole prerogative of the Postal Service.

[11] The issue in *Leonard* was the policy of hiring employees with arrest records not leading to conviction unless the position was designated as sensitive or the charges were currently pending. A strong argument could be made that this issue was not of a nature peculiar to the Postal Service but that it involved Government-wide employment policies closely related to provisions of title 5, United States Code, which are applicable to the Postal Service pursuant to 39 U.S.C. § 410(b)(1).

We realize that the practical application of our reasoning may be difficult. That, however, is the inescapable consequence of the hybrid status of the Postal Service under the Postal Reorganization Act, *i.e.*, the "uneasy and unresolved tensions between the dependent and independent aspects of the new [Postal] Service." *Leonard,* at 815.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

June 18, 1979

79-44 MEMORANDUM OPINION FOR THE GENERAL COUNSEL, ACTION

Budget Authority—Statutory Construction—Antideficiency Act (31 U.S.C. § 665)—Applicability to the Directors of the Peace Corps and ACTION

This memorandum responds to your inquiry of June 1 1979, whether the Peace Corps is an "agency," and the Director of the Peace Corps the "head of an agency," within the meaning of the Antideficiency Act (Act), 31 U.S.C. § 665. We understand you are concerned that the term "agency" in the Act may refer only to agencies that are independent establishments as defined by 5 U.S.C. § 104. If that were so, the Director of ACTION, which is an independent establishment as so defined, 42 U.S.C. § 5041, might arguably retain responsibilities under the Act even though budgetary authority over the Peace Corps, which is not such an independent establishment, (Executive Order No. 12137, § 1-101, 44 F.R. 29, 023 (1979)), has been transferred to the Director of the Peace Corps.

ACTION was created by Congress as an independent establishment within the meaning of 5 U.S.C. § 104, namely:

> * * * an establishment in the Executive branch * * * which is not an Executive department, military department, Government, corporation, or part thereof, or part of an independent establishment.

The Peace Corps, however, is not a legislatively structured unit. In the Peace Corps Act of 1961, 22 U.S.C. § 2501 *et seq.*, Congress vested administrative authority over Peace Corps functions in the President. The Peace Corps Act authorizes him to carry out programs in furtherance of that Act "on such terms and conditions as [the President] may determine," 22 U.S.C. § 2502(a), and to exercise any functions vested in him by that Act "through such agency or officer of the United States Government as he shall direct." 22 U.S.C. § 2503(b). In § 1-101 of Executive Order No. 12137, the President provided that the Peace Corps

"shall be an agency within ACTION * * *," thus making it a party of an "independent establishment," as that term is defined by 5 U.S.C. § 104. It follows that the Peace Corps is, within the meaning of 5 U.S.C. § 104 itself not an independent establishment.

The uncertainty whether the Peace Corps can be deemed an agency under the Antideficiency Act stems from a reference to the term "independent establishment" in the Act's definition of agency. Under that Act:

> * * * the term "agency" means any executive department, agency, commission, authority, administration, board, or *other independent establishment* in the executive branch of the Government, including any corporation wholly or partly owned by the United States which is an instrumentality of the United States. [31 U.S.C. § 665(d)(2) (emphasis added).]

The reference to "any * * * other independent establishment" logically implies, as the definition is written, that the preceding terms that are not necessarily excluded from the general class of independent establishments, refer to specific categories of the general class of "independent establishments."[1] "Independent establishment" is itself nowhere defined in the Antideficiency Act. However, if its definition is coextensive with the definition in 5 U.S.C. § 104, then the Peace Corps, although an agency, cannot be an "agency" within the meaning of the Antideficiency Act, because it is not an "agency" that is an "independent establishment" within the meaning of 5 U.S.C. § 104.

We conclude, however, based on the clear intent of the Antideficiency Act, that the term "independent establishment" is not intended to be coextensive with the term as defined in title 5. The intent of the Act is to vest certain budgetary responsibilities in the heads of all units of the executive branch to which appropriations are made available for definite periods of time, and which have responsibility for presenting to the Office of Management and Budget their own recommended budgets and administering the relevant appropriations independently. The House report on the bill that added the definition of "agency" to the Act, General Appropriations Act for 1951, Title XII, § 1211, 64 Stat. 765 (1950), strongly indicates that the amendments to the Act were intended to diffuse responsibility for governmental economy as broadly as possible through the executive branch. The report states:

> The administrative officials responsible for administration of an activity for which appropriation is made bear the final burden for rendering all necessary service with the smallest amount possible within the ceiling figure fixed by Congress. Every official

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[1] The only term preceding "any * * * other independent establishment" which cannot be a category of "independent establishment," as defined by 5 U.S.C. § 104, as "any executive department," 5 U.S.C. § 101.

> of the Government who has responsibility for the administration of a program must assume a portion of the burden for the deficit in the Federal Treasury * * *. [I]t is his responsibility to so control and administer the activities under his jurisdiction as to expend as little as possible out of the funds appropriated. [H. Rept. 1797, 81st Cong., 2d sess. 9 (1950).]

The breadth of the legislative purpose underlying the Antideficiency Act is inconsistent with a definition of agency that excludes from the operation of the Act any unit of the executive branch that has independent budgetary powers.

We therefore conclude that "independent establishment," as that term is used in the Antideficiency Act, refers to any integral unit of the executive branch to which appropriations are made available and which has independent budgetary authority. No elaboration of the definition of "agency" or of "independent establishment" appears in either the House, Senate, or Conference reports on the General Appropriations Act for 1951, cited above, which added the definition of "agency" to the Act, or in a section-by-section analysis of the amendment introduced into the CONGRESSIONAL RECORD by one of its sponsors. 96 CONGRESSIONAL RECORD 6835 (1950) (remarks of Representative Norell). However, any definition of "agency" narrower than the class of executive branch units that have independent budgetary authority would, for no obvious purpose, contradict the statute's plain intent.[2]

Under our analysis, it is plain that the Peace Corps is an agency that is an "independent establishment," and therefore an "agency" within the meaning of the Antideficiency Act. Executive Order No. 12137 delegates all but a limited number of functions reserved to the President concerning Peace Corps administration to the Director of the Peace Corps, § 1-102, and provides that all funds appropriated or otherwise made available to the President for carrying out the provisions of the Peace Corps Act shall be "deemed to be allocated without any further action of the President" to the Director of the Peace Corps or his delegate, § 1-106. As explained in the White House memorandum accompanying Executive Order No. 12137, it is intended that:

> [T]he Director of the Peace Corps shall have budgetary authority for the Peace Corps, to include responsibility for establishing and controlling a separate Peace Corps budget, subject only to ACTION policy guidance regarding coordination with domestic programs.

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[2] That Congress, in adding the definition of "agency" to the Antideficiency Act, contemplated the same meaning of "independent establishment" as was incorporated into title 5, also appears unlikely because of the timing of the two enactments. The amendment to the Antideficiency Act that added the definition of "agency" was enacted in 1950. A definition of "independent establishment" was added to title 5 in 1966, and applies expressly only to title 5. 5 U.S.C. § 104.

As explained by your Office, it is envisioned that the implementation of the Executive order will leave the Director of ACTION with no authority over the Peace Corps budget, which is to be prepared and controlled under the authority of the Director of the Peace Corps. Under this scheme, the agency to which the Peace Corps appropriation is to be made available would clearly appear to be the Peace Corps, under the authority of the Director of the Peace Corps, who is to control the budget.[3]

Finally, we note that, if the Director of the Peace Corps is not to be deemed the head of an agency within the meaning of the Antideficiency Act, it must follow that the budgetary responsibilities conferred by that Act must fall to a person with no control over the Peace Corps budget, *i.e.*, the Director of ACTION, or to no one. Either result would be absurd in view of the purpose of the Antideficiency Act.

In sum, we conclude that "any * * * agency" within the meaning of 31 U.S.C. § 665 refers only to agencies that are "independent establishments" within the meaning of that section. However, "independent establishment," under this Act, refers to any agency that has independent control over the establishment and administration of its budget. As described above, the Peace Corps is an agency that is such an independent establishment, and, for purposes of the Antideficiency Act, the Director of the Peace Corps is the head of an agency.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

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[3] Under Exec. Order No. 11603, 22 U.S.C. note following § 2501 (1976), superseded by Exec. Order No. 12137, the Peace Corps was designated a "component" of ACTION, and it was provided that all funds appropriated to the President to carry out the Peace Corps Act were to be deemed allocated without further Presidential action to the Director of ACTION. Congress recognized the President's delegation by subsequently appropriating funds for the Peace Corps to ACTION directly. *See, e.g.*, Foreign Assistance Appropriations Act of 1978, Title III, 92 Stat. 1597. Presumably, Congress will similarly recognize the President's redelegation of his Peace Corps authority and appropriate funds for the Peace Corps to the Director of the Peace Corps.

June 27, 1979

79-45 MEMORANDUM OPINION FOR COUNSEL TO THE PRESIDENT

Advisory Committees—Application of the Russell Amendment (31 U.S.C. § 696)

This responds to your request for an informal opinion on a legal question that had arisen in connection with a proposed Executive order reconstituting the National Advisory Committee for Women. That order redesignated the committee and removed its nonadvisory functions. Your question is whether this Office concurred in the general view taken by the Office of Management and Budget (OMB) that the so-called "Russell amendment" (31 U.S.C. § 696) does not limit the use of Government funds to pay the expenses of an advisory committee if (1) the funds are otherwise available for use in the procurement of advice of the kind that the committee provides and (2) the committee has no nonadvisory functions. We advised you informally that we concurred in OMB's view. This memorandum is a brief statement of the reasons for our opinion.

The Russell amendment provides that no funds may be used to pay the expenses of any "agency or instrumentality" if (1) the agency or instrumentality has been in existence for more than 1 year and (2) Congress has not appropriated "any money specifically for such agency or instrumentality or specifically authorized the expenditure of funds by it." 31 U.S.C. § 696.

Enacted in 1944 as a rider to an appropriation bill, the Russell amendment had an interesting preenactment history. It represented an attempt to use the power of the purse to curtail the activities of certain nonstatutory executive "agencies" that had been created by Executive order. In point of fact, it was directed at a particular agency—the Committee on Fair Employment Practices. That committee had no clear statutory basis; but it exercised a number of substantive powers, and it had taken vigorous action to diminish racially discriminatory practices in employment. These actions were obnoxious to Senator Russell and others who opposed the early civil rights movement. Moreover, with regard to that committee and others, there was doubt in some quarters that substantive actions taken

by nonstatutory agencies were lawful in the absence of actual statutory authority.

As to the present question, there is no clear indication either in the language of the statute or in its legislative history that the Congress intended to do anything other than prevent the expenditure of funds for agencies such as the Committee on Fair Employment Practices—agencies that Senator Russell would later call "action agencies."[1] In particular, there is no clear indication that the Russell amendment was intended to prevent constitutional or statutory officers from using funds to procure advice on matters within their jurisdictions, if the funds were otherwise available for that purpose. Prior to enactment of the Federal Advisory Committee Act, 5 U.S.C. App. § 1 *et seq.*, the Comptroller General and representatives of the Bureau of the Budget suggested that the statute could be interpreted broadly in this context, but we know of no judicial decision that settles the point.

In 1972 Congress enacted comprehensive legislation that addressed many of the administrative and legal questions that arise in connection with the longstanding practice of procuring advice from *ad hoc* "advisory committees." The Federal Advisory Committee Act did a number of important things. First, it expressly sanctioned the creation of advisory committees by Executive order. 5 U.S.C. App. § 2 *et seq.* Second, in contemplation that advisory committees would indeed expend agency funds from time to time, it created a system of agency reporting and recordkeeping that was designed to subject advisory committees to tighter administrative and legislative control in fiscal matters, 5 U.S.C. App. § 12(a); and it affirmatively required agencies to provide support services for advisory committees in certain circumstances. 5 U.S.C. App. § 12(b). Third, it provided generally that in the absence of some specific authorization, advisory committees should be purely advisory in nature. 5 U.S.C. App. §§ 2(b)(6), 9(b). Fourth, it provided that advisory committees should generally have a life of 2 years. 5 U.SC. App. § 14(a). Finally, it gave the Office of Management and Budget general responsibility for "all matters relating to advisory committees." 5 U.S.C. App. § 7. In that connection, it required the Director of OMB to review advisory committees annually, to make appropriate administrative and legislative recommendations concerning them, and to include in his annual budget recommendations a summary of the amounts he "deems necessary" for the expenses of advisory committees. 5 U.S.C. App. § 7(e).

Because of OMB's unique statutory responsibilities for "all matters relating to advisory committees," OMB's opinion on questions arising in the administration of the relevant statutes is entitled to substantial weight. We should defer to it unless there are compelling indications that it is wrong. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *see,*

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[1] *See* 90 CONGRESSIONAL RECORD 6022-21 (1944).

Zemel v. *Rusk,* 381 U.S. 1, 11–12 (1965); *Udall* v. *Tallman,* 380 U.S. 1, 16–18 (1965). We have reviewed all of the relevant materials and find no compelling reason to question OMB's conclusion that the Russell amendment does not limit the availability of Government funds for payment of the expenses of purely advisory committees.

There are two views of this question that are consistent with the view taken by OMB. The first gives controlling weight to the original legislative intention. The Russell amendment was intended to prevent nonstatutory agencies or instrumentalities from exercising actual governmental power without statutory authority. It was never intended to prevent statutory or constitutional officers from using Government money to obtain advice concerning their own duties, provided they are otherwise authorized to do so. Mere advisers are not "agencies" or "instrumentalities" of Government for purposes of the Russell amendment. They do not become "agencies" or "instrumentalities" merely because they meet and advise collectively. They become "agencies" or "instrumentalities" for Russell amendment purposes only if the officer to whom they report seeks to invest them with actual authority to take substantive action on his or the Government's behalf.

This interpretation of the Russell amendment is entirely consistent with the views that Senator Russell expressed when he first proposed the measure. We take the liberty of quoting his remarks at length:

> Mr. President, the purpose of the committee amendment, which is apparent from a reading thereof, is to retain in the Congress the power of legislating and creating bureaus and departments of the Government, and of giving to Congress the right to know what the bureaus and departments of the Government which have been created by Executive order are doing.
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> * * * I realize, Mr. President, that in time of war, emergencies may arise which might dictate that the executive branch of the Government should immediately create some agency to deal with an immediate difficulty, but certainly there is no excuse for the continuance of an agency which has been in existence for longer than 12 months for which the Congress has not appropriated, or for which the Congress has not had any opportunity to appropriate.
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> Secondly, Mr. President, *no agency which has power to issue orders affecting the lives and business of the American people should stay in existence for more than 12 months unless the Congress has passed upon an appropriation for such agency.* I have made an effort to ascertain the number of agencies which would be affected by this provision. According to a report which was filed by the Bureau of the Budget in response to a request which I made of the director of that agency, about 13 agencies would be affected.
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> I do not believe, Mr. President, that any lengthy discussion of this amendment is necessary. Its purpose is clear. Certainly those who have been complaining about bureaucrats and bureaucracy in this country, and who have heretofore complained because the Congress had not created or passed upon such agencies, should support this amendment and thereby give Congress the right at least to keep advised as to what all the different agencies of the Government are doing.
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> Of course, everyone has his pet agencies, everyone has departments which he wants preserved, and if we start action like that proposed, if we are to say that the President of the United States can legislate by Executive order when we favor the objective which he is seeking, we should say that we favor the President of the United States taking to himself the power that is vested by the Constitution in the Congress of the United States, and legislating and creating departments of government which issue orders that bring the people of the United States before them, and pass orders which direct people how they shall proceed in their daily business. [90 CONGRESSIONAL RECORD 3059–3061 (1944) (emphasis added.)]

Turning from the legislative history to the statutory text itself, we note that the language Senator Russell chose to adopt in framing his proposal is peculiarly apt if we accept the view that he had "action agencies" in mind. The language is less appropriate if we assume that there was a larger purpose behind it. In common legal parlance an "agency" or "instrumentality" is an entity or means through which a principal acts or exerts power. An individual or group that advises the Government but does not act on the Government's behalf or exert governmental power is not an "agency" or "instrumentality" of Government in that limited sense. To be sure, these words can be read more expansively. The text could be construed to refer to any entity established by the Government for a governmental purpose—any "establishment" or division within the Government, whether or not it acts on behalf of the Government or exerts any governmental power. But when a statutory text is open to more than one construction, we should consult other materials to determine what was intended; and, as we have said, when one consults the legislative history of the Russell amendment, one finds a very substantial basis for the conclusion that Senator Russell was concerned, not with advisory or other ancillary processes, but with the unauthorized exercise of actual governmental power by agencies not created or authorized by Congress. That history supports a technical and limited construction of the critical language.

This brings us to the second argument that supports the position taken by OMB. Whether or not one assumes that the Russell amendment was originally intended to apply to nonstatutory advisers or advisory groups, the Federal Advisory Committee Act has intervened. It has specifically

authorized the creation of purely advisory committees; it has provided that they may have a 2-year life; and it has contemplated, and made provision for, the practice of using agency funds to support advisory committees. Accordingly, if indeed agency funds may otherwise be lawfully expended for such a purpose, there is no longer any reason, under the Russell amendment, to bar an expenditure of funds in support of an advisory committee merely because the committee has been in existence for more than 1 year. To that extent, either the Federal Advisory Committee Act has superseded the Russell amendment in its application to purely advisory committees, or the Act has brought advisory committees within that class of entities to which Senator Russell had no objection: entities that exist by virtue of statutory authority.

It would be possible to construe these statutes in another way. Implied repeals are disfavored. Standing alone and strictly construed, the Russell amendment applies to any agency or instrumentality, whether or not the existence of the agency or instrumentality is authorized by statute; and so construed, the Russell amendment could be interpreted as imposing an across-the-board requirement for additional, "specific" authorization for any expenditure of money by or for any agency or instrumentality whenever the agency or instrumentality has been in existence for 1 year. We doubt, however, that such a broad construction would be true to the underlying legislative purpose. Given that purpose, if (1) an agency or instrumentality performs functions that are indeed authorized by statute and (2) a law or appropriation makes funds available for the support of such functions, the Russell amendment should not be interpreted as imposing additional, "specific" authorization requirements merely because the agency or instrumentality has been in existence for 1 year. If the function is authorized, the only real question is the one that is always present, no matter how old or young the agency may be: are the funds in question actually available for support of that function?

This appears to be the approach that the Comptroller General has taken in matters involving issues of this kind,[2] and it is a reasonable one. If

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[2] For example, in his opinion on agency funding of the National Commission on the Observance of International Women's Year (B-182398, January 13, 1977), the Comptroller General attributed no significance whatever to the fact that some of the funds were used to support activities conducted during the first year of the Commission's existence, while others were used for activities in the second year. The legal question was the same in either case: whether the agency in question was authorized to expend funds to support functions of the kind that the commission performed. Thus, in the case of the Department of State, the Comptroller General found sufficient authority for an expenditure in support of the commission in the Department of State's general statutory duty to "provide for the participation by the United States in international activities * * * for which provision has not been made by the terms of any treaty, convention, or Special Act of Congress * * * [and] * * * pay the expenses of participation in [such] activities * * *." 22 U.S.C. § 2672. Nothing more "specific" was required. In the case of other agencies, the Comptroller General found insufficient authority under the statutes the agencies administered.

function is authorized by statute, and there is authorization for the expenditure of funds to support such a function, the Russell amendment does not require a more "specific" authorization merely because the agency or instrumentality may be more than 1 year old.

MARY C. LAWTON
Deputy Assistant Attorney General
Office of Legal Counsel

June 28, 1979

79-46 MEMORANDUM OPINION FOR THE ACTING COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE

Due Process—United States (as Creditor)—Withholding Wages of Federal Employee (as Debtor) in Satisfaction of Debt Allegedly Owed the Government

This responds to your request for our guidance whether the Immigration and Naturalization Service (INS) must accord its employees a full evidentiary hearing before INS withholds, pursuant to 5 U.S.C. § 5512(a),[1] the wages of such employees in satisfaction of a debt allegedly owed the United States. In a conversation with your Office we were informed that more precisely the question is what kind of due process hearing is required. Before we proceed with our legal analysis and discussion it would be useful to delineate briefly the relevant factual situation. The INS believed that one of its employees was obligated to reimburse the Government for the loss of certain funds for which INS deemed her accountable. Based upon an investigation, INS decided that the employee was accountable for $2,175.00, funds found to be missing from a district office. Of that amount, $655.00 was recovered, thus leaving the amount unaccounted for at $1,520.00. The investigation concluded that the employee failed to follow adequate procedures to safeguard the funds.

The Federal Bureau of Investigation, by way of a separate investigation, concluded that the evidence was inconclusive and thus recommended against criminal prosecution. The INS, however, decided to recover the missing $1,520.00 by withholding from the employee's pay a designated sum each pay period. We understand that it so advised the employee

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[1] That provision reads as follows:

> The pay of an individual in arrears to the United States shall be withheld until he has accounted for and paid into the Treasury of the United States all sums for which he is liable.

See 26 Op. Att'y. Gen. 77 (1906).

who responded by filing a Federal civil action seeking to enjoin INS from withholding any part of the pay. The U.S. Attorney handling the case advised INS that he believed case law requires a "due process" hearing prior to administrative wage-withholding. Thereafter the Government and the employee stipulated that the case should be dismissed without prejudice and that INS, which had not yet withheld any pay, would accord the employee a fulll evidentiary hearing through its grievance procedures. While this stipulation moots your questions as to this particular case, you state that you seek guidance for future cases.

The Supreme Court in recent years has considered in a variety of circumstances what due process requirements apply where deprivation of property interests are involved. The case that is most relevant here is *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). That case dealt with hearing requirements involving garnishment of wages. The court considered a Wisconsin law allowing a garnishment to be instituted by the creditor's lawyer by requesting the clerk of the state court to issue a summons. Service of the summons upon the garnishee (the employer) effectively froze the employee's (the alleged debtor's) wages.

The Court stated:

> [The wages] may, it is true, be unfrozen if the trial of the main suit is ever had and the wage earner wins on the merits. But in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise. [395 U.S. at 339.]

The Court noted that there may be extraordinary circumstances justifying a summary procedure, *e.g.*, in order to protect the creditor against permanent loss. However, it found no such circumstances in the case.[2] In analyzing the requirements of due process with respect to attachments and other like processes, the Court stressed the unique nature of wages—"a specialized type of property presenting distinct problems in our economic system." *Id.* at 340. The Court stated:

> [A] prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall. Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing * * * this prejudgment garnishment procedure violates the fundamental principles of due process. [*Id.* at 341-342.]

Hence what the Government seeks is essentially a recoupment or a setoff. However, this does not distinguish it from garnishment since both may "as a practical matter drive a wage-earning family to the wall."

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[2] In the usual case there probably would be no extraordinary circumstances warranting such a summary procedure because the persons from whom the withholdings are to be made are Government employees who have a substantial interest in their jobs and are unlikely to abscond to avoid repayment.

The Court's evident concern was that wages should not be withheld without a due process hearing. This is because wages, in most cases, sustain the wage earner and his family from week to week and any deprivation thereof could have potentially severe consequences.[3]

It may be noted that 5 U.S.C. § 5512, the provision authorizing the withholding here, does not expressly provide for a hearing of any kind. The section speaks of an "individual in arrears to the United States," not of one suspected of being in arrears. But it does not deal with the due process requirement governing the determination of the individual's liability. Accordingly, the process involved in the determination of liability must be considered apart from § 5512. Further, the *Sniadach* rule is constitutionally based and cannot be undermined by statute. It is well established that if at all possible a statute will be construed to avoid constitutional difficulties. Thus, where a provision entails depriving individuals of property rights but fails to expressly provide for notice and a hearing, it must be read as embodying the procedural rights implicit in the due process clause. *Pan American World Airways, Inc.* v. *Marshall*, 439 F. Supp. 487 (S.D.N.Y. 1977). By reading § 5512 as consistent with the due process clause it becomes clear that notice and a hearing are necessary before administrative withholding of a Federal employee's pay can be effected.

Your precise question, as noted above, is whether a "full evidentiary hearing" is required. Although *Sniadach* did not discuss in detail the hearing requirements needed for a wage-withholding, the Court did hold that an "opportunity to be heard and to tender any defense" were required. *Id.* at 339. It is our opinion that a hearing similar to that required in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits) is necessary here, that is, a hearing closely approximating a judicial trial. The *Goldberg* hearing procedure was summarized in *Mathews* v. *Eldridge*, 424 U.S. 319, 325 n. 5 (1976) as follows:

> (1) "timely and adequate notice detailing the reasons for a proposed [Government action]"; (2) "an effective opportunity * * * to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally"; (3) retained counsel, if desired; (4) an "impartial" decisionmaker; (5) a decision resting "solely on the legal rules and evidence adduced at the hearing"; (6) a statement of reasons for the decision and the evidence relied on. 397 U.S., at 266–271.

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[3] Under the Wisconsin procedure, up to one-half of a debtor's wages could be frozen under the garnishment procedure. Thus, an argument can be made that freezing or withholding a significantly lesser portion of a person's wages would not require the same level of due process protection. However, we believe that the better view is to consider any deprivation of wages as substantial. Indeed, the Court in *Sniadach* did not appear to consider the potential severity of the deprivation with respect to individual debtors. Rather, the focus was on the importance of wages as a general matter.

The Court in *Mathews* stated that the dictates of due process generally require consideration of three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Id.* at 355.]

The private interest that may be adversely affected here by your agency's action is potentially substantial. This is because wages are "a specialized type of property presenting distinct problems in our economic system." *Sniadach*, at 340.

Moreover, as we understand it, the proposed wage-withholding involved here would constitute the final agency action. Thus, unless the employee sought judicial review and prevailed, the administrative deprivation will deprive the employee of the withheld wages. This is unlike *Goldberg* v. *Kelly* and *Mathews* v. *Eldridge,* in that the official action in those cases was temporary and subject to further administrative review which afforded the claimant an evidentiary hearing much like that ordered in *Goldberg.*[4] Accordingly, the deprivation would be final insofar as agency action was concerned so that heightened solicitude for the private interest is required. *See, North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U.S. 601, 606 (1975), where the Court noted that "the length or severity of a deprivation of use or possession [of property] would be another factor to weigh in determining the appropriate form of hearing * * *."

Concerning the second factor in *Mathews, i.e.,* the value of additional procedural safeguards, it would seem that a wage-withholding hearing might frequently involve disputed factual issues and questions of credibility. Thus, the hearing must be structured so as to provide for their resolution. *Mathews* at 343–345. We do not know, of course, whether such issues will arise in a particular case.

Finally, the cost to the Government of a *Goldberg*-type evidentiary hearing probably would not result in a significant burden on the Government. The Court in *Mathews* noted that the cost to the Government of providing statutory benefits to ineligible recipients pending decision would not be insubstantial. 424 U.S. at 347. This concern would be inapplicable in wage-withholding actions because the employee is otherwise clearly entitled to his or her wages. Further, it seems unlikely that the costs of the hearings themselves would impose a significant burden on the Government.

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[4] While the welfare recipient in *Goldberg* was entitled to an evidentiary hearing, the primary issue was whether the hearing was required before the termination of benefits or whether termination could be made subject to a subsequent evidentiary hearing. 397 U.S. at 259–260.

For these reasons, we believe that a *Goldberg* v. *Kelly*-type hearing is required in administrative wage withholdings.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

July 3, 1979

79-47 MEMORANDUM OPINION FOR THE DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT

Garnishment—Remuneration Paid to Federal Employees—Tennessee Valley Authority—Smithsonian Institution—42 U.S.C. §§ 659, 662

This responds to your request for our opinion whether your agency's draft regulation on garnishment for alimony and child support may lawfully cover payments for Federal workers' compensation, payments from the Tennessee Valley Authority (TVA) retirement system, and the salaries and benefits of "private roll" employees of the Smithsonian Institution.

We conclude that both workers' compensation payments and TVA retirement payments are subject to garnishment. The status of the Smithsonian's "private roll" employees is a more complex matter on which we are unable to give an opinion without first obtaining its views.

Under § 459(a) of the Social Security Act, as amended, 42 U.S.C. § 659(a), added in 1977,[1] remuneration for employment by the United States is subject to garnishment for alimony and child support. Section 461(a) of the Act, 42 U.S.C. § 661(a), authorizes the President to promulgate regulations implementing § 459 for the executive branch, including any wholly owned Federal corporation created by act of Congress. This authority has been delegated to you. Under § 462(f)(2) of the Act, 42 U.S.C. § 662(f)(2), "remuneration of employment" is defined to include:

> (2) periodic benefits (including a periodic benefit as defined in section 428(h)(3) of this title) or other payments to such individual under the insurance system established by subchapter II of this chapter or any other system or fund established by the

[1] Pub. L. No. 95-30, Title V, § 501(a).

United States (as defined in subsection (a) of this section) which provides for the payment of pensions, retirement or retired pay, annuities, dependents or survivors' benefits, or similar amounts payable on account of personal services performed by himself or any other individual (not including any payment as compensation for death under any Federal program, any payment under any Federal program established to provide "black lung" benefits, any payment by the Veterans' Administration as pension, or any payments by the Veterans' Administration as compensation for a service-connected disability or death, except any compensation paid by the Veterans' Administration to a former member of the Armed Forces who is in receipt of retired or retainer pay if such former member has waived a portion of his retired pay in order to receive such compensation), and does not consist of amounts paid, by way of reimbursement or otherwise, to such individual by his employer to defray expenses incurred by such individual in carrying out duties associated with his employment.

Your first question is whether proposed § 552.102(i)(3) of the regulation may lawfully include "amounts received under any federal program for compensation for work injuries"[2] as remuneration subject to garnishment. In our opinion, it can. As you point out, Senator Nunn, the sponsor of title V, expressly stated on the floor of the Senate that such payments would be subject to garnishment. *See* 123 CONGRESSIONAL RECORD S. 12909 (1977). This explanation, the sole relevant legislative history, is strong evidence that Congress intended Federal workers compensation payments to be covered. *See, e.g., United States* v. *Dickerson,* 310 U.S. 554, 557 (1940); *Richbourg Motor Co.* v. *United States,* 281 U.S. 528, 536 (1930). In addition, the text of § 462(b)(2) conforms to this expression of intent. By expressly excluding payments for disability arising from black lung, military service, or death related to employment, Congress showed that it considered the statute broad enough to include the general class of employment-related disability payments. Since workers' compensation payments (other than for death) were not excluded, they are covered as "remuneration" under § 462(b)(1). *See, e.g., United States* v. *Jones,* 567 F. (2d) 965 (10th Cir. 1977); *Tom* v. *Sutton,* 553 F. (2d) 1101 (9th Cir. 1976).

Your second question is whether payments from the Tennessee Valley Authority retirement system are "remuneration" under § 462(f)(2). The statute expressly provides that payments from a "fund established by the United States (as defined in subsection (a) of this section) which provides for the payment of pensions, retirement or retired pay, [or] annuities" is subject to garnishment. The TVA contends that its retirement system is

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[2] We understand this to mean payments under the Federal Employees Compensation Act, 5 U.S.C. § 8101 *et seq.*, and any similar statute.

not established by the United States within the meaning of the Act because it is a separate legal entity not under the control of either TVA or your agency. We have examined the arguments presented by TVA, and we conclude that payments from its retirement system are subject to the Act.

The TVA argues that its retirement system is an unincorporated association directed by a separate board of directors: three appointed by the Authority, three elected by members of the system, and the seventh chosen by the others. Section 12 of the system's rules provides that:

> No transfer, assignment, pledge, seizure or other voluntary or involuntary alienation or encumbrance of any pension, annuity, or other benefit provided [by the retirement system is] permitted or recognized.

This "spendthrift" provision, asserts TVA, was held valid in *TVA* v. *Kinzer,* 142 F. (2d) 833 (6th Cir. 1944). In addition, it argues, the rules of the retirement system constitute a contract between TVA and its employees, and 16 U.S.C. § 831b forbids any statutory change that would "impair the obligation of any contract" made by TVA.

A closer reading of the Act and the *Kinzer* case, however, leads to the opposite conclusion. First, § 462(a) of the Act defines the "United States" to include "any wholly owned Federal corporation." This includes TVA. *See* 16 U.S.C. § 831.[1] Nothing in the legislative history indicates that TVA was not to be included in this definition. Second, analysis of *Kinzer* plainly shows that the retirement system is "established" by TVA. The Court of Appeals held that TVA created the system, including rule 12, under its statutory authority to employ officers and agents without regard to the Civil Service laws and to "fix their compensation * * * and provide a system of organization to fix responsibility and promote efficiency." 142 F. (2d) at 835–836. The court noted that the retirement system was funded half by employee contributions and half by funds appropriated by Congress. 142 F. (2d) at 834–835. In finding the plan, including rule 12, to be within TVA's authority under 16 U.S.C. § 831b, the court pointed out that TVA employees were employees of the United States and that Congress regarded the retirement system as "the equivalent of the Civil Service Retirement System." 142 F. (2d) at 837–838. For that reason, the court held, rule 12 was valid despite a Tennessee law that prohibited such "spendthrift" provisions. *Id.*

Thus, *Kinzer,* on which TVA relies, is based on the view that the retirement system was established by a Federal instrumentality under statutory authority to further its purposes by enhancing the welfare of its employees. The retirement system is funded in the same way as the civil service retirement system and serves the same purpose. Despite TVA's

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[1] Office of Personnel Management's rulemaking authority under the Act also extends to any wholly owned Government corporation. Social Security Act, § 461(a)(1), 42 U.S.C. 661(a)(1).

asserted inability to control its trustees, the system is plainly "established" within the meaning of 459(a), 462(f)(2).

Nor can it be said that the application of the Act to the retirement system invalidates any contract right. TVA provides no authority for its assertion that the retirement system is based on contract. Insofar as we are aware, the system, including the restraint on alienation, was unilaterally created by the Authority. *See, TVA* v. *Kinzer, supra,* at 834–835. Where Congress has created a contributory retirement system by statute, it is well settled that an employee has no contractual right to future payments and thus lacks standing to object to statutory changes affecting only unaccrued future payments. *Nordstrom* v. *United States,* 342 F. (2d) 55, 169 Ct. Cl. 632 (1965); *Rafferty* v. *United States,* 210 F. (2d) 934 (3rd Cir. 1954). The same principle would apply to a unilateral change in the retirement system rules by TVA, and it applies *a fortiori* to a change required by statute. Thus, no contract obligation is impaired by the application of the Act to TVA.

Your third question is whether the salaries and benefits of the Smithsonian Institution's "private roll" employees may be subjected to garnishment under your proposed regulations. We understand that the "private roll" employees are paid with the Smithsonian's non-Federal funds, consisting of gifts, bequests, profits from its commercial activities, and the like. Whether their salaries and benefits may be subject to garnishment under your regulations has two aspects: first, whether these payments are "remuneration for employment due from or payable by the United States" within the meaning of § 459(a); second, whether the Smithsonian Institution is an agency in the executive branch within your rulemaking authority under § 461(a)(1). These are difficult and complex questions. The Smithsonian is *sui generis*: a fusion of a private and public body and a joint instrument, in a sense, of all three branches of the Government. Before expressing an opinion on its legal status or that of its "private roll" employees, we require more information than you have provided. Accordingly, we have requested the views of the General Counsel of the Smithsonian. Any further information or comment from you will also be welcome, including prior Civil Service Commission rulings relating to "private roll" employees.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

July 3, 1979

79-48 MEMORANDUM OPINION FOR THE ACTING DIRECTOR, EXECUTIVE OFFICE FOR U.S. ATTORNEYS

(1) Conflict of Interest (18 U.S.C. § 208)—Financial Interest
(2) Standards of Conduct (28 CFR § 45-735-9(a))—Prohibition Against Practice of Law

Assistant Attorney General Harmon has asked me to reply to your memorandum of June 21, 1979, regarding Mr. A, U.S. Attorney, Southern District of Texas.

You request advice, first, with respect to A's agreement with his former law partner, entered into before he took office as U.S. Attorney, that he will rejoin him as a partner after leaving that office. There is no statute or administrative regulation that precludes an officer or employee of this Department who came to it after departing another place of employment, including a law firm in which he was a partner, from returning to that place of employment pursuant to a pre-departure agreement to do so. Where there is an agreement of that kind, the officer or employee must of course comply with the requirement of 18 U.S.C. 208 that he disqualify himself from participating in his official capacity in any matter in which the other party to the agreement has a financial interest. In A's case the requirement of the statute applies not only to a matter pending in his Office in which his former partner has a financial interest on his own account but also to any matter pending there in which the latter appears as counsel.

Your second inquiry is concerned with the law firm's library, furniture, etc., and with the building in which the firm has its offices. The building is presumably owned of record by A and his former partner, either in their own names or through a corporate entity of some kind. No doubt A's withdrawal from the firm served to relinquish his interest in its law books, equipment, and the like. However, it is not apparent that he has given up his interest in the building. The last paragraph of his letter may be read as a disclaimer of any right to income from that real property during his tenure as U.S. Attorney, but it is not a negation of his continuing half

interest in the property. For purposes of the following discussion I shall attribute ownership of a half interest to him.

The standards of conduct of this Department prohibit a professional employee from engaging in the private practice of his profession, including the practice of law, except as specifically permitted by the Associate Attorney General "in unusual circumstances." 28 CFR 45.735-9(a), (c). It seems clear that a departmental lawyer who has an interest of some kind in the ongoing earnings of a law firm of which he was formerly a member and which he is scheduled to rejoin is, for the purposes of this regulation, engaged in the private practice of law even though he is completely inactive in the firm. Here, however, it appears that A has relinquished all interest in the income of his former firm earned during his Government service. Accordingly, the resolution of the question of the applicability of the regulation to him involves a consideration of—more accurately, perhaps, it hinges on—the nature of his continuing half interest in the building where the firm's offices are located. It is difficult to conceive of that equity interest as anything but an investment in real estate. To characterize its continued ownership by A as a means of engaging in the practice of law within the meaning of § 45.735-9(a) would be unrealistic.

In sum, we are of the view that A's agreement with his former partner does not cut across any restriction of the conflict of interest laws, subject to A's possible need to disqualify himself from official action under the requirement of 18 U.S.C. 208 noted above, or any restriction of the Department's standards of conduct, including § 45.735-9(a).

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

July 5, 1979

79-49 MEMORANDUM OPINION FOR THE ACTING DIRECTOR, EXECUTIVE OFFICE OF U.S. ATTORNEYS

Ethics in Government Act—Financial Report—Application to Spouses and Children of Reporting Official (5 U.S.C.A. App. I)

This is in response to your memorandum requesting our opinion on a question raised by a U.S. Attorney regarding the requirement under the Ethics in Government Act that the reporting official include information pertaining to his spouse and dependent children.

The requirement for reporting of spouses' and children's interests appears in § 202(e)(1) of the Ethics in Government Act 5 U.S.C.A. App. I, 1980 Supp. which provides in pertinent part:

> (e)(1) Except as provided in the last sentence of this paragraph, each report required by subsection (a), (b), or (c) of this section shall also contain information listed in paragraphs (1) through (5) of subsection (a) respecting the spouse or dependent child of the reporting individual as follows:
>
> * * *
>
> Each report referred to in subsection (b) of this section shall, with respect to the spouse and dependent child of the reporting individual, only contain information listed in paragraphs (1), (3), and (4) of subsection (a), as specified in this paragraph.

The U.S. Attorney suggests that the reference to "subsection (a), (b), or (c)" at the beginning of § 202(e)(1) refers not to those subsections of § 202, but to subsections (a), (b) and (c) of § 201.

The U.S. Attorney bases his suggestion on the fact that § 201 is captioned "PERSONS REQUIRED TO FILE" and that § 202 is captioned "CONTENTS OF REPORTS." He notes that § 202 does not "require" any reports to be filed. Rather, he says, it merely describes the contents of the reports that are required by § 201 to be filed by various categories of persons. Therefore, he believes the reports that must contain information

about spouses and dependent children are those required to be filed by subsections (a), (b) and (c) of § 201—*i.e.*, by those who assume office, by those who are nominated to office by the President, and by those who become candidates for the office of President or Vice President. We find this suggestion without merit.

First, the natural reading of § 202(e)(1), quoted above, is that it refers to subsections (a), (b) and (c) of the same section of which subsection (e) is itself a part, namely, § 202. Ordinarily, when a statute refers to a subpart of another section, the number of the other section is also expressly cited. Moreover, in § 202(e)(1), immediately after the reference to reports "required by subsection (a), (b), or (c)" at issue here, there is a reference to "paragraphs (1) through (5) of subsection (a)."[1] Subsection (a) of § 201 is not subdivided into paragraphs, while subsection (a) of § 202 is. Obviously, the second reference to "subsection (a)" in § 202(e)(1) must be to subsection (a) of § 202. Presumably, if Congress had intended a different subsection (a) in the immediately preceding reference, that reference would have been made express.

Second, he makes too much of the captions of §§ 201 and 202. Section 201 identifies the persons who must file reports, while § 202 describes the type of report these individuals are required to file. Subsection (a) describes the full report required to be filed on an annual basis by those holding office as of May 15 of each year (*i.e.*, by persons identified in § 201(d)). Subsection (b) of § 202 describes the more limited report to be filed by persons when they assume office, are nominated to office by the President, or become candidates for elective office (*i.e.*, by persons identified in §§ 201(a), (b) and (c)). These officials must report their assets, liabilities, outside affiliations, and future employment arrangements as of a given point in time near the date of filing. But they need not reach back to an earlier period to report gifts or most income previously received or property transactions previously engaged in. The last sentence of § 202(e)(1) makes a similar concession with regard to the spouse and children of a person who files a report "referred to in subsection (b)." Finally, subsection (c) of § 202 describes the information that must be filed by those who leave a covered executive branch position (*i.e.*, persons identified in § 201(e)).

[1] The last sentence of § 202(e)(1) likewise refers to paragraphs of "subsection (a)."

Aside from this explanation based solely on the statutory language, we can think of no reason why the Congress would have intended to require officials to report information pertaining to their spouses and dependent children only at the time those officials enter public office and not annually thereafter or when they leave office. We are aware of nothing in the legislative history of the Act to suggest this purpose.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

July 9, 1979

79-50 MEMORANDUM OPINION FOR THE SENIOR ASSOCIATE COUNSEL TO THE PRESIDENT

Federal Home Loan Bank Board—Chairman—Vacancy—Reorganization Plan No. 3 of 1947 (5 U.S.C. App. 1), Reorganization Plan No. 6 of 1961 (5 U.S.C. App.)

This memorandum confirms the oral advice this Office has recently given you regarding the selection of a new Chairman of the Federal Home Loan Bank Board. The facts, as we understand them, can be briefly stated. At noon, on Saturday, June 30, 1979, Mr. McKinney resigned as a member and Chairman of the Board. It is anticipated that his successor will be named within 10 days. There are two other board members in active service on the Board at this time.

The first question is whether the President is required to name an Acting Chairman (either one of the two members or someone else) to serve until a successor is named. It is our opinion that the President is not required to do so and that the Board ought to be able to perform its essential functions without significant interruption until appointment of a new Chairman. Pursuant to Reorganization Plan No. 3 of 1947, the President is empowered to designate the Chairman. *See* § 2(b), *reprinted in* 5 U.S.C. App. at 734 (1976 ed.). The plan also authorizes the Chairman to designate a person to serve as Acting Chairman during the "absence or disability" of the Chairman. *Id.* There is no provision, however, that deals specifically with the selection of an Acting Chairman to serve during a vacancy. In the absence of any such specific provision, it should be assumed that the power to designate an Acting Chairman remains in the President, and, in fact, we have been informed by the General Counsel of the Federal Home Loan Bank Board that historically the President has named Acting Chairmen in cases in which vacancies have occurred.

In the absence of a designation by the President of an Acting Chairman, the question arises whether the Board may operate without a Chairman for a short period of time. (We have been advised that a period of

approximately 10 days is contemplated.) At least a partial answer is provided by Reorganization Plan No. 6 of 1961, which authorizes the Chairman to delegate any of his management and oversight functions to any appropriate officer. *See* § 2(b), *reprinted in* 5 U.S.C. App. at 783. Pursuant to that authority, on June 29, 1979, the Chairman delegated to the "Chief Administrative Officer of the Bank Board" all of his administrative functions, including each of the eight listed functions set forth in § 1 of the 1961 reorganization plan. This delegation should assure continuity during the short period in which there will not be a sitting Chairman.

Finally, a question has also been raised with respect to the ability of the Board to meet in special or emergency session in the absence of a Chairman. Section 1(8) of the plan gives to the Chairman the power to call special meetings. Under the June 29 delegation, that power has been transferred to the Board's chief administrative officer. In any event, it is our opinion that a special session could be called by the two sitting board members even in the absence of such a call. This opinion is based on § 1(8) of the 1961 plan which transfers to the Chairman "[t]he calling of the Board into special session * * * upon request of one or both of the other members of the Board." This subsection seems to render the Chairman's calling of special meetings merely ministerial when one or both of the board members request a meeting. Furthermore, the Presidential message accompanying the plan makes clear that the transfer of functions is intended to strengthen internal management of the Board and not to change the distribution of power within the Board. The message states:

> [n]othing in the plan impinges upon the ability of the members of the Board to act independently with respect to substantive matters that come before them for decision, or to participate in the shaping of Board policies. In carrying out his managerial functions, the Chairman will be governed by the policies of the Board and the determinations it is authorized to make. [5 U.S.C. App. at 784.]

The plan and the President's message lead us to conclude that the two remaining members of the Board have the authority to call a special meeting if such a meeting is necessary to the proper functioning of the Board.

It is also our view that if a meeting is held by the other two board members any action taken at such meeting may not properly be challenged on the ground that the calling of the meeting was not in conformance with the reorganization plan. It appears that, as a matter of corporate common law, business transacted at a meeting of a corporate board is valid so long as there is sufficient notice to the board members enabling them to attend, or if, in fact, all the members did attend. *See* 2 Fletcher, *Cyclopedia of the Law of Private Corporations* §§ 404, 406, 411 (1969 ed.). We suspect that in the absence of specific statutory language to the contrary, a Government entity such as the Federal Home Loan Bank Board may rely on the common law rule. *Cf., FTC* v. *Flotill Products, Inc.*, 389 U.S. 1979 (1967). Of course, the notification and scheduling of any meeting would

still have to comply with other applicable provisions of law, including the provisions of the Sunshine Act, 5 U.S.C. §§ 552b.

Given these considerations, it is our opinion that the Board may function appropriately during this brief period without a sitting Chairman.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

July 11, 1979

79-51 MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Constitutional Law—Article I, Section 6, Clause 2—Appointment of Member of Congress to a Civil Office

This responds to the informal request of the Senate Judiciary Committee for the opinion of the Department of Justice regarding an unsigned memorandum dated July 2, 1979, taking the position that Article I, Section 6, Clause 2, of the Constitution bars Representative Abner Mikva from appointment during the present Congress as a judge of the U.S. Court of Appeals for the District of Columbia Circuit. That position rests on untenable factual assumptions and on a constitutional analysis that, in our opinion, is at odds with the plain language and settled interpretation of Clause 2. The clause reads as follows:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

I.

The memorandum argues that wisdom dictates that Representative Mikva's appointment as a judge be deferred beyond the expiration of his current congressional term, which began in January 1979. Its core premise is that "existing law will operate to increase the compensation of circuit judges during Representative Mikva's present term of office." However, the premise—namely, that the compensation of Federal judges must in fact increase during the present Congress—is speculative.

Federal appellate judges are compensated at rates determined under

§ 225 of the Federal Salary Act of 1967, Pub. L. No. 90-206, 81 Stat. 643, as amended, 2 U.S.C. §§ 351-361, and adjusted pursuant to the Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94-82, 89 Stat. 422, 28 U.S.C. § 461. Pursuant to § 205(a)(1) of the Executive Salary Cost-of-Living Act, the salary rate of Federal judges is to be adjusted by a percentage of the salary rate equal to the overall percentage of adjustments made in the rates of pay under the General Schedule. Adjustments in the rates of pay under the General Schedule are governed by the Federal Pay Comparability Act of 1970, Pub. L. No. 91-656, 84 Stat. 1946, 5 U.S.C. § 5305 *et seq.* It provides that the President is to direct his agent to prepare annually a report comparing rates of pay in the statutory pay system with rates of pay for the same levels of work in the private sector, and recommending appropriate adjustments of the former. After considering the report and the findings of the Advisory Committee on Federal Pay, the President is to adjust statutory rates of pay accordingly. That adjustment becomes effective in October of the applicable year. Alternatively, the President, in view of economic conditions affecting the general welfare, may prepare and transmit to Congress before September 1 of each year an alternative plan incorporating salary adjustments that he considers appropriate. Such an alternative also becomes effective in October, and it is to continue in effect unless, within a stated period, either House of Congress adopts a resolution disapproving the alternative plan. If a disapproval resolution is adopted, the salary adjustments for the statutory pay system recommended by the Advisory Committee on Federal Pay are to become effective.

A fundamental element of the foregoing statutory scheme is that salary adjustments are triggered by action of the President, which for 1979 has not yet occurred and will not necessarily occur under the statutory scheme until September. Moreover, once a Presidential decision is transmitted to Congress, it is possible that Congress will act to the contrary by legislation, as it has in the past, preventing upward salary adjustments. In short, it is incorrect to assert that, at the present time, it is known as a fact that the salary of Federal appellate judges will increase this year or, indeed, during this Congress.

II.

Thus, the issue at this time is not whether Congressman Mikva may be appointed to a judgeship the emoluments of which have already been increased, but rather whether he may be appointed to a judgeship as to which the emoluments may be increased subsequent to his appointment. To hold that in the latter situation he is precluded from appointment, it would be necessary to construe Clause 2 as barring the appointment of a Member of the Congress to a civil office during the term for which he has been elected before the emoluments of the office have been increased. That interpretation is plainly at odds with the language of the

constitutional provision itself, stating that no Member of Congress "shall * * * be appointed" to a civil office the emoluments of which "*shall have been increased*" during the term for which the Member was elected. [Emphasis added.] By using the future tense in referring to an appointment, while employing the future perfect tense to refer to an increase in emoluments, the provision on its face plainly shows an intention of preventing an appointment only when an increase in the emoluments of an office precedes an appointment to that office.

The importance of carefully construing the literal language of the constitutional provision is underscored in the opinion of Attorney General Ramsey Clark, 42 Op. Att'y Gen. 381 (1969), which concluded that it did not disqualify Representative Laird from appointment as Secretary of Defense. The essential foundation of the Clark opinion was the language of the constitutional proscription, which, he held, "clearly does not apply to an increase in compensation which is proposed subsequent to the appointment." Furthermore, he held that it did not apply where "it is possible but not certain at the time of the appointment that a proposed salary increase for the appointee may receive final approval at a future date." 42 Op. Att'y Gen., at 382. The reasoning, which is directly applicable to the present case, is as follows:

> It is my view that, notwithstanding submission of any salary increase recommendations in the Budget message, the salaries in question will not 'have been increased' within the meaning of the constitutional prohibition so long as Congress may still exercise its power of disapproval. Assuming that you [Representative Laird] are, in the normal practice * * * nominated, confirmed, and appointed as Secretary of Defense within a few days following the inauguration, *i.e.,* during the period in which it remains uncertain whether Congress may disapprove the Presidential salary recommendations, I believe your appointment will not be precluded by this constitutional clause. [*Id.* at 382–83.]

Just as Attorney General Clark concluded that before an increase is certain an appointment is valid, so in the present circumstances, until such an increase has become an accomplished fact, Representative Mikva's appointment is permissible.

The memorandum attempts to distinguish the Clark opinion on the ground that the salary statute in effect at that time is different from the present salary statute because under the current arrangement, some salary adjustment will go into effect unless the Congress as a whole, as opposed to one House alone, takes affirmative legislative action to prevent it. The notion is that present law makes it somewhat more difficult for Congress to prevent a salary increase. However, whatever else may be said about the distinction, it is simply not germane to the reasoning of the Clark opinion. The opinion, in summarizing the applicable statutory scheme, emphasized that "* * * it will be uncertain whether there will be any increase in Cabinet salaries until March 1, or such earlier date as Congress may

take definitive action manifesting that it will not disapprove such increase." [Emphasis added.] 42 Op. Att'y Gen., at 382. The precise nature of "definitive action" by Congress was not an issue in the Clark situation. Rather, the crucial point was the uncertainty of a salary increase at the time of Mr. Laird's appointment. Furthermore, nothing in the language of the constitutional provision suggests that it operate only when it may be relatively less difficult for Congress to prevent an increase. Rather, the critical point is whether there has been an "appointment of a legislator to an office the compensation of which '*shall have been*' increased prior to the making of such appointment." [Emphasis in original.] 42 Op. Att'y Gen. at 381–82.

The memorandum also asserts that the present case is covered by the 1882 opinion of Attorney General Brewster, 17 Op. Att'y Gen. 365, holding that a former member of Congress could not be appointed to an office because of the proscription of Clause 2. However, the memorandum neglects to note that the situation underlying the Brewster opinion is fundamentally distinguishable from the present case. The Brewster opinion involved a former Senator, whose term was to expire in March 1883; he resigned from the Senate in 1881 to accept appointment as Secretary of the Interior, subsequently resigned from that position, returned to private life, and was being considered for appointment to the office of tariff commissioner created by legislation enacted on May 15, 1882. It is obvious that he could not have been appointed to the newly created position until after it had in fact been created. Thus, as Attorney General Clark stressed in his opinion in discussing the Brewster holding, it rested on a crucial distinguishable factual foundation, and as such it "has no bearing on [the present] situation." 42 Op. Att'y Gen. at 383.[1]

In short, the language and settled interpretation of Clause 2 establish that Representative Mikva is not barred from appointment.

III.

It should be further noted that, contrary to the view expressed in the memorandum, even if a salary increase for Federal judges generally were to occur, Congress could, by legislation, exempt from coverage the office to which Representative Mikva may be appointed. Such action was taken in the past. In 1909 President Taft sought to appoint Senator Knox as Secretary of State, although in the prior year the compensation for that

[1] Moreover, it should be noted that if the opposite interpretation were followed, and it were held that a sitting Member of Congress could not be appointed to an office the emoluments of which were increased after his appointment, then Congress, by enacting a salary increase after the President had appointed him a Federal judge, would thereby retroactively invalidate the appointment. This would, in effect, amount to his removal and thus would circumvent the constitutionally mandated process of impeachment as the only existing method for removing Federal judges.

office had been increased. A bill was enacted reducing the salary of the office to the previous level in order to avoid the constitutional problem. *See* 43 CONGRESSIONAL RECORD 2205, 2390–2403. The same action was taken with respect to the appointment of Senator Saxbe to the office of Attorney General. *See* Pub. L. No. 93–178, 87 Stat. 697 (Dec. 10, 1973). Accordingly, even if a salary increase were to become effective prior to the appointment of Representative Mikva, which is not the situation presently existing, he would not thereby be necessarily barred from appointment.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

July 16, 1979

79-52 MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION

Indian Lands—Eminent Domain—Mineral Rights Held by the United States as Trustees

This responds to your request for our opinion on the above matter.

In *United States* v. *Winnebago Tribe of Nebraska,* 542 F. (2d) 1002 (8th Cir. 1976) (hereafter *Winnebago*), it was held that the United States may not take through eminent domain lands that it holds in trust for Indians under a treaty unless Congress clearly intended that Indian lands be taken. The present case raises the question whether *Winnebago* applies to mineral rights held by the United States in trust for the Osage Tribe under a statute rather than a treaty. The Army Corps of Engineers contends that *Winnebago* does not apply to the lands in question; the Department of the Interior and your Indian Resources and Land Acquisition Sections contend that it does. We have reviewed the arguments of the interested agencies and have independently examined the authorities. We concur in the conclusion of the Indian Resources and Land Acquisition Sections that the mineral rights in question cannot be taken without a clear statutory intent to permit such action.[1]

In *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960), the Supreme Court held that a general eminent domain statute authorized the taking of lands purchased by the Indians in fee simple. The *Winnebago* decision stated that *Tuscarora* applied only to lands which "were not held in trust by the United States and were not reserved by treaty." 542 F. (2d) at 1005. The Corps contends that this case is distinguishable from *Winnebago* on both points: the land is held absolutely by the Tribe instead of by the United States, and the land is "reserved," if at all, by statute rather than by treaty. Your Division and the Department of the Interior contend that

[1] We express no opinion whether the requisite congressional intent exists in this case.

the land is held in trust for the Tribe and that the rationale of *Winnebago* applies to land so held under a statute.

The background information you have provided may be summarized as follows. In 1866, the United States and the Cherokee Nation agreed by treaty that the United States could purchase Cherokee land in Oklahoma to settle other friendly Indians. 14 Stat. 799. The treaty of 1866 between the United States and the Osage Tribe, 14 Stat. 687, provided that the Osage could be removed from their Kansas reservation to Oklahoma with their consent and that half the proceeds from the sale of the Kansas reservation would be used to purchase a new reservation in Oklahoma. In 1870, a statute authorized the President to remove the Osage Tribe from Kansas when the tribe agreed. Act of July 18, 1870, c. 296, § 12, 16 Stat. 362. The Osage Reservation, now Osage County, Oklahoma, was created by the Act of June 5, 1872, 17 Stat. 228, to implement the 1870 statute. In 1883, the United States bought the land in the reservation from the Cherokees in fee simple "in trust for the use and benefit" of the Osage Tribe. In 1906, the Osage Allotment Act, 34 Stat. 539, was enacted. Section 2 of the Act allotted the Tribe's lands to its individual members. However, sections 3 through 5 of the Act reserved the mineral rights in the land to the Tribe for 25 years, with the royalties to be paid to the United States in trust for the Tribe and distributed to the individuals. This reservation of mineral rights has been extended several times and was made perpetual in 1978. *See* Pub. L. No. 95-496, § 2, 92 Stat. 1660.

The Corps' first argument is that the Osage Allotment Act conveyed the mineral rights to the tribe absolutely, placing only the proceeds in trust for the individual Indians. Your Division, to the contrary, argues that the original conveyance of the Reservation was to the United States in trust for the benefit of the Tribe and that § 3 of the Allotment Act retained in that status the mineral interest that was not conveyed to the individuals. As you point out, the Supreme Court has twice stated that the Osage mineral rights are held by the United States in trust for the Tribe. *See, United States* v. *Mason,* 412 U.S. 391 (1973); *West* v. *Oklahoma Tax Commission.* 334 U.S. 717 (1948).[2] Moreover, in *United States* v. *City of Pawhuska,* 502 F. (2d) 821 (10th Cir. 1974), the United States litigated on behalf of the Tribe as trustee of the mineral rights; the court stated that the rights were held in trust by the United States. Finally § 3 of the Osage Allotment Act requires the approval of the United States for any lease of mineral rights by the Tribe. These are persuasive indications that the mineral rights are held by the United States for the Tribe's benefit. On this question of real property law, we defer to your view that the United

[2] As the Corps notes, these cases involved the unquestionable trust status of the individual income interests in the minerals under Section 4 of the Osage Allotment Act, and the Court's characterization of the Government's relation to the Tribe is dictum.

States holds the mineral rights in trust for the benefit of the Tribe.[3]

The Corps' second argument is that the *Winnebago* rule only applies to lands reserved by treaty and thus does not protect the mineral rights in this case. We agree with your view that this argument is without merit. The *Winnebago* decision merely applies the general rule that, although Congress has the power to abrogate rights secured to Indians by treaty, its intent to renege on its previous commitments must be clearly shown. 542 F. (2d) at 1005. *See generally, Bryan* v. *Itasca County,* 426 U.S. 373 (1976); *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164 (1973); *Menominee Tribe* v. *United States,* 391 U.S. 404 (1968). It is our opinion that this principle applies equally where an agreement with a tribe is ratified by statute. *Antoine* v. *Washington,* 420 U.S. 194 (1975). *Antoine* points out that the further negotiation of Indian treaties was forbidden by statute in 1871.[4] That statute had the purpose and effect of allowing the House of Representatives to participate in developing Federal Indian policy. *Id.,* at 202. However, the Court concluded, the statutory method of ratifying agreements has the same legal effect as a treaty and is governed by the same rules of construction. *Id.,* at 204. *See also, Choate* v. *Trapp,* 224 U.S. 665, 675 (1912). The historical accident that the agreement moving the Osage Tribe to the Oklahoma reservation was implemented by a statute in 1872 rather than by treaty at an earlier date does not affect its construction.[5] As you have concluded, the *Winnebago* rationale would therefore apply.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

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[3] We therefore find it unnecessary to address the Corps' assertion that *Tuscarora* applies to any land owned in fee simple by an Indian tribe.

[4] Act of March 3, 1871, 16 Stat. 566, 25 U.S.C. § 71.

[5] We also note that the Department of the Interior has raised an alternative argument that the Osage Reservation was treaty land and that the mineral rights come within the most literal reading of *Winnebago.* As Interior points out, the 1866 Treaty authorized the United States to remove the Osage Tribe to Oklahoma and obliged it to purchase the new reservation with half the proceeds of the sale of the old one. The subsequent acquisition of the Oklahoma reservation, though effected under a statute, was in pursuit of this treaty obligation and in replacement of treaty lands.

July 18, 1979

79-53 MEMORANDUM OPINION FOR THE SECRETARY OF LABOR

Immigration and Nationality Act—8 U.S.C. § 1101(a)(15)(H)—Nonimmigrant Aliens—Soccer Strike

This is in response to your request to the Attorney General for reconsideration of this Office's April 18 memorandum dealing with the status of nonimmigrant alien soccer players during a strike affecting the soccer league in which they play. That memorandum considered whether the players, temporarily employed in the United States by the North American Soccer league on so-called "H visas," 8 U.S.C. § 1101(a)(15)(H), could lawfully continue to work during the strike, and whether those who chose to honor the strike might lawfully remain in the United States. It concluded that the Immigration and Nationality Act (INA) and applicable regulations of the Immigration and Naturalization Service (INS) neither required deportation of those who chose not to work during the strike nor barred players from continuing to work if they chose to do so.

You take issue with this conclusion, pointing out that it has been "longstanding immigration policy" to bar the use of temporary alien labor whenever a labor dispute involving a work stoppage is in progress. You state that under INS regulations no nonimmigrant workers may be admitted into the United States during the pendency of a strike at their place of prospective employment; and that nonimmigrants already in employment at the beginning of the strike are required to discontinue work. You believe that the interpretation of these regulations in our memorandum will have "deleterious consequences outside the instant soccer dispute in that employers will be encouraged to stockpile docile alien labor" as insurance against a strike by their domestic workers. In addition, you note the possible collateral foreign policy consequences if injury or other harm to alien strikebreakers should occur.

At the Attorney General's request, we have undertaken additional research into the legal issues presented. We have reviewed a number of

documents (including those discussed in your request) that were not available to us at the time our original memorandum was prepared and are helpful in understanding the position that INS has taken over the years. On the basis of the materials that we now have, we are inclined to agree that INS has indeed interpreted its regulations in the way you suggest, that is, INS has interpreted them to mean that nonimmigrant aliens temporarily employed in this country must leave their employment in the event of a strike.

The INS regulation appears in Part 214 of title 8 of the Code of Federal Regulations ("Nonimmigrant Classes") at § 214.2(h)(10); it reads as follows:

> A petition [for admission] shall be denied if a strike or other labor dispute involving a work stoppage or layoff of employees is in progress in the occupation and at the place the beneficiary is to be employed or trained; if the petition has already been approved, the approval of the beneficiary's employment or training is automatically suspended while such strike or other labor dispute is in progress.

There are similar prohibitions in the regulations against employment of nonimmigration students during a strike, § 214.2(f)(6), and of nonimmigrant intra-company transferees § 124.2(1)(3a). In addition, the regulations provide that resident alien commuters, so-called "green-card" commuters, will not be permitted to reenter the United States to work at a place where a labor dispute involving a work stoppage is in progress. § 211.5(d).[1]

The regulation applicable to nonimmigrant aliens on H visas was promulgated in 1965. According to a memorandum prepared by an INS staff member at the time, it was designed to bring the regulations governing temporary workers into accord with those applicable to students. The restriction on student employment, promulgated a few months earlier, provided that permission for a student to work would be "automatically suspended during the period when a strike or other labor dispute involving a work stoppage or layoff of regular employees occurs at his place of employment." The memorandum states:

> It is believed that the Regulations relating to H nonimmigrants should contain a similar provision so that it is clear that the *Service does not authorize the use of H workers in situations involving strikes or labor disputes.* [Emphasis added.]

As you correctly point out, § 214.2(h)(10) has not been limited by INS to a prohibition on an alien's continuing to work during a labor dispute, but has also been broadly construed by that agency to prohibit an alien's participating in a strike.

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[1] This regulation was struck down by the Court of Appeals for the Ninth Circuit in *Sam Andrews' Sons* v. *Mitchell,* 457 F. (2d) 745 (1972), as an abuse of the Attorney General's discretion under the Immigration and Nationality Act (INA).

In light of this history of administrative construction of the regulation,[2] we have reassessed our conclusions, focusing now not on the meaning of the regulation but rather on its validity as so construed. After careful consideration, we continue to have serious doubt whether § 124.2(h)(10) would be upheld if applied to require that nonimmigrant alien employees cease working in a situation like the soccer strike. This is so for two related reasons, both of which were touched on in our memorandum. First, the broad and unconditional requirement that an employee withhold his services during a work stoppage would appear to impinge on the individual's rights under § 7 of the National Labor Relations Act (NLRA), and, potentially, to upset the balance struck by Congress under that Act between labor and management, without serving any discernible purpose under the Immigration and Nationality Act. As you recognize, the two laws must be construed in a manner calculated to minimize conflict between them.

Second, while the Attorney General's authority under § 214(a) of the INA, 8 U.S.C. § 184(a) to impose conditions upon a nonimmigrant's visa is certainly very broad, at least in the absence of some more specific factual information about how this regulation relates to the purposes of the INA in a case like the soccer strike, we question whether his authority extends this far. As we noted in our memorandum, the conditions imposed must have some reasonable relationship to ends that are permissible under the INA, particularly in cases where those conditions are inconsistent with other constitutional or statutory guarantees. *Cf., Kleindienst* v. *Mandel*, 408 U.S. 753, 769 (1972) (violation of visa terms on previous visit sufficient grounds for exclusion of applicant for admission under § 212(a)(28) and (d)(3)). We have been pointed to no specific instance of employer "stockpiling" or other abuse of the temporary worker system that enforcement of this regulation could resolve.

That the present regulation can be enforced only through the institution of deportation proceedings adds to our concern. The purpose for which an H worker is admitted is to fill a gap in the domestic labor market for the benefit of the employer. A rule that triggers deportation without some finding that the conditions of entry no longer exist or that there are some statutory grounds for deportation seems to us likely to be held unreasonable in many situations. We think it would present particularly troublesome issues if invoked to deport an individual solely because he engaged in concerted activity against his employer.

The theory underlying the present regulation, as we understand it, was to preserve as neutral a role as possible between INS and the temporary alien worker in a labor dispute. Recognizing that the goal of neutrality

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[2] Section 214.2(h)(10) has been actually enforced on only one occasion since its promulgation—in connection with the 1976 baseball strike. It is our understanding, however, that none of the nonimmigrants involved in that situation had actually entered the United States at the time of the strike. There is thus no precedent for the regulation's application to individuals actually at work in this country at the time a labor dispute arises.

is an appropriate one for INS, and at the same time that there may be many situations in which it would be equally appropriate under the INA to limit alien involvement in domestic labor disputes, we have undertaken to assist INS in drafting a regulation that would be more precisely tailored to the purposes of the INA and less likely to precipitate conflicts with the NLRA.

You have closed by offering the assistance of your Solicitor's Office in reconsidering this Department's interpretation of the regulation. At a meeting called to discuss this matter last week, we were informed by your Solicitor's Office that while the Department of Labor was interested in being informed of any proposed changes in the INS regulations, it was not interested in participating in their development. We would indeed appreciate whatever assistance those knowledgeable in your Department have to offer, and we would particularly find it valuable to have its active involvement in considering the preparation of a new regulation.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

July 19, 1979

79-54 MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Constitutional Law—Article I, Section 6, Clause 2—Appointment of Member of Congress to a Civil Office

This memorandum addresses the arguments made in a letter dated July 16, 1979, from the general counsel of the National Rifle Association (NRA), to Senator Joseph Biden concerning the constitutional eligibility of Representative Abner Mikva for appointment to the U.S. Court of Appeals for the District of Columbia Circuit. The letter substantially repeats contentions contained in an unsigned memorandum dated July 2, 1979, to which I responded in my memorandum to you of July 11, 1979. However, in order to clarify the issues, we will discuss certain of the main points advanced by the NRA after summarizing our position.

It is our conclusion that, under the present statutory posture, Congressman Mikva's appointment is not barred by Article I, Section 6, Clause 2, of the Constitution. First, since no increase in the emoluments of Federal judges has to date come into effect during this Congress, we are dealing with a situation in which there is a prospect—but no present reality—of such an increase. Accordingly, the question is whether the appointment is barred by the possibility of a future salary increase during the term for which the Member of Congress was elected. The plain language and settled executive interpretation of Clause 2 firmly support the view that a sitting member of Congress is not barred from appointment in such circumstances. Second, even if a salary increase were to occur prior to the appointment of Representative Mikva, it is our position that Congress is constitutionally empowered to exempt from coverage of the increase the office to which Representative Mikva may be appointed. Such practice has both historic (the appointment of Senator Knox as Secretary of State) and modern (appointment of Senator Saxbe as Attorney General) precedent, each of which was referred to in our earlier memorandum.

The NRA, in responding to these arguments, has stated quite clearly

(at page 2 of its July 16 letter) that its position is that under existing statutes "the compensation of federal judges must increase during the present Congress." This is simply incorrect. It is possible for Congress, by means of legislation, to block a salary increase for judges during the present Congress; we do not now know what course Congress will take.

Further, the NRA letter makes plain that its position is that all sitting Members of Congress are barred from appointment to Federal judgeships, or any other "civil office" for purposes of Clause 2, until after the end of their terms as Members of Congress. That reasoning rests on the premise that the Federal salary statutes, by providing for the possibility of annual adjustments in Government salaries, disqualify all Members of Congress because, after their appointment to a civil office, the office to which they had been appointed may have its compensation adjusted upwards. Such an extreme view fails to take account of the plain wording of Clause 2, stating that no Member of Congress "*shall* * * * be appointed" to a civil office the emoluments of which "*shall have been* encreased" during the term for which the member was elected. [Emphasis added.] As we noted in our earlier memorandum, by using the future tense in referring to an appointment, while employing the future perfect tense to refer to an increase in emoluments, the provision on its face displays a clear and unambiguous intent of preventing an appointment only when an increase in the emoluments of an office precedes an appointment.

In response, the NRA letter seems to suggest that our position treats differently the provision's language "shall have been created * * * during such time," referring to an office, and the language "shall have been encreased * * * during such time," referring to the compensation. If we understand that suggestion correctly, the opposite is in fact the case. For it is clear that a Member of Congress cannot be appointed to a civil office before the office has been created. Thus, the constitutional language referring to the creation of offices must be taken to refer to a situation in which an office is created during the term of a Member of Congress, at a certain time, and after that time but before the end of his term, the member is appointed to the office. Such an appointment under Clause 2 is barred. In precisely analogous fashion, with respect to the language regarding an increase in emoluments, the language must, in our opinion, be taken to refer to a situation in which the emoluments of an office are increased during the term of a Member of Congress, at a certain time, and after that time but before the end of this term, the Member is appointed. In short, the two situations should be viewed in parallel terms. That reasoning leads to our conclusion that unless emoluments for an office have been increased prior to appointment, the Constitution presents no bar.

Further, the NRA's letter rather inexplicably asserts that Attorney General Clark's opinion regarding the appointment of Representative Laird to the office of Secretary of Defense does not lend support to the view that Representative Mikva's appointment would be constitutional.

In fact, the Clark opinion directly supports that view. Under the statute involved in the Clark opinion, the President was authorized to include recommendations for salary increases, if any, in his budget message to Congress, the recommendations to become effective no earlier than 30 days following the transmittal in the President's budget message, unless they were disapproved by Congress. Under these circumstances, Mr. Laird would have been a Member of the 91st Congress when the recommendations for salary increases were transmitted, but the Secretary of Defense when they became effective. *See* Op. Att'y Gen. 381, 382 (1969) On this basis—which if anything is less favorable than the present factual situation—Attorney General Clark reasoned that the appointment would be valid because the proscription of Clause 2 does not apply where "it is impossible but not certain at the time of the appointment that a proposed salary increase for the appointee may receive final approval at a future date." 42 Op. Att'y Gen. 382. That reasoning applies directly to this case, in which it is possible, but not certain, that a salary increase may receive final approval at a future date.

In response to our contention that even if, in the future, a salary increase for Federal judges were to come into effect before Representative Mikva were appointed to the Federal bench, Congress still could by legislation exempt his office from coverage of the salary increase. The July 16 memorandum merely repeats points earlier advanced. The short answer is that, although this point has been debated in the past (for example, by Professor Kurland), Congress quite correctly, has not accepted the suggestion that Clause 2 stands in the way of such a procedure.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

July 24, 1979

79-55 MEMORANDUM OPINION FOR THE ASSISTANT TO THE PRESIDENT FOR DOMESTIC AFFAIRS & POLICY

Constitutional Law—Commerce Clause (Article I, Section 8, Clause 3)—Constitutional Aspects of the Proposed Energy Mobilization Board Legislation

The purpose of this memorandum is to expand on and to memorialize this Office's legal advice to your staff regarding the Administration's proposal to create an Energy Mobilization Board (Board).

The Board, to be established in the Executive Office of the President, would have three members appointed by the President with the advice and consent of the Senate. The Board's central purpose would be to expedite the completion of designated "critical energy facilities"—projects intended to reduce the Nation's reliance on imported oil.

Expedition would be achieved by the Board's establishment of a Project Decision Schedule (Schedule), setting a timetable for all Federal, State, and local decisionmaking required for the completion and operation of a critical energy facility (CEF). Should any agency fail to render a decision within the set time, the Board itself would then make the decision, applying the Federal, State, or local law that the supplanted agency would have applied. In establishing the Schedule, the Board would be authorized to waive any Federal, State, and local procedural decisionmaking requirements, such as those relating to the methods of decisionmaking and timing. While no substantive environmental and other standards could be changed, the Board would be authorized to either (1) designate a lead agency to prepare a single comprehensive environmental impact statement (EIS) for a CEF, or (2) waive Federal, State, and local EIS requirements and adopt another method of evaluating the environmental impact of a CEF. The Board would also be authorized to waive Federal, State, and local laws and regulations enacted or promulgated after the commencement of construction of a critical energy facility if the new requirement hindered its expeditious completion and if grant of a waiver would not unduly endanger public health or safety.

The Administration's proposal also seeks to expedite the completion of CEFs by limiting and expediting judicial review, because the Board decision designating CEFs and establishing Schedules would not be subject to review. All other actions would be subject to review only in a Federal court of appeals. Parties challenging agency action would have 60 days from the completion of the permit process to bring suit unless the Board determines that earlier review is necessary in order to expedite completion of the process or to ensure fairness. In reviewing Board and agency decisions, the courts of appeal would apply the appropriate Federal, State, and local substantive law.

The proposal raises constitutional questions of first impression, and our memorandum addresses these issues.

I. The Board's Decisionmaking Authority

The purpose of the legislation is to expedite completion of energy projects designed to reduce national dependence on foreign sources of oil. Effectuation of the important national interests of reducing oil imports and increasing domestic energy production is within Congress' broad power under the Commerce Clause of the Constitution, Article I, Section 8, Clause 3. The Supreme Court has, however, recognized limits on the exercise of congressional power under the Commerce Clause when legislation interferes with traditional state functions. *See, National League of Cities* v. *Usery,* 426 U.S. 833 (1976). The proposal is subject to challenge on this ground because it empowers the Board to: (1) set decision schedules binding on State and local agencies; (2) waive State and local procedural decisionmaking requirements; and (3) supplant State and local decisionmakers. We treat these questions *seriatim.*

A. Scheduling

Under the proposal, all State and local agencies would be required to forward to the Board a proposed timetable for actions related to approval of a CEF and the Board then sets a deadline for each decision. In cases of "exceptional national need," this deadline could be shorter than the one set by State or local law.

It could be argued that Congress would exceed its power under the Commerce Clause by authorizing a Federal agency to make a decision. This argument takes on force when one considers the possibility that such decisions may be made by local units of government—*e.g.,* town councils.

In *National League of Cities* v. *Usery, supra,* the Court invalidated extension of the Fair Labor Standards Act's (FLSA) minimum and maximum hour standards to State and local governments. The Court's opinion, written by Mr. Justice Rehnquist, held that the Federal requirements had a significant impact upon the functioning of State and local governments, compelling them to forego governmental activities and displacing

local policies regarding the manner in which governmental services would otherwise be supplied. *Id.*, at 847–48. Thus, the extension was found to "impermissibly interfere with the integral governmental functions" of States and localities. The Court concluded that "insofar as the challenged amendments operate to displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3." *Id.*, at 852.

The reasoning of the Court provides the framework for analysis of the constitutionality of the Administration's proposal. It could be forcefully argued that local decisions on land use, health, and safety are traditional State functions and that Federal imposition of deadlines is an impermissible intrusion in the decisionmaking process that "may substantially restructure traditional ways in which local governments have arranged their affairs." 426 U.S., at 849.

Notwithstanding such contentions, we believe that the scheduling mandate of the Board is not contrary to the holding in *National League of Cities*. First, the Court stressed the financial burden imposed by FLSA on States and localities. Here, Congress would not be imposing a burden, altering fiscal policies, curtailing traditional State and local activities, or regulating the provision of traditional services. The Federal Government would not be directing local governing bodies to decide a matter in a particular way; localities would be free to grant or deny permits and licenses pursuant to State and local standards. Nor would the Board require localities to perform a new function; it would simply set a deadline for a decision that would otherwise be made at some time. Analytically, State and local decisionmakers and procedures would not be displaced because there is no power in the Board to require such agencies to follow the Schedule. The Board could not, for example, seek injunctive relief to require a State agency to meet the Schedule. Rather, the situation here is analogous to several complex Federal regulatory programs, such as the Clean Air Act discussed below, which set specific ground rules for State action and which provide for preemption by Federal agencies of the State role if those rules are not followed. Such programs have been sustained against constitutional challenges similar to those that we may anticipate would be leveled against a statute enacting the Administration's program. We therefore believe that the Board may be empowered to set reasonable deadlines for local decisions.

Moreover, it should be noted that Mr. Justice Blackmun jointed the Court's opinion in *National League of Cities* because it "adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." 426 U.S. at 856.

We believe that the balancing approach suggested by Mr. Justice Blackmun would sustain the authority of Congress to empower the Board to determine State and local deadline. The seriousness of the energy crisis

is apparent, and its impact on foreign policy, national security, and international monetary policy will, we assume, be the major focus of congressional deliberation concerning this proposal. A CEF may be designated only if a project has been determined "to be critical in contributing to the reduction of the nation's dependence upon imported oil or petroleum products;" and State and local deadlines may be shortened only "[i]n circumstances of exceptional national need." We are persuaded that these interests will be sufficient to override a local agency's interest in deciding when to decide. The national interest in expedition seems strong enough to overcome State and local decisionmaking processes that, Congress finds, delay decisions necessary to the expeditious completion of CEFs.

B. Waiver of State Procedures

For the reasons discussed above, we believe that the authority of the Board to waive State and local procedural requirements passes constitutional muster. Since substantive standards such as those regarding the environment, land use, health, and safety are specifically excluded from a waiver, there is no threat to the provision of traditional State and local services. Waivers impose no financial burden on the States or localities; if anything, they are likely to conserve State and local resources. Again, we believe that the critical national interest at stake outweighs State or local interest in any particular decisionmaking procedures. Our conclusion, however, is subject to two qualifications. First, the waiver power of the Board is subject to due process limitations. Since it is likely that private rights will be at stake when property is taken or a particular land use is permitted, wholesale waiver of procedures could deny injured persons due process protection. Second, wholesale waiver may obstruct a local agency's ability to make a rational decision or to carry out a traditional function. For example, total waiver of State and local environmental impact requirements might make it impossible in particular cases for a State to evaluate adequately the environmental impact of a facility and thus could hinder its rational function of protecting the public health and safety.[1] But these are problems of degree, not kind. The possibility that a court might find that a particular instance of waiver denied constitutional rights or unconstitutionally interfered with a State's performance of its sovereign functions would not void the waiver provision as a whole. So long as the Board applied a procedural waiver reasonably and "in circumstances of exceptional national need," we believe such action would be constitutional.

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[1]This problem is mitigated by the proposal's requirement that "in each case of waiver, the Board shall establish alternative procedures for the assessment of environmental impacts of the facility."

C. Displacement of State and Local Decisionmaking

The proposal provides that if a State or local agency fails to meet a deadline established by the Schedule, the Board may make the decision in lieu of the agency, thus intruding on authority exercised by State and local officials. It could be argued that supplanting decisionmaking strikes at the heart of State and local sovereignty, an integral governmental function.

However, the constitutional power of Congress to supplant local decisionmakers is already well established. Under the Commerce Clause, Congress may preempt local decisionmaking altogether and it may deprive local government totally from exercising its sovereign powers. Preemption of State and local laws that interfere with Federal energy policy is commonplace. *See, e.g.,* § 6(b) of the Emergency Petroleum Allocation Act, 15 U.S.C. § 755(b).

The critical distinction under the case law is between removing decisionmaking from the State and local authorities on the one hand and forcing State and local authorities to implement Federal programs on the other. This distinction is made clear by the courts of appeal decisions that considered constitutional challenges to the Clean Air Act, 42 U.S.C. § 7401 *et seq.,* and the Environmental Protection Agency's (EPA) implementing regulations. That Act gives States the opportunity to establish plans implementing Federal air pollution standards. If a State fails to develop an adequate plan, the EPA is authorized to promulgate a plan for the State. 42 U.S.C. § 7410(c)(1).[2] The EPA adopted regulations that would have subjected States to an injunction or criminal penalties for failure to implement the EPA-promulgated plan. The States challenged the constitutionality of the regulations, claiming that Congress would not authorize the EPA to compel State enforcement of Federal programs. Three courts of appeal suggested that EPA regulations exceeded Congress' power under the Commerce Clause by invading State sovereignty. *Brown* v. *EPA,* 521 F.(2d) 827, 834–40 (9th Cir. 1975); *District of Columbia* v. *Train,* 521 F.(2d) 971, 992–94 (D.C. Cir. 1975); *Maryland* v. *EPA,* 530 F.(2d) 215, 225–28 (4th Cir. 1975).[3] The courts distinguished a constitutional difference between Federal regulation of commerce and Federal regulation of State action in the commerce field. To the extent that EPA regulations forced State legislatures to enact laws or be subject to penalties, those regulations impermissibly intruded upon State sovereignty. The District of Columbia Court of Appeals held that the EPA was "attempting to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory

[2]The Federal Water Pollution Control Amendments, 33 U.S.C. § 1313(b), contain a similar provision.

[3]The judgments of the three courts of appeal were subsequently vacated and remanded by the Supreme Court based on an EPA concession that its regulations went beyond the power granted to it by the Clean Air Act. *See, EPA* v. *Brown,* 431 U.S. 99 (1977).

program * * * " 521 F.(2d), at 992. The court stated that EPA could seek State cooperation. Absent cooperation, the "recourse contemplated by the Commerce Clause is direct federal regulation of the offending activity and not coerced state policing of the details of an intricate federal plan under threat of federal enforcement proceedings." *Id.*, at 993. Similarly, the Fourth Circuit noted the difference between inviting a State to administer regulations and compelling administration under threat of injunction and criminal sanctions. While questioning the constitutionality of EPA regulations, the court had no problem with the "time honored and constitutionally approved device of threat and promise * * * . The threat is a federally imposed regulation with federal administration; the promise is the invitation for Maryland to enact a suitable implementation plan and administer it with state employees, thus avoiding federal interference." 530 F.(2d) at 228. None of the courts of appeal suggested that the authority of EPA to promulgate compliance plans for States that failed to comply was unconstitutional.

The distinction drawn by these cases strongly supports the constitutionality of the proposed Board procedures. We believe that Congress on an adequate record can preempt all State and local law that interfered with the construction of a critical energy facility. The Administration's EMB proposal, however, does not go so far; it seeks to achieve State and local cooperation without altering State and local law. The proposal sets a deadline for State action, inviting the States to act; if that deadline passes, the Board is empowered to make the decision. There is no conscription of State or local personnel or services; there is no compulsion of State or local action. States and localities are given the opportunity to act within a certain time before they lose their ability to act. Such a scheme clearly seems to fit within the "time honored and constitutionally approved device of threat and promise." *Maryland* v. *EPA, supra,* 530 F.(2d), at 228. In fact, this proposal is less intrusive than a scheme of total preemption because the Board will apply the substantive law of the States and localities[4] and its decisions will be subject to judicial review under the relevant State and local standards.

II. Judicial Review of State and Local Decisions

As outlined above, review of Board actions and decisions by Federal, State, and local agencies under the Schedule would be lodged exclusively in the Federal courts of appeal. The reviewing court would apply the Federal, State, or local law governing the challenged decisions. This raises the questions whether Congress may oust State courts of jurisdiction and whether Federal courts are capable of receiving such jurisdiction under Article III of the Constitution.

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[4]The incorporation of State and local laws as the Federal standards for decisions made by the Board in lieu of State and local decisionmakers is not novel. In the area of Federal taxation, the Internal Revenue Service routinely interprets and applies State laws establishing property rights in determining Federal tax liability. *See, e.g., Morgan* v. *Commissioner,* 309 U.S. 78 (1940).

A. Divesting State Court Jurisdiction

Congress has clear authority to vest in the Federal courts exclusive jurisdiction of cases within the purview of Article III of the Constitution. *Bowles* v. *Willingham*, 321 U.S. 503, 511-512 (1944); *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 429-30 (1867). And Federal courts may entertain State matters, applying controlling State law, if Congress so provides. *The Mayor* v. *Cooper*, 73 U.S. (6 Wall.) 247 (1867) (civil removal); *Tennessee* v. *Davis*. 100 U.S. 257 (1879) (criminal removal). Nor is it unusual for Federal courts to apply and interpret State law. Since *Erie RR. Co.* v. *Tompkins*, 304 U.S. 64 (1938), Federal courts sitting in diversity have applied substantive State law. Federal courts also apply State criminal law under the Assimilative Crimes Act, 18 U.S.C. § 13, and under removal statutes. *See, Tennessee* v. *Davis*, 100 U.S. at 271-72; *Miller* v. *Kentucky*, 40 F.(2d) 820 (6th Cir. 1930). And cases brought under the Federal Torts Claim Act are governed by State tort liability standards. 28 U.S.C § 1346(b).

Thus, we see no constitutional impediment to vesting exclusive jurisdiction in Federal courts or in having those courts apply the appropriate State or local law. The question that remains, however, is whether the courts of appeal are constitutionally empowered to decide such cases—that is, whether challenges to State and local permit decisions come within Article III.

B. Jurisdiction in the Courts of Appeal

Under the Administration's proposal, decisions made by the Board in lieu of State and local decisions may be subject to review in the courts of appeal. A suit challenging a Board decision falls within Federal jurisdiction, because the United States is a party to the suit.

If, however, a State or local agency renders a decision within the time limit prescribed by the Schedule, the basis for jurisdiction of a Federal court of appeals is less certain.[5] In such a situation, the question is whether these cases would "arise under" Federal law, and thus whether they may be made subject to Federal jurisdiction under Article III.

In order to examine the proposed basis on Federal court jurisdiction to review State actions, we believe it would be useful to define the context in which such litigation may arise.

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[5]We note that parties to the State or local agency proceeding may raise before an agency or before a Federal court certain Federal constitutional issues related to the agency's action, adequate to vest jurisdiction in the court over those issues. State claims would then be cognizable in the Federal courts under the doctrine of "pendent" jurisdiction. *See generally, United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

First, State court jurisdiction is being preempted because of the critical need for expeditious judicial review of State and local decisions affecting the planning, construction, and operation of CEFs. This judgment, necessarily reflects a belief that State courts cannot be relied on to reach decisions as promptly as required in order to meet the national objectives established for CEFs.

Second, the Energy Security Corporation would be a governmentally sponsored enterprise with a broad range of powers to shape the overall development of CEFs involved in the sponsorship of CEFs through direct grants or loans, or through construction of a limited number of CEFs. More importantly, the decision to bring a specific energy project under the Federal umbrella by designating it as a CEF triggers a range of actions open to the Board, which further illustrates the Federal interest present in any approval decision by a State or local agency.

Third, judicial review of most decisions made by State and local agencies may present at least some substantial Federal questions. Where, for example, the Board has granted a waiver of State procedural requirements to a State agency in order to enable it to meet its deadline for decisions prescribed by the Schedule, the Federal question whether the waiver power was exercised arbitrarily by the Board and whether the State agency's procedure comported with Federal constitutional requirements might well be part of the litigation.

The Administration's proposal, as presently drafted, provides neither for any overriding principle of Federal law to control the interpretation of State substantive law nor specifically for incorporation of State law as a Federal standard to be administered by State or local decisionmakers as Federal law. Thus, when either the Board or State and local agencies make approval decisions pursuant to State substantive law, they are applying that law *qua* State law. If Congress expressly incorporated State law as the Federal rule of decision, suits challenging those decisions would "arise under" the laws of the United States. *See, Macomber* v. *Bose,* 401 F.(2d) 545 (9th Cir. 1968); *Stokes* v. *Adair,* 265 F.(2d) 662 (4th Cir. 1959), cert. denied, 361 U.S. 816 (1959); *Quadrini* v. *Sikorsky Aircraft Division, United Aircraft Corp.*, 425 F. Supp. 81, 87 (D. Conn. 1977); *Textile Workers Union* v. *American Thread Co.*, 113 F. Supp. 137, 140 (D. Mass. 1953). The decisions establish that Congress may incorporate State law as the Federal standard and also that it may leave to the States the authority to amend the substance of the State laws on the books when the Federal statute effecting such incorporation is enacted. *See, e.g., United States* v. *Sharpnack,* 355 U.S. 286 (1958).[6]

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[6]Incorporation would permit Congress to freeze State law standards as presently in force. The Administration's proposal, however, does not seek to freeze standards as they may evolve, which suggests that there are no significant policy reasons to have State law directly incorporated, except to the extent that incorporation brings actions relating to a CEF within the purview of Article III.

(Continued)

Assuming, however, that there is at least some symbolic reason to allow State decisionmakers to continue to apply State law *qua* State law, we believe that Federal court jurisdiction under the so-called "protective jurisdiction" theory would be available.

In *International Brotherhood of Teamsters* v. *W.L. Mead, Inc.*, 230 F.(2d) 576 (1st Cir. 1956), the court of appeals upheld the constitutionality of § 301 of the Taft-Hartley Act on the theory of "protective jurisdiction." Under that theory, Congress is not required to displace totally (or presumably to incorporate) all otherwise applicable State law in its comprehensive regulation of a specific area of activity. Rather, Congress may leave issues to be decided by reference to State law but place litigation over those issues and others in Article III courts. 230 F.(2d), at 580–81.

In reaching its conclusion, the court relied on *Williams* v. *Austrian*, 331 U.S. 642 (1947), a case in which Federal jurisdiction was found in a bankruptcy suit in which only State law would be applied by a Federal court.[7] The decision appears to suggest that some limits on "protective jurisdiction" might be derived from Article III, one such being the requirement of a high degree of overall Federal regulation of an area before Federal "protective" jurisdiction could be established. We think that the Administration's overall CEF proposal would clearly meet that threshold test. We would add that the court's analysis received the explicit approval of Justices Burton and Harlan in *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957), where the Court upheld the constitutionality of § 301 of the Taft-Hartley Act on other grounds.

Although we conclude that Federal jurisdiction consistent with Article III's "arising under" requirement may be conferred under either an "incorporation" or "protective jurisdiction" rationale, we would note that such jurisdiction could also be established by empowering the Board to intervene as a party in any case brought in a court of appeals challenging an approval decision made by a State or local agency. In these circumstances, jurisdiction would be established as an Article III matter by virtue of the United States or one of its instrumentalities being a "party" to the suit, *see, United States* v. *San Jacinto Tin Co.*,, 125 U.S. 273 (1888), having a judicially cognizable interest in its subject matter.

(Continued)

At least in theory, there might be a Tenth Amendment objection to federalizing the State law to be applied by State agencies, even though Federal law is substantively identical to the displaced State law. The objection would be that the State or local agency has, in effect, been instructed with regard to the law to be applied by it and is therefore required to administer a Federal program without having any freedom to decline to do so. *See, Maryland* v. *EPA, supra.*

[7]*See Also, Schumacher* v. *Beeler*, 293 U.S. 367 (1934). *See generally* Mishkin, "The Federal 'Question' in the District Courts," 53 Columbia L. Rev. 157, 195 (1953).

III. Conclusion

We conclude that constitutionally the Board may be granted authority to subject State and local agency decisonmaking to the Schedule; to waive nonconstitutional procedural requirements imposed on those agencies by State law; and to act in the place of such agencies when they fail to meet the Schedule. If the Schedule is met, then State sovereignty is respected; if the Schedule is not met, then decisionmaking power passes to the Board. We reach these conclusions acknowledging that these are constitutional law questions with no direct precedent either in judicial decision or historical experience.

We also believe that jurisdiction may be vested in the Federal courts to hear all challenges to approval decisions made by State and local agencies even in cases involving questions of substantive State law, that the Board may be made a party to any such action in order to ensure that the interests of the United States are adequately represented, and that the requirements of Article III are met.

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July 31, 1979

79-56 MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

(1) Federally Chartered Corporations—National Consumer Cooperative Bank—Board of Directors
(2) Recess Appointments

This responds to your memorandum concerning the National Consumer Cooperative Bank (the Bank). The Bank has been "created and chartered [as] a body corporate * * * as an instrumentality of the United States, and until otherwise provided, shall be a mixed ownership Government corporation." Act of August 20, 1978. § 101, 92 Stat. 499. I have been advised that it is important for budgetary reasons that the Bank be operational by early August. This would involve the convening of the Board of Directors by that time.

Under § 103(a) of the Act, 92 Stat. 502, the Board consists of 13 members who for the time being are to be appointed by the President by and with the advice and consent of the Senate. Seven members are to be appointed from the Senate. Seven members are to be appointed from among officers of agencies and departments of the Government of the United States, and six from the general public. The President has nominated 11 directors, 5 of whom are Government officials and 6 who represent the general public. It is likely that those directors will be confirmed prior to the August recess of the Senate. It is, however, possible that the remaining two Government officials will not be nominated until the end of July, too late to be confirmed prior to the recess.

The question is whether the initial meeting of the Board may be convened before all its members have been appointed. In my view, the Board can be so convened. The statutory language (§ 101) provides: "[t]here is hereby created and chartered a body corporate * * * ." Congress thus intended the corporation to come into existence immediately. Under the

common law rule a quorum consisting of a majority may act for a collective body in the absence of a statutory provision to the contrary.[1] Federal regulatory agencies frequently operate with vacancies in their membership as long as a quorum is present. Congress is fully aware of that practice, which has been approved by the Supreme Court,[2] and it did not indicate that a different rule should apply to the first meeting of the Bank's Board of Directors. We therefore are of the opinion that a Board meeting can be held if a quorum of at least seven directors is present, even if all of the statutory number of directors have not been appointed.

We are aware of the memorandum of the Deputy General Counsel of the Community Services Administration, which concludes that the Board cannot act before all of the 13 statutory members have been appointed. In our view, however, the authorities cited for that proposition are not applicable here.

These authorities are fairly old State cases relating to boards and commissions of a governmental nature. The Bank, however, although an instrumentality of the United States, would operate in the main like a private corporation. Two of the cases, *Williamsburg* v. *Lord*, 51 Me. 599 (1863), and *Colman* v. *Shattuck*, 62 N.Y. 348 (1875), as well as *Schenck* v. *Peay*, 21 F. Cas. 607 (C.C.E.D. Ark. 1868) (No. 12450), the only pertinent Federal case of which we are aware, deal with tax sales of real property where the courts traditionally are hypercritical. As Judge Miller stated in *Schenck:*

> Nothing is better settled in the law of the country than that proceedings in pais for the purpose of divesting one person of title to real estate, and conferring it on another, must be shown to have been in exact pursuance of the statute authorizing them, and that no presumption will be indulged in favor of their correctness. This principle has been more frequently applied to tax titles than to any other class of cases.

The other two cases cited in the memorandum, *People ex rel. Hoffman* v. *Hecht*, 105 Cal. 621 (1895), and *First National Bank* v. *Mt. Tabor*, 52 Vt. 87 (1879), in fact repudiate the ancient and technical common law rule on which the memorandum relies.

We have not been able to discover any recent applicable cases. In a closely related situation, namely, the increase in the number of the members of a board of directors of a corporation, it has been held that the quorum of the board is to be determined on the basis of the old board until the new members are actually elected, thus implying that a board is capable of transacting business before it has been brought up to its new membership. *Robertson* v. *Hartman*, 6 Cal. 2d 408, 57 P.2d 1310 (1936); *Rocket Mining Co.* v. *Gill*, 25 Utah 2d 434, 483 P.2d 897 (1971).

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[1] *Federal Trade Commission* v. *Flotill Products*, 389 U.S. 179 183 (1967); 2 Fletcher, *Cyclopedia of the Law of Private Corporations*, §§ 419, 421; 4 McQuillan, *The Law of Municipal Corporations*, § 13.30.

[2] *See, Federal Trade Commission* v. *Flotill Products, supra.*

The final argument of the Deputy General Counsel is that the Presidential or Federal control envisaged by Congress would be lacking if the Board were composed only of five Government and six private members. Federal control, however, is assured by the provision in § 103(a), pursuant to which any member of the Board appointed by the President serves at the pleasure of the President. This argument also overlooks the fact that, even if all Federal members were appointed, the Board could still transact business with a quorum consisting of one Government member and six private members.

You have also asked whether recess appointments would be appropriate for the two Government members who are not likely to be confirmed prior to the recess of the Senate. The Attorneys General have ruled that the President can make recess appointments during a month-long summer recess of the Senate. 33 Op. Att'y Gen. 20 (1921); 41 Op. Att'y Gen. 463 (1960). There have been numerous instances of recess appointments before and after those opinions during intrasession recesses of the Senate of a month or similar duration. However, since *Kennedy* v. *Sampson*, 511 F.(2d) 430 (C.A.D.C. 1974), which held that the Pocket Veto Clause of Article I, Section 7, Clause 2, of the Constitution does not apply to intrasession adjournments, Presidents have been reluctant to make recess appointments during an intrasession adjournment of the Senate, although the *Kennedy* case does not directly apply to recess appointments under Article II, Section 2, Clause 3, of the Constitution. Nevertheless, it is our opinion that the President is constitutionally authorized to make recess appointments during the forthcoming recess. The question whether the two Government members of the Board should be given recess appointments therefore constitutes a policy decision. In the event that it should be decided to give recess appointments to the directors, it would be necessary, in view of 5 U.S.C. § 5503, to submit nominations to the Senate before it goes into recess. Otherwise, the recess appointees could not be paid unless subsequently confirmed.

We recommend against designations under the Vacancy Act (5 U.S.C. §§ 3345–3349) in view of the uncertainties of the application of those provisions to agencies and instrumentalities other than the departments listed in 5 U.S.C. §§ 101, 102, and of the 30-day clause of 5 U.S.C. § 3348.

As to a call for the first meeting of the Board of Directors, it appears sufficient if it is signed by two or more of the directors. Some take the position that the agenda attached to the notice may be brief, others suggest a more comprehensive notice. We suggest that the agenda be signed by the directors calling the meeting.

Under the Sunshine Act it would be necessary to make a public announcement of the meeting, including a notice in the *Federal Register*. 5 U.S.C. § 552b.

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August 3, 1979

79-57 MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

Constitutional Law—Article II, Section 2, Clause 3—Recess Appointments—Compensation (5 U.S.C. § 5503)

We are responding to your inquiry whether the President can make appointments under Article II, Section 2, Clause 3 of the Constitution[1] during the forthcoming recess of the Senate, that is expected to last from about August 2 until September 4, 1979. It is our opinion that the President has this power.

A preliminary question is whether the President's authority to make appointments under this clause, commonly called "recess appointments," applies to all vacancies that exist during a recess of the Senate or whether it is limited to those vacancies that arise during the recess. A long line of opinions of the Attorneys General, going back to 1823 (*see* 41 Op. Att'y Gen. 463, 465 (1960)), and which have been judicially approved (*see, Allocco* v. *United States,* 305 F.(2d) 704 (2d Cir. 1962)), has firmly established that the words "may happen" is to be read as meaning, "may happen to exist during the recess of the Senate," rather than as, "may happen to occur during the recess of the Senate." The President's power to make recess appointments thus is not limited to those vacancies that occurred after the Senate went into recess, but extends to all vacancies existing during the recess regardless of the time when they arose. It should be noted, however, that where a vacancy existed while the senate was in session, the recipient of the recess appointment may be paid for his services only if the conditions of 5 U.S.C. § 5503 have been met. We discuss this matter in more detail later in this opinion.

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[1]Article II, § 2, cl. 3, provides:

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

The question whether an intrasession recess of the Senate constitutes a recess within the meaning of Article II, Section 2, Clause 3, of the Constitution has a checkered background. Attorney General Knox ruled in 1901 that an adjournment of the Senate during the Christmas holidays, lasting from December 19, 1901, to January 6, 1902, was not a recess during which the President could make recess appointments. 23 Op. Att'y. Gen. 599 (1901). That interpretation was overruled in 1921 by Attorney General Daugherty, who held that the President had the power to make appointments during a recess of the Senate lasting from August 24 to September 21, 1921. 33 Op. Att'y. Gen. 20 (1921). The opinion concluded that there was no valid distinction between a recess and an adjournment, and it applied the definition of a recess as described by the Senate Judiciary Committee in its report of March 2, 1905:

> the period of time when the senate is *not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions;* when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments * * * . [S. Rept. 4389, 58th Cong., 3d sess., 1905; 39 CONGRESSIONAL RECORD 3823. [(Emphasis added.)]

The Attorney General, however, closed with the warning that the term "recess" had to be given a practical construction. Hence, he suggested that no one "would for a moment contend that the Senate is not in session" in the event of an adjournment lasting only 2 days, and he did not believe that an adjournment for 5 or even 10 days constituted the recess intended by the Constitution. He admitted that by "the very nature of things the line of demarcation cannot be accurately drawn." He believed, nevertheless, that:

> the President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate. Every presumption is to be indulged in favor the validity of whatever action he may take. But there is a point, necessarily hard of definition, where palpable abuse of discretion might subject his appointment to review.

This opinion was cited and quoted with approval by the Comptroller General in 28 Comp. Gen. 30, 34 (1948), and reaffirmed by Acting Attorney General Walsh in 1960 in connection with an intrasession summer recess lasting from July 3, 1960, to August 15, 1960. 41 Op. Att'y Gen. 463 (1960). Presidents frequently have made recess appointments during intrasession recesses lasting for about a month.

In the winter of 1970 the Senate recessed from December 22 to December 28, 1970, and the House adjourned from December 22 to December 29, 1970. When the Office was informally approached about possible appointments during that recess, we advised against their making

in the light of the warning in Attorney General Daughtery's opinion. In connection with the Pocket Veto Clause of the Constitution, Article I, Section 7, Clause 2, the President, however, decided without awaiting our advice that the 6-day adjournment of the Senate constituted an adjournment which prevented the return of a Senate bill; hence, that he could pocket veto S. 3418, The Family Practice of Medicine Act. Senator Kennedy, who had voted in favor of the bill, thereupon sought a declaratory judgment that the bill had become law without the signature of the President because the President had failed to return the bill within the 10-day period provided for in Article I, Section 7, Clause 2, and that the 6-day intrasession adjournment did not prevent the return of the bill. The D.C. Circuit Court of Appeals held that the bill had become law. That decision was based on the considerations that the 6-day adjournment had not prevented the return of the bill on account of its short duration, and that it was an intrasession adjournment and "appropriate arrangements * * * for receipt of presidential messages" had been made. *Kennedy* v. *Sampson,* 511 F.(2d) 430, 442 (C.A.D.C. 1974). The decision rests on an extrapolation of *Wright* v. *United States,* 302 U.S. 583 (1938), but is inconsistent with important passages in the *Pocket Veto Case,* 279 U.S. 655, 683–687 (1929), which considered such "appropriate arrangements for the receipt of Presidential messages" to be ineffective. The executive branch did not, however, seek Supreme Court review of *Kennedy.*

As the result of *Kennedy* v. *Sampson,* President Ford indicated that he would not invoke the pocket veto power during an intrasession recess. Moreover, in view of the functional affinity between the pocket veto and recess appointment powers, Presidents during recent years have been hesitant to make recess appointments during intrasession recesses of the Senate.

We have carefully reexamined the pertinent opinions of the Attorneys General and have concluded that we should follow the opinions of Attorney General Daugherty and Acting Attorney General Walsh, which hold that the President is authorized to make recess appointments during a summer recess of the Senate of a month's duration. The decision in *Kennedy* does not require a departure from those rulings. While the Pocket Veto and Recess Appointment Clauses deal with similar situations, namely, the President's powers while Congress is not in session, they, nevertheless, are not identical. The Pocket Veto Clause deals with an adjournment of the Congress that prevents the return of a bill, the Recess Appointment Clause with a recess of the Senate. If the Founding Fathers had wanted the two clauses to cover the same situation, it is reasonable to assume that they would have selected identical language for both. *See, Holmes* v. *Jennison,* 14 Pet. 540, 570–571 (1840). Moreover, the effect of a pocket veto and of a recess appointment is different. A pocket veto is final. It kills the legislation absolutely and it can be revived only by resuming the legislative process from the beginning. A recess appointment, on the other hand, results only in the temporary filling of an office, and, as a practical matter,

Congress can force the recess appointee to resign by rejecting his nomination. Pursuant to an annual appropriation rider, a rejection has the effect of cutting off his compensation.[2] Finally, since, as pointed out above, *Kennedy* v. *Sampson* is in conflict with an important aspect of the decision of the Supreme Court in the *Pocket Veto Case, supra,* we do not consider it the last word on the question whether the President may exercise his pocket veto power during an intrasession adjournment of a month's duration.

Should the President decide to exercise his recess appointment power during the forthcoming recess of the Senate, the following technical points should be considered.

A. If the vacancy existed while the Senate was in session, the recess appointee can be compensated pursuant to 5 U.S.C. § 5503, only if: the vacancy arose within 30 days of the end of the session of the Senate, or, if a nomination for the office was pending before the Senate at the end of the session, or if a nomination for the office was rejected by the Senate within 30 days before the end of the session. In addition, a nomination to fill the vacancy referred to above must be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate. No nomination need be submitted where the vacancy occurred during the recess of the Senate.

B. A recess appointment presupposes the existence of a vacancy. If there is an incumbent in office the recess appointment in itself does not effect a removal of the incumbent so as to create a vacancy. *See, Peck* v. *United States,* 39 Ct. Cl. 125 (1904); 23 Op. Atty Gen. 30, 34-35 (1900). Before the President can exercise his recess appointment power in such a case he must exercise his constitutional removal power to the extent it is available, or, if not available, the incumbent must resign.

LARRY A. HAMMOND
Acting Assistant Attorney General
Office of Legal Counsel

[2]For the last pertinent statute, *see* Treasury, Postal Service and General Government Appropriations Act, 1979, § 604 92 Stat. 1015.

August 6, 1979

79-58 MEMORANDUM OPINION FOR THE ACTING ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

Renegotiation Board—Reporting Requirement (50 U.S.C. App. § 1215)—Effect of Absence of an Appropriation—Repeals by Implication

You ask whether contractors must continue to file financial reports with the Renegotiation Board in light of the absence of an appropriation for the Board. It appears that the situation giving rise to the question results from Congress' failure to make an appropriation for the Renegotiation Board without expressly repealing the Renegotiation Act, 50 U.S.C. App. § 1191 *et seq.* (1976). You note that, pursuant to 50 U.S.C. App. § 1215(e) (1976), contractors holding contracts or subcontracts subject to the Renegotiation Act must periodically file financial reports with the Renegotiation Board. Further, you state that a willful failure to file such a report constitutes a criminal offense, and that because of this contractors continue to mail financial reports to a nonexistent Board. The General Services Administration is holding the reports.

Based on the above you have asked whether the financial reporting requirements of 50 U.S.C. App. § 1191(c)(5)(A) (1976) are suspended or terminated. We believe that there is no requirement for the continued filing of the reports.

The Renegotiation Act of 1951, 65 Stat. 7, was enacted to eliminate excessive profits in contracts by which the United States procures property, processes, services, and the construction of facilities necessary for the national defense. The Renegotiation Board, following statutory guidelines, was to determine whether contracts subject to the Act resulted in excessive profits. 50 U.S.C. App. § 1217 (1976). The provisions of the Act applied only to receipts and accruals, under covered contracts, which were attributable to performance on or before September 30, 1976. 50 U.S.C. App. § 1212(c)(1) (1976).

Public Law No. 95–431, 95 Stat. 1043 (1978), the 1979 Appropriations Act for the Departments of State, Justice, Commerce, and others, provides that:

> For necessary expenses of the Renegotiation Board, including termination or cessation of the activities of the Board, and including hire of passenger motor vehicles and services as authorized by 5 U.S.C. 3109, $5,260,000, to be available only until March 31, 1979: *Provided,* That all property (including records) of the Board shall be transferred to the Administrator, General Services Administration, upon cessation of the Board's activities, or on March 31, 1979, whichever first occurs.

This provision was explained in the Senate report as follows:

> Contractors' liability to report their receipts and accruals to the Renegotiation Board under the Renegotiation Act of 1951 expired on September 30, 1976 [*see* 50 U.S.C. App. § 1212(c)(1)] and has not yet been extended beyond that date * * * .
>
> As a result of extensive hearings the Committee has concluded that the Board is not effective and by its emphasis on profits it is not an incentive to reducing costs. The appropriation recommended by the Committee is for the Board's activities during the period October 1, 1978 through May 31, 1979[1] to allow the Board sufficient time to close its offices, transfer its property and records to the General Services Administration, and provide for the orderly termination of activities, including the payment of terminal leave and severance pay to eligible employees. [Senate Rept. 1043, 95th Cong., 2d sess. 80–81 (1978).]

The House report likewise expressed dissatisfaction with certain of the Board's actions and made clear its intention that the Board's activities be completed prior to March 31, 1979, and thereafter cease (H. Rept. 1253, 95th Cong., 2d sess. 50–51 (1978)). The House report further deemed it appropriate to consider termination of the Board in light of Congress' failure to extend the Renegotiation Act after its September 30, 1976 expiration. *Id.* at 50.

We believe that Congress, by implication, repealed the Act and thus eliminated the Act's reporting requirements. In *Lewis* v. *United States,* 244 U.S. 134 (1917), the Court considered the effect of Congress' failure to appropriate for a particular Government office while augmenting the appropriation of the Interior Department for the Secretary of the Interior to finish the work "caused by the discontinuance" of the office. The Court stated:

> It is true that repeals by implication are not favored. The repugnancy between the later act upon the same subject and the formal legislation must be such that the first act cannot stand

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[1]The Senate later receded to the House's proposed March 31, 1979, termination date.

and be capable of execution consistently with the terms of the later enactment. As we view it, such conflict does appear in this instance.

It must be assumed that Congress was familiar with the action of the executive department undertaking to terminate the office and when Congress acted upon the assumption that the office was abolished and provided for the unfinished work * * * "caused by the discontinuance" of the office, such action was tantamount to a direct repeal of the act creating the office and had the effect to abolish it. [*Id.* at 144.]

We think that this principle applies here.[2] The Act is not capable of execution in light of the Board's abolition.

In this connection, it should be noted that since Congress intended to eliminate the Board's functions it follows that the reporting requirements under the Renegotiation Act were intended to cease with the Board's termination. This is for the simple reason that the reporting requirements were merely to assist the Board in carrying out its functions. Since those functions no longer exist, reporting would accomplish nothing.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

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[2]Here, as in *Lewis* v. *United States*, Congress acted through an appropriation measure. Thus, *Lewis* also stands for the proposition that Congress may repeal substantive laws by way of an appropriation provision. *See also, City of Los Angeles* v. *Adams*, 556 F. (2d) 40 (D.C. Cir. 1977).

August 10, 1979

79-59 MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

Federal Advisory Committee Act (5 U.S.C. App. I)—United States-Japan Consultative Group on Economic Relations

This responds to your request that we summarize the advice we have provided you by telephone concerning two questions that involve the U.S.-Japan Consultative Group on Economic Relations (the Group). The questions are the following: (1) is the Group covered by the Federal Advisory Committee Act; and (2) would an individual appointed to serve as the chief of staff for the American members of the Group be subject to the Federal conflict of interest statutes? Given the facts as we understand them, the answer to the first question is no, and the answer to the second question is yes.

The United States-Japan Consultative Group on Economic Relations has been established by agreement between the President and the Prime Minister of Japan. It is to be composed of eight members, with four serving from each country; to date, only the lead representatives of each nation have been appointed. The Group is to meet at regular intervals for a total of a few days per year. Its mission, in the broadest terms, is to provide a forum for discussion of major economic issues—involving trade, finance, commerce, and related matters—of significance to both nations and, ultimately, to bilateral relations between them.

There are to be two chiefs of staff, one for the Group's Japanese members and one for the American members. The American chief of staff is to be formally appointed either by the President or by the Secretary of State. The actual work of the staff director would include the identification, analysis, and monitoring of economic issues crucial to the Government's economic policy vis-a-vis Japan.

The Federal Advisory Committee Act

It is our opinion that as a matter of statutory construction Congress did not intend the Federal Advisory Committee Act (FACA), 5 U.S.C. App. (Supp. III, 1979), to apply to such a body created jointly by the United States and another nation. The FACA's definition of an advisory committee, in § 3(2), does not specifically mention international bodies. A broad and literal reading of the definition might encompass an international commission, assuming that it has the function of advising the President or a Federal agency. But, as we concluded in 1976 in the context of international joint commissions in which the United States participates, such a reading would be inappropriate.

First, it should not be assumed, absent clear evidence to the contrary, that Congress intended the FACA to apply, in this country or abroad, to groups created jointly by, and serving jointly, the United States and another sovereign state. For to conclude otherwise would in effect impose certain duties on the members of the group who are citizens of a foreign nation, and would empower U.S. officials to take control of aspects of the group's operation as required by the FACA. *See, e.g.*, FACA, § 10(d)-(f). Such a consequence might prove offensive to the foreign nation and its members, and would violate the accepted principle of statutory construction that, absent contrary indication, Federal legislation will not extend beyond the boundaries of the United States in order to avoid offending the "dignity or right of sovereignty" of other nations. *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 381 (1948); *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 285 (1952). In addition, substantial issues of constitutionality concerning the extent of the President's power to conduct foreign relations should be avoided in the construction of statutes. *See, e.g., United States* v. *Vuitch*, 402 U.S. 62, 70 (1971). For these reasons, we conclude that the FACA should not be viewed as applying to the U.S.-Japan Consultative Group.[1]

Conflict of Interest Statutes

The second question you have raised is whether the staff director for the American members of the Group should be considered an "officer" or "employee" of the United States, and thereby subject to the conflict of interest restrictions imposed on such persons. As you know, there are basically two types of Government employees for purposes of the conflict of interest statutes: regular employees, and "special Government employees." If one fits within either category, he or she must meet certain standards set down by the conflict of interest statutes; however, the standards applicable

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[1]It should be noted that there is a second ground upon which it might be concluded that the FACA is inapplicable. The Act applies only to groups whose functions are "advisory" in nature, and this group—serving as an instrument of U.S. foreign policy—might be regarded as "operational" rather than advisory. Because we think the result clear for the alternative reason stated above, we have not studied in detail this second ground.

to special Government employees, who are appointed to perform services (with or without compensation) for not more than 130 of the succeeding 365 days, are somewhat less stringent. For both categories, the threshold test is whether a person is an "officer" or "employee" of the United States.

In light of the facts as explained to us, there seems to be little doubt that the staff director would be an officer or employee of the Government for present purposes. First, such an individual would be appointed to his position. Thus, there will be a clear formal relationship between the individual and the Government. In addition, the staff director is to perform functions that would appear plainly to be governmental in character. He will, for instance, assist in identifying issues of sensitivity to the U.S. Government in its economic relations with Japan. He will call upon officials in the Government with expertise in this area—such as in the Department of State and Commerce—and may ask them for background papers on matters of importance to the Nation. He will help assemble information needed in formulating advice to the President. He will also monitor Japanese responses to the Group's activities. Furthermore, he is to be directly supervised by the lead American representative among the Group's members, who is himself a full-time, regular Government employee. These facts, in their totality, lead us to conclude, on the basis of the tests we have applied in other circumstances, that the staff director would be at least a special Government employee, if not a regular Government employee.[2]

The designation of an officer or employee of the United States as a special Government employee, as that term is defined in 18 U.S.C. § 202, depends on a good faith estimate by the employing agency, made at the time of appointment, that the individual concerned will not actually perform services on all or part of more than 130 of the succeeding 365 days. The designation of a special Government employee remains in effect for the entire 365 days, even if it should turn out that the individual in fact serves for more than 130 days. *See, Federal Personnel Manual,* Chapter 735, Appendix C, at 2.

LARRY A. HAMMOND
Acting Assistant Attorney General
Office of Legal Counsel

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[2] *See also* B. Manning, *Federal Conflict of Interest Law* 27, 34 (1964).

August 16, 1979

79-60 MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

Political Contributions by Federal Employees (18 U.S.C. §§ 602, 607)

This responds to your memorandum concerning the interpretation of 18 U.S.C. §§ 602 and 607, which pertain to political contributions by Federal employees.

The first question you pose is whether, under 18 U.S.C. § 607, Federal employees may voluntarily make political contributions to the Carter-Mondale Presidential Committee. Section 607 criminalizes the giving by one Federal employee to any other Federal employee or officer of any valuable thing "to be applied to the promotion of any political object." The Civil Service Commission (now the Office of Personnel Mangement), however, has promulgated regulations pursuant to the Hatch Act expressly permitting Federal employees to "make a financial contribution to a political party or organization." 5 CFR § 733.111(a)(8) (1978). This Department, consequently, does not currently view voluntary contributions made to political organizations, including committees that support incumbent Federal officers for reelection, as prosecutable violations under § 607.

The second question you posed concerns 18 U.S.C. § 602. That statute prohibits any Federal officer from being "in any manner concerned in soliciting or receiving * * * for any political purpose whatever" anything of value from another Federal officer or employee. The issue presented is whether the President would be deemed "in any manner concerned" with soliciting political contributions from Federal employees on the sole ground that otherwise lawful contributions were made by Federal employees to his political committee that would benefit his campaign.

Section 602 proscribes activities by Federal officers or employees intended to coerce political contributions by other Federal officers or employees. Liability under § 602 depends on the acts of the Federal officer or employee involved. Assuming that the President, or any other Federal

officer or employee, in no way acted directly or indirectly with the object of securing contributions from other Federal officers or employees, he would not be vicariously liable under § 602 solely because an otherwise lawful contribution by a Federal employee had been made to his campaign.

For your information, this Department is prepared to give assistance to candidates and political committees by providing general information with respect to the interpretation of the criminal laws concerning campaign activities. Inquiries may be directed by any such party to the Assistant Attorney General in charge of the Criminal Division. In addition to the guidance this Office may provide concerning the duties and obligations of Federal employees, the President, like other concerned persons would, of course, be entitled to such general information.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

August 22, 1979

79-61 MEMORANDUM OPINION FOR THE SECRETARY OF AGRICULTURE

Animal Welfare Act (7 U.S.C. § 2131 *et seq.*)—Commerce—Application to Intrastate Activity

This is in response to your request for the opinion of the Department of Justice on the scope of coverage of the Animal Welfare Act, 7 U.S.C. § 2131 *et seq.* Specifically, you inquire whether the Act applies to activities that are entirely intrastate. The occasion for your question is the recent refusal by the U.S. Attorneys for the Eastern District of Pennsylvania and the Eastern District of Illinois to prosecute cases referred to them by your Department on the ground that the Act extends only to interstate transactions. For reasons stated hereafter, we believe that Congress intended the Act to cover purely intrastate activities otherwise falling within its provisions.[1]

The Animal Welfare Act was enacted in 1966 as Pub. L. No. 89-544, 80 Stat. 350. As stated in its preamble, its purpose was "to prevent the sale or use of dogs and cats which have been stolen, and to insure that certain animals intended for use in research facilities are provided humane care and treatment," by regulating certain activities "in commerce." This term was defined in § 2(c) of the Act as follows:

> The term "commerce" means commerce between any State, territory, possession, or the District of Columbia, or the Commonwealth of Puerto Rico, and any place outside thereof; or between points within the same State, territory, or possession, or the District of Columbia, or the Commonwealth of Puerto Rico, but through any place outside thereof; or within any territory, possession, or the District of Columbia.

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[1]Nothing in this opinion should be viewed as expressing our views on any question other than the narrow legal issue regarding the general application of the Animal Welfare Act to purely intrastate activities.

In 1970, the definitional section of the Act was amended. The definition of "commerce" in § 2(c) was expanded to include "trade traffic * * * [and] transportation," as well as "commerce." A new § 2(d) added a new definition for "affecting commerce:"

> The term "affecting commerce" means in commerce or burdening or obstructing or substantially affecting commerce or the free flow of commerce, or having led or tending to lead to the inhumane care of animals used or intended for use for purposes of research, experimentation, exhibition, or held for sale as pets by burdening or obstructing or substantially affecting commerce or the free flow of commerce.

According to the House report accompanying the 1970 bill, this addition was

> intended to broaden the authority under the Act to regulate persons who supply animals which are intended for use in research facilities, for exhibition, or as pets. [H. Rept. 1651, 91st Cong., 2d sess. 9 (1970).]

More important, subsequent sections of the Act regulating specific activities were revised to cover activities "affecting commerce," rather than simply those "in commerce." *See, e.g.*, § 4, 7 U.S.C. § 2134 (transportation of animals); § 11, 7 U.S.C. § 2140 (identification of animals for transportation). We believe these amendments reflect Congress' intention to expand the Act's coverage beyond those activities that are "in commerce" in the strict sense and to reach activities that merely "affect" interstate commerce. This expanded coverage in turn reflects Congress' determination that certain specified activities have a sufficient effect on commerce among the States to require regulation, even if they take place entirely within one State.

The 1976 Amendments to the Animal Welfare Act confirm Congress' intent that the Act should extend to intrastate activities. Its preamble, § 1(b), 7 U.S.C. § 2131(b), was revised to incorporate the specific congressional findings underlying the regulatory system imposed by the Act. It now reads in pertinent part as follows:

> The Congress finds that *animals and activities which are regulated under this Act are either in interstate or foreign commerce or substantially affect such commerce* or the free flow thereof, and that regulation of animals and activities as provided in this Act is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce * * *. [Emphasis added.]

If there had been any doubt of the coverage of the Act prior to 1976, the amended preamble makes clear that all activities regulated under the Act, including those confined to a single State, are governed by its provisions.

In further clarification of this point, the definition of "commerce" itself now found in 7 U.S.C. § 2132(c) was revised to consolidate former §§ 2(c) and 2(d), so that the term "commerce" as used in the Act includes both traffic between States and traffic that merely "affects" such interstate traffic generally:

> The term "commerce" means trade, traffic, transportation, or other commerce—
> (1) between a place in a State and any place outside of such State, or between points within the same State but through any place outside thereof, or within any territory, possession, or the District of Columbia;
> (2) which affects trade, traffic, transportation, or other commerce described in paragraph (1).

We believe that this provision, read in the context of the other provisions of the Act and its legislative history, must be construed to provide two distinct definitions of "commerce" for purposes of the Act's coverage.[2] Any other construction would make meaningless, or at best redundant, the 1970 and 1976 amendments to the Act. We are, therefore, of the opinion that the Animal Welfare Act applies to activities that take place entirely within one State, as well as to those that involve traffic across State lines.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

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[2]If Congress had used the conjunction "and" between subparagraphs (1) and (2), it would be at least arguable that it would not have succeeded in carrying out its plain intent to expand coverage of the Act to purely intrastate activities that affect interstate commerce. Congress, however, did not use "and" to conjoin subparagraphs (1) and (2) but rather did not use a connective word.

August 27, 1979

79-62 MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

Transportation of Executive Branch Officials by Government Passenger Motor Vehicles (31 U.S.C. § 638a)

This responds to your request of July 20.

Home-to-work transportation in Government vehicles is governed by 31 U.S.C. § 638a(c)(2).[1] It prohibits generally the transportation of executive branch officials between their homes and places of employment by Government-owned passenger motor vehicles. Exceptions are provided for the following: (1) medical officers on out-patient medical service; (2) officers engaged in field work where approved by the head of the department concerned; (3) official use of the President and heads of executive departments, and (4) ambassadors and other principal diplomatic

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[1]The text of the provision is as follows:

(c) Unless otherwise specifically provided, no appropriation available for any department shall be expended

* * * * * * *

(2) for the maintenance, operation, and repair of any Government-owned passenger motor vehicle or aircraft not used exclusively for official purposes; and "official purposes" shall not include the transportation of officers and employees between their domiciles and places of employment, except in cases of medical officers on out-patient medical service and except in cases of officers and employees engaged in field work the character of whose duties makes such transportation necesssary and then only as to such latter cases when the same is approved by the head of the department concerned. Any officer or employee of the Government who willfully uses or authorizes the use of any Government-owned passenger motor vehicle or aircraft or of any passenger motor vehicle or aircraft leased by the Government, for other than official purposes or otherwise violates the provisions of this paragraph shall be suspended from duty by the head of the department concerned, without compensation, for not less than one month, and shall be suspended for a longer period or summarily removed from office if circumstances warrant. The limitations of this paragraph shall not apply to any motor vehicles or aircraft for official use of the President, the heads of the executive departments enumerated in section 101 of title 5, ambassadors, ministers, charges d'affaires, and other principal diplomatic and consular officials.

and consular officials. The statute also covers independent establishments and other agencies, wholly owned Government corporations, and the government of the District of Columbia, but not members of Congress and the Architect of the Capitol.[2]

We understand that our opinion is wanted with respect to the following particular questions: (1) the scope of the Comptroller General's implied exception to § 638a(c)(2) permitting home-to-work travel "in the interest of the Government;" (2) whether an appropriation for the purchase and operation of passenger motor vehicles implicitly authorizes their use for home-to-work transportation; (3) whether the statutory exception for "ambassadors * * * and other principal diplomatic and consular officers" extends to officials in the United States whose duties involve national defense and foreign policy; (4) the nature of "field work" in which home-to-work transportation may be allowed by an agency head; and (5) whether the statute applies to independent regulatory agencies and, if so, whether the President is empowered to promulgate implementing regulations for those agencies.

We will address these questions *seriatim.*

Your first question concerns the scope of the Comptroller General's view that home-to-work transportation may be provided when it is in the Government's interest and not merely for personal convenience. In our opinion, the scope of that exception is narrow.

Section 638a(c)(2) has a sparse and unilluminating legislative history. Between 1935 and 1946 it appeared sporadically in appropriation acts[3] and was enacted into permanent law in 1946.[4] Neither the committee reports nor the debates discuss it.[5] Its enactment appears to have been prompted by a recommendation of the Joint Committee on the Reduction of Unnecessary Federal Expenditure stating that the use of Government vehicles should be curtailed, both to save money and to conserve fuel in wartime. The Joint Committee expressed concern over both the private use of Government vehicles and the general level of use.[6]

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[2]Section 638a(c)(2) was enacted as § 16 of the Administrative Expenses Act of 1946, 60 Stat. 810. Section 18 of that Act, 41 U.S.C. § 5a, defines "department" as follows:

> The word "department" as used in this Act shall be construed to include independent establishments, other agencies, wholly owned Government corporations * * * and the government of the District of Columbia, but shall not include the Senate, House of Representatives, or office of the Architect of the Capitol, or the officers or employees thereof.

See also 41 CFR § 1-1.102 (1978).

[3]*See* Act of March 15, 1934, ch. 70, § 3, 48 Stat. 450; Independent Officer Appropriation Act, 1944, ch. 145, § 202(a). 57 Stat. 195.

[4]Administrative Expenses Act of 1946, ch. 744, § 16, 60 Stat. 810.

[5]*See* H. Rept. 109, 78th Cong., 1st sess. (1943). S. Rept. 247, 78th Cong., 1st sess. (1943).

[6]*See* S. Doc. 5, 78th Cong., 1st sess. at 2-4; 89 CONGRESSIONAL RECORD 895-896 (1943); 88 CONGRESSIONAL RECORD 4225-4226 (1942).

The statute prohibits expenditure of funds for the operation of any Government passenger motor vehicle not used exclusively for "official purposes." It excludes from "official purposes" home-to-work transportation for Government employees, other than those specifically excepted. Despite the plain language of the statute, the Comptroller General in a series of three opinions holds that an additional exception may be implied for situations in which an agency decides that such transportation is "in the interest of the Government."[7] He reasoned as follows:

> In construing the specific restriction in this statute against employee use of government-owned vehicles for transportation between domicile and placement of employment, our Office has recognized that its primary purpose is to prevent the use of Government vehicles for the personal convenience of an employee. In this regard we have long held that use of a Government vehicle does not violate the intent of the cited statute where such use is deemed to be in the interest of the Government. We have further held that the control over the use of Government vehicles is primarily a matter of administrative discretion, to be exercised by the agency concerned within the framework of applicable laws. 25 Comp. Gen. 844 (1946). [54 Comp. Gen. at 857.]

But this sweeping language has been applied narrowly by both the Comptroller General and this Department.

The implicit exception theory first appeared in dictum in 25 Comp. Gen. 844, 846–847 (1946). That decision involved a claim for cab fare from an employee's home to the place where he obtained a Government car for official travel. The claim was disallowed on the general principle that an employee must bear his own commuting expenses. In passing, the Comptroller General said that § 638a(c)(2) would not have prohibited the employee from "using a Government automobile to drive to his residence when it is in the interest of the Government that he start on official travel from that point, rather than from his place of business." *Id.* at 847.

He applied this implicit exception in two instances in 1975. In the first he held it to be in the Government's interest to provide home-to-work transportation for military employees abroad where the Department of Defense determined that there was a "clear and present" danger of terrorism. But the decision cautioned that it would be best for the Department of Defense to obtain specific statutory authority for this[8] and concluded that it would be an abuse of discretion to provide transportation in countries where no clear and present danger existed. 54 Comp. Gen. 854, 857–858 (1975).[9] In the second instance, the Comptroller General approved

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[7] 54 Comp. Gen. 1066 (1975); 54 Comp. Gen. 855 (1975); 25 Comp. Gen. 844 (1946).

[8] It appears that no such authority was obtained.

[9] *See* OLC Memorandum of November 1978, to the Counsel to the President, "Home-to-Work Transportation of White House Employees;" letter of November 16, 1978, to Senator Proxmire from the Assistant Attorney General for Administration.

the transportation of essential employees where a strike rendered normal public transportation unavailable. To avoid personal benefit to the employees, however, the decision states that transportation must be limited to "temporary emergencies" and that employees must pay the equivalent of commercial fares. 54 Comp. Gen. 1066, 1067-1068 (1975).

This Department has heeded that home-to-work transportation may be provided for the Director, Federal Bureau of Investigation, the Assistant to the President for National Security Affairs, and the Assistant Attorney General, Office for the Improvements in the Administration of Justice. For the first two individuals, it was the judgment of the responsible officers that a genuine danger to their personal safety existed. In our opinion, travel for the Assistant Attorney General was primary in the interest of the Government because his personal services were unique and indispensable and a temporary medical condition made it impracticable for him to use other transportation.[10]

With respect to both the Director of the Federal Bureau of Investigation and the Assistant to the President, additional factors were cited. Both were said to need communications equipment in the car to be able to respond to crises. In addition, it was said that the Government automobile permitted the Director to protect official documents that he took home. Standing by themselves, we doubt that these factors justify home-to-work transportation. They are common to large numbers of senior officials with duties involving national defense, foreign policy, or law enforcement. Rather than being the product of forces beyond the control of the employing agency, they are inherent in the position. If such common circumstances made home-to-work transportation primarily for the Government's convenience, the statute's express prohibition would be a dead letter for a significant number of senior officials. Nothing in its text, background, or prior interpretation supports a reading so contrary to its plain meaning.

This is a true *a fortiori* of another justification sometimes given for home-to-work transportation, namely, that it conserves the valuable time of senior officials by permitting them to work while being transported. There is hardly a senior officer to whom this rationale would not, in fact or fancy, apply. It would also make the statute nearly a dead letter for any officer with sufficient status to have a regularly assigned automobile. A senior official may lengthen his or her working day, if necessary, by coming earlier, leaving later, and living closer to the office. Using Government transportation instead is a matter of personal convenience.[11]

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[10]Memorandum of August 29, 1977, "Automobile Transportation for Assistant Attorney General Meador." Transportation for Mr. Meador was originally approved for 60 days. It has been subsequently extended indefinitely because his medical condition proved permanent.

[11]*Cf.* 23 Comp. Gen. 352, 357 (1943); 19 Comp. Gen. 836-837 (1940).

We are aware of nothing that supports a broad application of the exception implied by the Comptroller General. That exception may be utilized only when there is no doubt that the transportation is necessary to further an official purpose of the Government. As we view it, only two truly exceptional situations exist: (1) where there is good cause to believe that the physical safety of the official requires his protection, and (2) where the Government temporarily would be deprived of essential services unless official transportation is provided to enable the officer to get to work. Both categories must be confined to unusual factual circumstances.

The second question is whether an appropriation for the purchase, operation, or hire of passenger motor vehicles implicitly authorizes their use for home-to-work transportation. In our opinion, it does not.

Section 638a(a) provides that, "[u]nless specifically authorized by the appropriation concerned or other law," no appropriation may be used to hire or purchase passenger motor vehicles other than those for the President and heads of the executive departments. As part of the Administrative Expenses Act, this provision also applies to all executive establishments. *See* footnote 2, *supra.* Its purpose is to retain congressional control over procurement of passenger cars.[12] Accordingly, appropriations specifically provide for the purchase or hire of passenger motor vehicles.[13] And § 638a(c)(2) similarly states that an appropriation must "specifically" provide that it is available for home-to-work transportation. We are aware of only one instance in which Congress has done so.[14] Since the exceptions to § 638a call for two separate "specific" statements serving two separate purposes, an appropriation for the procurement of passenger automobiles for official use plainly does not imply authority to use them for home-to-work transportation. Were this not so, any agency that could buy automobiles could use them without regard to § 638a(c)(2).

The third question is whether the "ambassadors, ministers, charges d'affaires, and other principal diplomatic and consular officers" excluded from the prohibition of § 638a(c)(2) include officials in the United States whose duties involve national defense or foreign relations. Our opinion is that they do not.

These terms are not defined in the statute or discussed in its legislative history. They do, however, have a well-established connotation of persons who represent a government abroad. They have been construed as respectively, the accredited representatives of the United States abroad and of

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[12] *See generally* 44 Comp. Gen. 117 (1964).

[13] *See, e.g.,* Act of June 30, 1976, Pub. L. No. 94-330, 90 Stat. 778; Military Construction Appropriation Act, 1966, Pub. L. No. 89-202, § 105, 79 Stat. 837; Department of Justice Appropriation Act, 1950, Pub. L. No. 179, 63 Stat. 460.

[14] *See* Legislative Branch Appropriation Act, 1979, 92 Stat. 786 (shuttle buses for Library of Congress employees).

of foreign states here.[15] Their technical meaning is that ambassadors, ministers, and charges d'affaires are the chief officers of a diplomatic mission abroad.[16] By familiar principles of statutory construction, Congress should be understood as having used these terms to accord with their technical meaning as reinforced by prior legal usage.[17] The named officials refer to senior diplomatic officials representing this country abroad. By the principle of *ejusdem generis,* the class of "other principal diplomatic and consular officers" is limited to persons of the same type—that is, senior officials who represent the United States abroad.[18] This interpretation confines the exclusion to a well-defined group that Congress rationally could have set apart for reasons of protocol, prestige, and usage, and thus it is not inconsistent with the general purpose of § 638a(c)(2).

The next question is the nature of the limited exception for "field work." This is also a technical term. For purposes of pay and classification, the civil service laws distinguish between the "departmental" service on the one hand and the "field" service on the other. As explained in a decision by the Comptroller of the Treasury, 21 Comp. Dec. 708, 711 (1915):

> The executive departments of Government execute the laws which Congress enacts through the instrumentalities sometimes designated "departmental" and "field" establishments. What is known as the "field force" is engaged, directly or indirectly, in locally executing the laws, while the "departmental force" is engaged in general supervisory and administrative direction and control of the various field forces.[19]

Field employees are located for the most part, out of Washington. In many cases, such as inspectors, extension agents, or law enforcement personnel, their work involves visits to scattered locations away from their office. Departmental employees, on the other hand, would be concentrated in Washington, and their routine duties would be performed at their posts.

As we have said above, Congress is usually understood to have used a technical legal term in accordance with its legal meaning. Thus, "field work" consists of the execution of statutory programs by individuals below the policy level stationed away from the seat of government. It often saves considerable time for these individuals to go directly from their homes to a workplace away from their office, and it reasonably can be

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[15] *Ex Parte Gruber,* 269 U.S. 302, 303 (1925); *In re Baiz,* 135 U.S. 403, 424–425, 432 (1890); 7 Op. Atty. Gen. 186, 190–192 (1855). *See also, The Federalist,* No. 81, at 510–511 (Harvard ed. 1961).

[16] *See* 7 Whiteman, *Digest of International Law,* §§ 2, 15; 4 Rackworth, *Digest of International Law* § 370, at 394–396; *id.,* § 371, at 398.

[17] *See, Bradley* v. *United States,* 410 U.S. 605, 609 (1973); *Standard Oil Corp.* v. *United States,* 221 U.S. 1, 51 (1911).

[18] *See, e.g., Cleveland* v. *United States,* 329 U.S. 14, 18 (1946); *United States* v. *Stever,* 222 U.S. 167, 174–175 (1911).

[19] *Accord,* 19 Comp. Gen. 630, 631 (1940); 5 Comp. Gen. 272, 273–274 (1925).

viewed as within the Government's interest for them to do so.[20] The "field work" exception therefore should be viewed as an express recognition by Congress that it is in the Government's interest for official vehicles to be used in this way, subject to the control of the agency head.

Your final question is whether § 638a(c)(2) applies to independent regulatory agencies and, if so, whether the President has the power to promulgate regulations implementing the statute for these agencies. We believe that the statute does apply to independent regulatory agencies, and that the President has the power to promulgate implementing regulations for that purpose.

Section 638a(c)(2) provides that no appropriation available for any "department" shall be expanded for the use of vehicles for other than official purposes. We have pointed out above,[21] that the Administrative Expenses Act of 1946 provides that the term "department" shall be construed to include *"independent establishments, other agencies*, wholly owned Government corporations * * * and the government of the District of Columbia * * * ." [Emphasis added.]

The President may promulgate regulations to enforce § 638a for both executive departments and independent establishments. The President's authority has two sources. First, 5 U.S.C. § 7301 empowers him to "Prescribe regulations for the conduct of employees in the executive branch." Under this authority, the President and his delegates have promulgated regulations governing employee conduct in agencies throughout the executive branch, including the independent regulatory agencies.[22] Authority under § 7301 has been held to include regulations relating to the use of Government property.[23]

The second source of authority is the Federal Property and Administrative Services Act, 40 U.S.C. § 471 *et seq.* This statute applies to all the executive agencies, including independent establishments.[24] Its general purpose is to provide an efficient and economical system for the procurement, supply, and utilization of Government personal property.[25] Under it, the Administrator of General Services has the power to "procure and supply personal property * * * for the use of executive agencies in the proper discharge of their responsibilities" to the extent that he determines it advantageous in terms of economy and efficiency.[26] The President may prescribe policies and directives "not inconsistent" with the provisions of the Act that he considers necessary, and these are binding on executive

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[20] *See* 25 Comp. Gen. 844, 847 (1946).

[21] *See* pp. 1-2 and note 2, *supra.*

[22] *See* Exec. Order No. 11222 (1965); 5 CFR § 735.102(a)(Civil Service Commission); 16 CFR § 5.2 (FTC); 29 CFR Part 100 (NLRB); 29 CFR § 1600.735-1 (EEOC); 47 CFR § 19.735-107 (FCC); 49 CFR Part 1000 (ICC).

[23] *See, Kaplan* v. *Corcoran,* 545 F. (2d) 1073, 1077 (7th Cir. 1976): *see generally, Old Dominion Branch No. 496, AFL-CIO* v. *Austin,* 418 U.S. 264, 273, n. 5 (1974).

[24] 40 U.S.C. § 472(a).

[25] 40 U.S.C. § 471.

[26] 40 U.S.C. § 481(a)(3).

agencies generally.[27] Subject to the President's authority, the Administrator may issue such regulations as he considers necessary to effectuate his functions under the Act.[28] At present, there is a specific General Services Administration regulation directing all executive agencies, which includes independent establishments,[29] to comply with § 638a(c)(2).[30]

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

[27] 40 U.S.C. § 486(a).
[28] 40 U.S.C. § 486(c).
[29] *See* p. 9 and note 25, *infra.*
[30] 41 CFR § 101-38.1304(c) (1978).

August 28, 1979

79-63 MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF ENERGY

Real Property—Title—Authority of the Attorney General (40 U.S.C. § 255)—Strategic Petroleum Reserve

This memorandum responds to your request for our opinion with respect to the application and interpretation of certain Department of Justice regulations in connection with a potential real property transaction relating to the Strategic Petroleum Reserve (SPR) under the Energy Policy and Conservation Act of 1975 (EPCA), 42 U.S.C. § 6201, *et seq.* The regulations in question (which are unpublished) set forth the standards pursuant to which the Attorney General exercises the authority, conferred on him by § 355 of the Revised Statutes, 40 U.S.C. § 255 (hereinafter § 255), to pass on the sufficiency of title to lands to be acquired by the United States.[1] As we understand it, you wish to know whether § 255 applies to transactions for the SPR and, if so, whether under the regulations the transaction in question should be approved. For the reasons that follow, it is our conclusion that your Department's real property transactions with respect to the SPR must be subjected to the Attorney General's review process contemplated by § 255. It is our further conclusion that the application of the regulations implementing § 255 requires disapproval of the transaction outlined in your request.

Although the statutory scheme of the EPCA is not a simple one, an understanding of its several central provisions is important to a resolution of the issues involved. Section 154(a) of the EPCA, 42 U.S.C. 6234(a), mandates the establishment of locations for the storage of petroleum products

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[1]Section 255 provides in pertinent part:

> Unless the Attorney General gives prior written approval of the sufficiency of the title to land for the purpose for which the property is being acquired by the United States, public money may not be expended for the purchase of the land or any interest therein.

(known as the SPR). Under § 159(f) the Secretary of Energy is authorized, "to the extent necessary or appropriate to implement" the SPR program, to:

> (B) acquire by purchase, condemnation, or otherwise, land or interests in land for the location of storage and related facilities;
>
> (C) construct, purchase, lease, or otherwise acquire storage and related facilities;
>
> (D) use, lease, maintain, sell, or otherwise dispose of storage and related facilities acquired pursuant to this part;
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> * * * * * * *
>
> (F) store petroleum products in storage facilities owned and controlled by the United States or in storage facilities owned by others if such facilities are subject to audit by the United States;
>
> (G) execute any contracts necessary to carry out the provisions of such Strategic Petroleum Reserve Plan, Early Storage Reserve Plan, proposal or amendment * * * .

As defined in § 152(4), 42 U.S.C. 6232(4), an "interest in land" which the Secretary is authorized to acquire under (B) includes

> any ownership or possessory right with respect to real property, including ownership in fee, an easement, a leasehold, and any subsurface or mineral rights.

Section 154(b) provides for submission of an SPR plan to Congress, which must detail the Secretary's plans for designing, constructing, and filling the Reserve. All proposals to acquire land and construct facilities must be included in the plan. Under § 159, 42 U.S.C. § 6239, the plan does not become effective and may not be implemented unless neither House of Congress has disapproved it within 45 days (or both Houses affirmatively approve it). Although amendments may be made to the plan, these too must be submitted to Congress for its review prior to taking effect. We understand that the real property transaction that is the subject of your request would, pursuant to this requirement, ultimately be submitted to Congress as an amendment to the existing SPR plan.

Under § 255, the Attorney General has the responsibility for passing on the "sufficiency" of the title being acquired by the United States whenever public money is expended for the purchase of land "or any interest therein." While § 255 was codified in its present form in 1970, the Attorney General has been vested with the responsibility of approving titles to land acquired by the United States or its agencies under successive statutes since the mid-19th century.[2] We have been informed that the Land and

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[2]The earliest statutory precursor of § 255, enacted in 1841, 5 Stat. 468, made it "the duty of the Attorney General to examine into titles of the land or sites for the purpose of erecting thereon armories, and other public works or buildings * * *."

Natural Resources Division (Land Division) of this Department has consistently taken the position that if Congress wishes to establish exceptions to the requirement of Attorney General approval under § 255, it must do so explicitly.

The regulations implementing § 255 require a determination "that the proposed interest in property is in accord with the authorizing legislation and that such interest is sufficient for the purposes for which the property is being acquired." Regulation 5(a). In administering these regulations, the Land Division has generally taken the position that where permanent improvements of substantial value are to be erected, the only interest sufficient to protect the Federal investment is a full fee simple title. Thus, Regulation 5, "Character of Title Which May be Approved," provides in pertinent part as follows:

> (b) * * * [T]here may be restrictive covenants or agreements in conveyances to prior owners under which the title might revert to the grantors in such deeds upon the use of the property for an unauthorized purpose or for other reasons. *When permanent type improvements or improvements of substantial value are to be erected on lands, a defeasible title to such lands is not acceptable and must not be approved, unless the estate is clearly authorized by the Congress.*
>
> (c) Other covenants and conditions in the deeds to the United States or in prior deeds may limit the use of the property in a manner which may prevent the sale and disposition of the property under laws relating to the disposition of surplus property so as to prevent the recovery of a substantial portion of the Government's investment in the property. *Titles are not acceptable which are subject to such covenants and conditions in the absence of clear authorizing legislation.*
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> * * * * * * *
>
> (f) *A defeasible fee title to land may be acquired by purchase or donation when no permanent improvements are to be erected thereon,* provided that the statute authorizing the acquisition in question does not preclude acquisition of title to the interest which the agency intends to acquire, the interest intended to be acquired is sufficient to permit the use of the land contemplated, and the consideration for the land has been determined with reference to the value of the limited interest that is acquired. In the event it is decided at some future time to erect permanent improvements on such land, the provision for defeasance must be eliminated. [Emphasis added.]

These regulations recognize that Congress may authorize the acquisition of any interest in real property and may empower the making of expenditures to improve the property, no matter how risky; but they also recognize that

"it is very seldom that a particular interest is authorized by legislation." Regulation 4(a). A general legislative authorization to acquire and build on land has not been regarded as sufficient to bring a particular transaction within the exceptions in Regulation 5(b) and 5(c). Thus, in cases where § 255 applies, this Department has regularly refused to approve the acquisition of less than fee simple title if permanent and substantial improvements are to be constructed on the land, unless Congress has separately and explicitly approved the particular acquisition. We see no legal basis upon which to take issue with this consistent interpretation of the reach of § 255, and we do not understand your request to question this interpretation of the Attorney General's responsibility.

As explained in your request, your Department proposes to acquire a servitude to an underground mine cavern at Cote Blanche, Louisiana, to an underground buffer zone around the cavern, and to sufficient surface area to install or construct "pumps, valves, and other support equipment and facilities." You state, that under the proposed terms of acquisition, the servitude would be granted for the purpose of storing liquid hydrocarbons, and for that purpose only, and that

> [i]f the Government no longer required and used the premises for the specific purpose for which the servitude was granted, i.e., the storage of liquid hydrocarbons, the Government would not be able to use the servitude for other Government purposes and could not enjoy the benefit of the improvements made thereon.

While it is not yet clear exactly how great an investment is anticipated in order to ready the site for petroleum storage, your Office has informed us that it would be substantial. The improvements that would be installed or constructed would not be readily removable in the event that the site were determined at some point to be no longer useful, or if for some other reason the United States were no longer in a position to utilize the land as a petroleum storage facility.[3] In addition, you have identified six circumstances the occurrence of any of which would, under Louisiana law, result in the termination of the servitude:

> 1. By the destruction of the estate which owes the servitude, or of that to which the servitude is due, or by such a change taking place that the thing subject to the servitude cannot be used;
> 2. By confusion;
> 3. By the abandonment of that part of the estate which owes the servitude;
> 4. By the renunciation of the servitude on the part of him to whom it is due, or by the express or tacit remission of his right;

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[3]Indeed, there appears to be some question whether, under Louisiana law, the United States could retain title to the improvements erected on the site in the event the servitude were to lapse. *See* La. Civ. Code §§ 505, 508; Yiannopoulos, *Civil Law of Property* § 46, at 141 (1968).

5. By the expiration of the time for which the servitude was granted, or by the happening of the dissolving condition attached to the servitude; or

6. By the dissolution of the right of him who established the servitude.

Some of these occurrences appear to be within the control of the United States (*e.g.*, renunciation and "confusion") but others are not. One troublesome possibility which you recognize is that the estate that owes the servitude might be destroyed or changed in some way so as to make it impossible to use the servitude for the purposes originally intended. You point out that "[i]t is conceivable that the salt dome might collapse and that the servitude would be considered terminated" and that "the Government could lose at least the right to remove the improvements." You also refer to other ways in which, through circumstances beyond its control, the United States could lose its investment in the land and improvements:

> if oil were unavailable to fill the caverns, or if at some future time the Government decided not to use the servitude for hydrocarbon storage, or if the cavern were to collapse, then although the Government's right to use the property would not terminate after ten years' non-use, the Government would have no right to use the servitude for other Government purposes for which the servitude and improvements thereon may be suitable. Moreover, given the limited purposes of the servitude and the fact that prescription would run against one to whom the Government alienated its interest, the potential for the Government's recovery of its investment through sale of its servitude interest, is uncertain.

On the basis of its own analysis of Louisiana law, and the various risks attending the transaction described in the preceding paragraphs, the Land Division has concluded that the title proposed to be acquired is not sufficient to permit approval under the regulations implementing § 255. This position has been based not only on the potential for destruction of the servitude under Louisiana law, but also on the restrictions on use incorporated in the terms of acquisition.

We do not understand you to be asking us to review the reasonableness of the substantive standards contained in the regulations. Rather, you wish an opinion on whether they should be applied to the transaction in question. Thus stated, your request has two parts: first, whether § 255 and its implementing regulations apply at all to transactions of the SPR; and second, if § 255 applies, whether the transaction in question should nonetheless be approved under the regulations as having been "clearly authorized" by Congress.

As noted above, this Department's position for some time now has been that exemptions from the statutory requirement of Attorney General approval must be explicit. We think the terms of § 255 and its legislative history support this interpretation. Prior to its revision in 1970, § 255 provided that no public money should be expended upon any land purchased

by the United States for the purpose of erecting any public building until the Attorney General had given his written opinion "in favor of the validity of the title." The Attorney General was authorized to approve titles subject to infirmities only where the sale price of the land did not exceed $10 per acre, and the total value of the interest being acquired did not exceed $3,500. A number of Federal agencies were exempted in whole or in part from the provisions of § 255, including the Departments of the Army, the Interior, and Agriculture, and the Tennessee Valley Authority. In addition, the Attorney General was specifically authorized to approve title to easements and the rights-of-way under certain circumstances, although apparently not for the purpose of constructing permanent improvements on them. In Pub. L. No. 91-393, 84 Stat. 835 (1970), Congress substantially revised § 255 to simplify and consolidate its provisions, and to centralize in the Attorney General responsibility for approving titles to land or interests in land acquired by the United States. In so doing, it specifically rejected a bill proposed by the Department of Justice that would in effect have made each agency responsible for its own land transactions. Both the Senate and House Committees concluded that "the Attorney General as the chief law officer of the United States should retain the primary responsibility for the approval of land titles." S. Rept. 1111, 91st Cong., 2d sess. 4 (1970); H. Rept. 970, 91st Cong., 2d sess. 3 (1970). The bill passed by Congress in 1970 rescinded the statutory exemptions for all agencies but the Tennessee Valley Authority. Instead, the Act authorized the Attorney General to delegate his responsibility to other departments and agencies, subject to his general supervision, and in accordance with regulations promulgated by him.

Since 1970, then, the Attorney General has had responsibility, either directly or in a supervisory capacity, for approving title to land or interests in land acquired by all Government agencies except the Tennessee Valley Authority. We are informed by the Land Division that this authority has regularly been exercised in connection with land acquisitions by such diverse entities as the St. Lawrence Seaway, the National Park Foundation, and the Pennsylvania Avenue Redevelopment Corporation.[4]

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[4]Beyond the exemption in § 255 itself for the TVA, there appears to be only one agency whose land transactions have, since 1970, been exempted from § 255 review. Section 410(a) of the Postal Reorganization Act of 1970, 39 U.S.C. § 410(a), exempts the Postal Service from all but certain enumerated Federal laws dealing with, *inter alia*, property and funds. This Department has taken the position that title to land acquired by the Postal Service need not be approved by the Attorney General. Beyond this, Congress has specifically exempted a few categories of land acquisition. *See* 48 U.S.C. § 1409b (Interior Department may construct projects on land acquired in Virgin Islands); *see also* successive appropriation bills since the mid-70s for the Department of Defense and the International Communications Agency, which have contained specific exemptions from the requirement of prior Attorney General approval to acquire land and begin construction of buildings for military housing and other purposes, and for radio facilities in foreign countries. *See, e.g.*, Pub. L. No. 95-457, 92 Stat. 1231 (1978); Pub. L. No. 95-431, 92 Stat. 1021 (1978). The fact that Congress continues to carve out specific exemptions from § 255 lends weight to the view that exemptions from the reach of § 255 will not be implied from a general statutory authorization to acquire interests in land.

We have found nothing in the EPCA or its legislative history to indicate that Congress intended to exempt any transactions from the review applicable to virtually all other agency acquisitions.

We conclude, therefore, that § 255 does apply, and that it requires Attorney General approval of land acquisitions for the SPR. The question then becomes whether the transaction has been or will be "clearly authorized by the Congress" so as to satisfy the requirements contained in Regulation 5. The fact that EPCA authorizes the Secretary generally to purchase interests in land—defined to include the acquisition of an easement or leasehold interest—is not by itself sufficient. Indeed, as we have stated, nothing short of a direct and specific approval by Congress of a particular acquisition will suffice whenever substantial improvements are to be made and the acquisition of less than fee title is contemplated.[5] We therefore reach the issue of whether the submission of this transaction to Congress as a proposed amendment to the SPR plan constitutes an appropriate vehicle for obtaining the necessary specific congressional approval. Stated differently, may the failure of either House of Congress to take any action to block a proposed amendment to the SPR pursuant to the one-House veto provision of § 159 be regarded as constituting the specific congressional approval necessary to satisfy the requirements of the § 255 regulations? We think it cannot.

As you know, the President in his statement of June 21, 1978, to Congress[6] reaffirmed the view expressed both by earlier Presidents and by a succession of Attorneys General that so-called "legislative veto" mechanisms are unconstitutional. The central constitutional principal underlying that often-stated view is that the Constitution prescribes one way—and one way only—for the enactment of laws. The procedure set forth in Article I, section 7, which contemplates affirmative approval of legislative proposals by both Houses followed by submission to the President for the exercise of his veto prerogative, is the exclusive method of lawmaking. While congressional guidance in the form of a resolution of disapproval or veto adopted pursuant to a statute that does not comport with Article I, section 7, may be regarded as performing a useful advisory function, we have repeatedly concluded that even such affirmative acts have no binding legal significance. It follows, *a fortiori,* that Congress' total inaction, by virtue of both Houses' failure to adopt even an advisory resolution with

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[5]Nor do we believe that an exemption from § 255 must necessarily be implied from the statutory scheme of the EPCA. The legislative history of that Act suggests that Congress anticipated that some land might usefully be acquired for the location of storage and related facilities which would not require the construction of substantial permanent improvements. *See* H. Rept. No. 340, 94th Cong., 1st sess. 35 (1975) (bill authorizes "acquisition of interests in land, storage and related facilities *or* construction of such storage and related facilities * * * ." [Emphasis added.] And, it is our understanding that a leasehold interest or servitude might be acquired on existing pipelines or storage facilities. Therefore, to say that no substantial permanent improvements may be constructed on land that the United States does not own in fee does not nullify the statutory authorization to acquire lesser interests in land.

[6]H. Doc. 95-357, reprinted at 124 CONGRESSIONAL RECORD H. 5879 (June 21, 1978).

respect to any particular amendment of the SPR plan, cannot be regarded as providing the legislative imprimatur required by the regulations. It should be understood, however, that our conclusion would be different if both Houses of Congress acted affirmatively by joint resolution to approve the proposed transaction—an alternative apparently contemplated by § 551(c)(2) of the EPCA, 42 U.S.C. § 6421(c)(2). This section sets forth the procedure for congressional review of Presidential requests to implement certain energy actions. If this course were followed, the President's transmittal message should set forth the limited circumstances under which it is being submitted.[7]

The Comptroller General's conclusion that Congress did intend to authorize construction of improvements on leased land under the EPCA, to which you refer, is not necessarily inconsistent with the position this Department has taken with respect to similar construction on a servitude. The authority under which the Comptroller General passes upon expenditures for the construction of public buildings on leased land is significantly different from that governing the Attorney General's role under § 255. The only specific statutory basis for the Comptroller General's disapproving expenditures over a certain amount is in § 322 of the Economy Act of 1932, 40 U.S.C. § 278a. The Comptroller General's "general rule" that appropriated funds may not be used to make permanent improvements to private property without specific statutory authority, has itself no statutory basis other than those laws that deal generally with appropriations. *See* 39 Comp. Gen. 388, 390 (1959). The Comptroller General takes the position that neither that rule nor § 322 was intended to apply in situations in which Congress clearly anticipated and approved the making of improvements on land not owned by the United States. *Compare* 46 Comp. Gen. 60 (1966), with 53 Comp. Gen. 317 (1973). The Comptroller General has no basis upon which to disapprove the amount of an expenditure where the expenditure itself has been explicitly authorized. By contrast, the Attorney General remains responsible under § 255 for determining the sufficiency of title for the purpose intended, whether or not the transaction may otherwise be authorized by law. Congress can therefore reasonably be expected to make itself absolutely clear when the exercise of this responsibility is to be waived.[8]

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[7]We note that any legislation enacted by Congress, whether by bill or joint resolution and whether passed pursuant to 42 U.S.C. § 6421(c)(2) or without reference to that statute, would suffice to satisfy the requirements of Art. I, § 7.

[8]Additionally, the interest in land represented by a leasehold is generally of a more certain quality than a servitude under Louisiana law. A lease is for a period certain, and it is therefore possible to predict exactly how long the land will be available for the contemplated use. The Government may plan to construct improvements whose useful life will more or less coincide with the term of the lease, and may otherwise take steps to control the disposition of its investment after the expiration of the lease. A servitude, on the other hand, may be extinguished at any time following its acquisition upon the happening of a number of circumstances beyond the control of the Government. The risk of this happening in the instant case is acknowledged by you. To the extent that a degree of discretion is involved in both situations, we find nothing necessarily incongruous about the differing conclusions reached by the Comptroller General and this Department.

While these differences in statutory responsibility may satisfactorily justify a difference in the conclusions reached heretofore by the Comptroller General and those stated in this opinion, it should be pointed out that insofar as the Comptroller General's opinion purports to rely on the fact of congressional "approval" pursuant to the veto mechanism, we disagree with it. As stated above, we are unable to find any legal significance in the failure of disapproval.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

September 5, 1979

79-64 MEMORANDUM OPINION FOR A DEPUTY ASSOCIATE ATTORNEY GENERAL

Immigration and Nationality Act—Alien Crewmen—Temporary Landing—Review by Attorney General of Decisions by Board of Immigration Appeals

This responds to a request of your Office for our advice on the issue whether the Seafarers International Union (SIU) has stated a sufficient basis for the Attorney General to direct review pursuant to 8 CFR § 3.1(h)(i) of the Board of Immigration Appeals' (BIA's) decision in this case.[1] After carefully considering the SIU's submission, we do not believe that it has done so.*

I.

The present matter arose when, in February, 1977, the alien crew of the *Dosina,* a Dutch tanker performing lightering operations (which involve bringing to shore crude oil from supertankers in international waters) applied for a conditional permit to land temporarily in the United States pursuant to § 252(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1282(a). That provision authorizes an immigration inspector to grant such a permit in his discretion if he finds that the alien applicant is a nonimmigrant crewman. In this case, the immigration inspector questioned whether the crew was eligible for conditional landing permits. But instead of simply refusing the permits, the inspector ordered that they appear at exclusion proceedings before an immigration judge for a determination whether they were excludable immigrants lacking valid immigrant visas.

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[1] 8 CFR § 3.1(h)(i) provides that the Board shall refer to the Attorney General for review all cases which "[t]he Attorney General directs the Board to refer to him." The question here is whether the SIU has stated a legal basis on which the Attorney General should direct that the case be referred to him for review. This is not a case in which the Chairman of the BIA or a majority of the Board has referred the matter to the Attorney General for his review. *Cf.* 8 CFR § 3.1(h)(ii).

*The Attorney General subsequently declined to review the BIA's decision.

In a hearing before an immigration judge, counsel for the crew and the trial attorney for the Immigration and Naturalization Service argued that the crew were *bona fide* alien crewmen and that they were not subject to exclusion. Both contended that the immigration judge lacked jurisdiction under § 235(b) of the Act, 8 U.S.C. § 1225(b), to consider the admissibility of the crew. The judge rejected that contention. He held that the crew were immigrants lacking valid immigrant visas and thus were inadmissible. The judge certified his decision to the BIA for review.

The BIA's decision reached two conclusions: (1) that the crew of the *Dosina* were "alien crewmen" for purposes of the Act; and (2) that they were not subject to the jurisdiction of an immigration judge presiding over exclusion proceedings. The proper procedure, the BIA pointed out, would have been for the immigration inspector to refuse alien crewmen temporary landing permits, rather than to place them in exclusion proceedings.

The definition of an "alien crewman" is as follows:

> [A]n alien crewman serving in good faith as such in any capacity required for normal operation and service on board a vessel * * * who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel * * * on which he arrived * * * .[2]

Here, the crew, as found by the BIA, consisted of aliens serving on a foreign vessel. In this connection the BIA found that the crew members were named on lists obtained from an American consul in Mexico each 29 days, as required, and that none of the crew sought to enter for a longer period than that in which the vessel was to be in port, or under any conditions other than those of an alien crewman. Given these findings, the BIA concluded that the crew "clearly" were within the accepted statutory definition of alien crewmen. With this particular conclusion we find no error, and the SIU has presented no basis on which to question it.

The BIA next turned to § 235(b) of the Act, 8 U.S.C. § 1225(b), pursuant to which the exclusion proceedings in this case were held. That subsection states:

> Every alien (*other than an alien crewman*), and except as otherwise provided in subsection (c) of this section and in section 273(d), who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detailed for further inquiry to be conducted by a special inquiry officer * * * . [Emphasis added.]

The foregoing provision explicitly excepts from further inquiry before an immigration judge,[3] such as in exclusion proceedings, any "alien crewman." The BIA held that since the *Dosina* crew consisted of alien crewmen,

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[2]Section 101(a)(15)(D) of the Act, 8 U.S.C. § 1101(a)(15)(D).

[3]8 CFR § 1.1(l) provides: "The term 'immigration judge' means special inquiry officer and may be used interchangeably with the term special inquiry officer wherever it appears in this chapter."

the judge lacked jurisdiction to consider whether they were excludable as immigrants. This result would appear to follow directly from the plain language of the statute.

Accordingly, we cannot say that the BIA's substantive analysis of the precise legal issues here was incorrect. Nor can we conclude that the BIA chose to focus on the wrong questions, for it appears plain that if an immigration judge has no jurisdiction to conduct certain proceedings, it is the BIA's responsibility in the first instance to address that matter.

II.

The SIU urges the Attorney General both to direct that this case be referred to him for review and to reverse the BIA's decision, with the result that the immigration judge's decision would be reinstated. The practical import of this turns on the fact that if the immigration judge's decision were to be reinstated, there would be a precedent for the proposition that aliens are excludable when they appear at a port seeking temporary landing permits as crewmen while performing lightering functions for supertankers in international waters. Underlying SIU's technical approach is the desire for a precedent favorable to SIU's interest of furthering the job opportunities of American seamen, who apparently believe that they ought to have exclusive rights to perform lightering operations that in the past have been performed, as in this case, by alien crews. Whatever the merits of this as a policy matter, it has no merit as a matter of law in the context of this case.

Two main legal arguments are raised by SIU: (1) that the BIA lacked jurisdiction to review the decision of the immigration judge, and thus the judge's decision should not have been disturbed; and (2) that the BIA committed reversible procedural error. In our view, neither contention is a sufficient basis for the Attorney General to direct that the case be referred to him for review.

The first argument rests on the SIU's interpretation of 8 CFR § 3.4, which provides, in pertinent part, that "(d)eparture from the United States of a person who is the subject to [*sic*] deportation proceedings subsequent to the taking of an appeal but prior to a decision thereon shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been taken." The SIU notes that prior to the BIA's decision, the crew excluded by the immigration judge had returned to their home country. However, at the time of oral argument before the Board, several of them had once again returned to the *Dosina*, which was then continuing in operation and evidently receiving permission for its alien crew to land temporarily in the United States.[4] Nevertheless, the SIU takes the position that since the BIA knew

[4]Execution of an immigration judge's order of exclusion is stayed while the case is before the BIA by means of certification. *See* 8 CFR § 3.6. The BIA noted in its decision that it was not certain on what particular basis the crew of the *Dosina* had been permitted to land subsequent to the immigration judge's decision in this case.

that the crew members had voluntarily left the United States for some time prior to its final decision, 8 CFR § 3.4. required the BIA to rule that "the appeal" should be considered as withdrawn.[5]

A main difficulty with this position is that 8 CFR § 3.4, on its face, speaks of "*deportation* proceedings" (emphasis added), not exclusion proceedings such as occurred in this case, and we have been told informally by the BIA Chairman that in practice the provision has been confined to the deportation context.[6] In addition, the provision refers to "the taking of an *appeal*" (emphasis added). In this case, the immigration judge *certified* his decision to the BIA for review; the matter did not reach the BIA by means of an appeal by an applicant or a district director.[7] Thus, the regulation on its face is not applicable.

The SIU's second basic argument is that the BIA improperly and unfairly denied its motion of November 7, 1977, when, on February 13, 1978, it allowed the SIU to act as an *amicus curiae* in the case. The core of this suggestion is SIU's assertion that SIU's economic interests in the outcome of the case were so great that its view should have been more fully considered by the BIA, such as in oral argument. The problem with this is that SIU's motion was not denied. The motion was entitled "Seafarers International Union of North American Application for Intervention or Alternatively as Amicus Curiae * * *." The alternative relief—participation as an *amicus curiae*—was granted, and so the contention that the BIA improperly failed to state the grounds for denial of the motion as a whole seems to miss the mark.[8]

In the end, we are left with the fact that SIU has requested the Attorney General to direct that the case be referred to him for review and to reverse the BIA decision which is not incorrect, and in procedural terms is not successfully challenged by SIU. Further, important institutional interests are at stake here. It would appear that in a case certified to the BIA in which

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[5]The SIU makes clear that its argument is distinct from a claim that the controversy was moot. Rather, the SIU's position is that, as a matter of law, 8 CFR § 3.4 ousted the BIA of jurisdiction over the case.

[6]The distinction between exclusion proceedings, designed to determine whether an alien is admissible, and deportation proceedings that occur after an alien has entered the country is a fundamental one in the administration of the immigration laws. *CF.* 9 I&N Dec. 356, 360 (BIA 1961). *Compare* 8 CFR Part 236, dealing with exclusion, *with* 8 CFR Part 243, dealing with deportation.

[7]Pursuant to 8 CFR § 236.6, an immigration judge has authority to certify his decision to the BIA "when it involves an unusually complex or novel question of law or fact." Appeals from orders arising in exclusion proceedings are covered by 8 CFR § 236.7.

[8]Further, although the SIU appears mainly to be concerned that it did not participate in oral argument before the BIA, *see* Motion for Reconsideration at 2-3, 8 CFR § 3.1(e) provides plainly that oral argument will be heard by the BIA "upon request." The SIU's motion of November 7, 1977, did not request oral argument. Apparently the point was raised for the first time in the Motion for Reconsideration of August 15, 1978—one month after the BIA rendered its decision in the case.

the primary issue is whether an immigration judge has jurisdiction to conduct certain exclusion proceedings, the BIA should have power to reach a decision, assuming no contrary law or regulation. Otherwise, an orderly administrative process regarding the resolution of jurisdictional issues might well be jeopardized. For all of these reasons, we consider that the SIU has not presented a valid basis for the Attorney General to direct that the case be referred to him for review.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

September 8, 1979

79-65 MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

Merit Systems Protection Board—Term of Office—Statutory Construction—5 U.S.C. § 1202

This responds to the request of your Office for our opinion on the question whether the President's nomination of Mr. A to be a member of the Merit Systems Protection Board (MSPB) correctly states the term of the office as expiring on March 1, 1981, or whether he should be nominated for a term of 7 years. It is our opinion that the nomination is correct as it stands.

The Merit Systems Protection Board was created by Reorganization Plan No. 2 of 1978[1] and was continued, as modified, by the Civil Service Reform Act of 1978, § 202(a).[2] The plan was made effective January 1, 1979.[3] The effective date of the Act was January 11, 1979.[4] In creating the Board the plan had provided simply: "The United States Civil Service Commission is hereby redesignated the Merit Systems Protection Board."[5] It also redesignated the commissioners as members of the Board.[6] The Act provides for appointment of members of the Board to 7-year terms,[7] but also contains a transition provision relating to the terms of members serving on the Board on the effective date of the Act.[8]

Commissioners of the Civil Service Commission served 6-year terms that were systematically staggered so that one term expired every 2 years.

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[1]43 F.R. 36037 (1978), reprinted in 5 U.S.C. § 1101 note (Supp. II, 1978).

[2]5 U.S.C. §§ 1201-1209 (Supp. III, 1979).

[3]Executive Order No. 12107, § 1, 5 U.S.C. § 1101 note (Supp. II, 1978).

[4]Civil Service Reform Act of 1978, § 907, 5 U.S.C. § 1101, note (Supp. III, 1979).

[5]Reorganization Plan No. 2, § 201(a), 43 F.R. at 36038 (1978); 5 U.S.C. § 1101 note (Supp. II, 1978).

[6]*Id.*

[7]Civil Service Reform Act, § 202(a). Section 202(a) of the Act added Chapter 12 to title 5, United States Code. Chapter 12 consists of §§ 1201-1209. The terms of office of the members of the MSPB are set by § 1202(a), 5 U.S.C. § 1202(a) (1979 Supp.).

[8]Civil Service Reform Act of 1978, § 202(b), 5 U.S.C. § 1201, note (Supp. III, 1979).

When the commissioners were redesignated members of MSPB, their terms of office remained the same and continued to be controlled by 5 U.S.C. § 1102.[9] That section provided:

> (a) The term of office of each Civil Service Commissioner is 6 years. The term of one Commissioner ends on March 1 of each odd-numbered year.
>
> (b) A Commissioner appointed to fill a vacancy occurring before the end of the term of office of his predecessor serves for the remainder of that term. The appointment is subject to the requirements of section 1101 of this title.
>
> (c) When the term of office of a Commissioner ends, he may continue to serve until his successor is appointed and has qualified.
>
> (d) The President may remove a Commissioner.

Under § 1102 the terms of the commissioners and, as of January 1, 1979, of the members of the MSPB were due to expire, sequentially, on March 1, 1979, 1981, and 1983.

On January 1, 1979, Mr. S, former civil service commissioner, then a member of the MSPB, whose term was due to expire on March 1, 1981, received a recess appointment to a different office. He was sworn in on January 2. On that date he automatically vacated his office as a member of the Board.[10] The office that he vacated had not been filled by January 11, 1979, the effective date of the Act.[11] The question presented is whether the fact of vacancy on that particular date worked an immediate change in the term of the office vacated, the one for which Mr. A has been nominated. We believe that it did not.

The transition provision of the Act reads:

> Any term of office of any member of the Merit Systems Protection Board serving on the effective date of this Act shall continue in effect until the term would expire under section 1102 of title 5, United States Code, as in effect immediately before the effective date of this Act, and upon expiration of the term, appointments to such office shall be made under sections 1201 and 1202 of title 5, United States Code (as added by this section).

Literally this provision is inapplicable to Mr. A's position. As written it would seem to affect only the term of the office that was actually filled on January 11, 1979. A literal reading thus points to the conclusion that an office such as the one with which we are concerned, in existence but vacant

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[9]Civil Service Reform Act of 1978 § 201(a), amended, *inter alia,* 5 U.S.C. § 1102. As used herein "5 U.S.C. § 1202" refers to that section of title 5 as in effect immediately before the effective date of the Act.

[10]The law in effect on January 2 provided that commissioners of the Civil Service Commission (who had been redesignated members of the MSPB by that date) could not "hold another office or position in the Government of the United States." 5 U.S.C. § 1101 (1976).

[11]Due to a complicated chain of events, two of the three positions of members of the Merit Systems Protection Board were vacant on the effective date of the Act.

on January 11, should be filled in accordance with the nontransitional terms of the Act—that is, with a person appointed for 7 years. However, in our view Congress did not intend such a result.

In explaining the transition provision the Senate report said:

> Subsection (e) provides that individuals currently serving on the Civil Service Commission, who will become members of the Merit Systems Protection Board by virtue of Reorganization Plan No. 2 of 1978, will continue to hold their positions on the Board until their terms would otherwise have expired as members of the Civil Service Commission (commissioners currently serve for six-year terms). If an individual now serving as a Civil Service Commissioner does not serve out the remainder of his present term, an individual appointed to fill the vacancy will only serve for the remainder of the six-year term established under the older law. Since the present terms of the Commission are staggered, this procedure will assure that the new terms of the members of the Board will continue to be staggered.[12]

It is clear from this legislative history that the intent of Congress in including the provision in the Act was twofold. First, it wished to maintain continuity with respect to the membership of the Merit Systems Protection Board. Second, and more importantly, it intended to maintain continuity in the terms of office of the members of the Board. This is apparent not only from the quoted legislative history of the provision but also from its plain language. This continuity, however, was based upon a congressional assumption that the membership of the Board would be fixed on the effective date of the Act. Given this assumption, the primary focus of the transition provision was on continuing, for an interim period, the terms of office of the members of the Board as they were established by Reorganization Plan No. 2—that is, derivatively from 5 U.S.C. § 1102.[13] The reason for this focus is clear. As is unequivocally stated in the legislative history, it is to "assure that the new terms of the members of the Board will continue to be staggered," as were the terms of the former civil service commissioners.

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[12]S. Rept. 969, 95th Cong., 2d sess. 28 (1978). Both the House and the Senate versions of the Civil Service Reform Act contained transition provisions identical to the one finally enacted. Section 202(a) of the Senate bill, S. 2640, 95th Cong., 2d sess. § 202(a) of the Senate bill, S. 2640, 95th Cong., 2d sess. § 202(a) (1978), would have added a new chapter 12, consisting of §§ 1201-1207, to title 5 of the United States Code. The transition provision was subsection (e) of § 1202 to be added. In the House, the transition provision was § 202(b) of H. 11280, 95th Cong., 2d sess. (1978). The House report erroneously describes H. 11280, § 202(b), as establishing the Board. *See* H. Rept. 1403, 95th Cong., 2d sess. 20 (1978). Actually, it was § 202(c) of H. 11280, as reported, that established pay rates. *See* 124 CONGRESSIONAL RECORD H. 9368 (daily ed., Sept. 11, 1978), H. 9676 (daily ed., Sept. 13, 1978).

[13]Under the provision, as its explanation emphasizes, the duration of an initial term of office of a member of the "new" (congressionally created) Merit Systems Protection Board should not be changed by the resignation of a former member of the Civil Service Commission (whom Congress erroneously assumed would be serving on the Board on the effective date of the Act). Rather, the term should continue as unexpired and may be filled only for the duration of the period fixed by § 1102.

The question Mr. A's nomination presents, therefore, is whether the words or intent of § 1102 should govern the term of office. Read literally the transition provision does not cover Mr. A and, therefore, he could receive a 7-year term. On the other hand, such a term would defeat the congressional intent of providing systematically staggered terms. The problem arises because the factual situation here, a vacancy as of January 11, 1979, simply was not foreseen by Congress.

It is a well-settled rule of interpretation "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, not within the intention of its makers." *Church of the Holy Trinity* v. *United States,* 143 U.S. 457, 459 (1892). In *Church of the Holy Trinity,* the Court refused to apply to a contract between a religious corporation and a pastor a broadly worded statute that made it a crime to assist an alien's immigration to the United States by entering a service contract with him previous to his entry. There was no doubt that the contract fell "within the letter of this section," *id.*, but the Court relied upon its understanding of the harm the Act was meant to correct, expressed in the legislative history, to hold that the contract nevertheless was not to be included within the prohibition.

The Court has warned countless times "against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, *e.g., Church of the Holy Trinity* v. *United States,* 143 U.S. 457, 459–462; *Markham* v. *Catell,* 326 U.S. 404, 409; for " 'literalness may strangle meaning,' *Utah Junk Co.* v. *Porter,* 328 U.S. 39, 44." *Lynch* v. *Overholser,* 369 U.S. 705, 710 (1962). The D.C. Court of Appeals has stated this same principle as follows:

> * * * the plain meaning doctrine has always been considered subservient to a truly discernible legislative purpose * * * The use of the legislative history to determine Congressional purpose is appropriate where * * * the literal words of the statute would bring about an end completely at variance with the purpose of the Act * * *. [*Aviation Consumer Project* v. *Washburn,* 535 F. (2d) 101, 106–107 (D.C. Cir. 1976).]

See also, Ozawa v. *United States,* 260 U.S. 178, 194 (1922) ("We may look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail,") and *Helvering* v. *New York Trust Co.,* 292 U.S. 455, 464 (1934) ("the expounding of a statutory provision strictly according to the letter without regard to other parts of the Act and legislative history would often defeat the object intended to be accomplished").

This principle of statutory interpretation has frequently been applied to avoid constitutional problems; however, it is by no means limited to such problems. For example *Helvering, supra,* held the capital gains tax provision applicable to property held by a trustee for less than 2 years, despite language in the statute that on its face required that the property be held

more than 2 years. Again, in *United States* v. *Public Utilities Commission,* 345 U.S. 295 (1953), the Court held that although a literal reading of the Federal Power Act would exclude municipalities from the definition of a "person" subject to regulation by the Federal Power Commission, this exclusion had in fact been inadvertent. In such circumstances, intent rather than language, if they do not lead to the same result, should govern. 345 U.S. 316. Similarly, in *United States* v. *American Trucking Association, Inc.,* 310 U.S. 534, 543 (1940), the Court limited the reach of the Interstate Commerce Commission's jurisdiction by reading a narrow interpretation, based on the legislative history, into the word "employee" ("even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole,' the Court has followed that purpose, rather than the literal words.") 310 U.S. at 543. A final example of the Court's using the purpose of a statute to discount the literal application of its language is *Johansen* v. *United States,* 343 U.S. 427 (1952). There the Court held that despite the language of the Public Vessels Act, which on its face granted to anyone a right to bring suit against the United States "for damages caused by a public vessel of the United States," Congress had no intention to grant this right to U.S. employees and therefore they were not to be included within its scope.

In sum, "when aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' " *American Trucking Association, Inc., supra,* at 543-544. In the case at hand the language is superficially clear, but the factual situation—resignation of a member between January 1 and January 11, 1979—was not one that Congress contemplated. In applying the statute to these facts, the above cases make clear that congressional intent should preempt literal meaning.

The major, expressed intent of Congress in including the transition provision in the Act was to "assure that the new terms of the members of the Board will continue to be staggered." We take the intent to stagger to be an important one, since historically Congress has consistently provided for the systematic staggering of the terms of the heads of the major multimember independent agencies. Quite to the contrary of what Congress intended to achieve by the provision, a literal reading of the transition provision would assure, given the fact of the vacancy, that the new terms of members of the Merit Systems Protection Board would never be systematically staggered. That intent, however, should not be lightly frustrated by a wooden application of the provision designed to effectuate it. This is especially true when such an application would do nothing to further any demonstrable purpose of the provision and is a possibility only because Congress made an assumption of fact that turned out to be erroneous.

We believe that the correct construction of the transition provision is that it continued unchanged, the terms of office of all three members of

the MSPB in existence on the effective date of the Act, whether occupied or not.[14] In our view, this is the only construction that will effectuate the clearly expressed intent of Congress. Moreover, it avoids the unreasonable and unintended result that a congressionally unanticipated vacancy on January 11 should result in a term for the vacant office different from that which would have resulted from a vacancy on any other day, a result different from that which Congress contemplated, and different from that dictated by the intent of Congress ultimately to ensure systematically staggered terms for the members of the Merit Systems Protection Board.

For the reasons stated we believe that the term of the office of member of the Merit Systems Protection Board that Mr. A has been nominated to fill will expire on March 1, 1981.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

[14]We note further that the appointment of Ms. P to the MSPB implicitly adopted the interpretation presented here. The position she took was also one that was vacant on January 11, 1979. Her term of office, however, runs from March 1, 1979, which is the date the term of office of the commissioner she replaced would have terminated. This means that it was assumed that the term of office of the member who resigned continued beyond January 11 to March 1, 1979, despite the resignation.

September 11, 1979

79-66 MEMORANDUM OPINION FOR THE ACTING ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

Merit Systems Protection Board—Litigating Authority (5 U.S.C. § 1205)

This responds to Assistant Attorney General Babcock's May 10, 1979, request for our views concerning the scope of litigating authority given the Merit Systems Protection Board under the Civil Service Reform Act, § 202(a), 92 Stat. 1111, 5 U.S.C. § 1205(h) (Supp. II, 1978). The relevant portion of that subsection of the Act provides:

> Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Chairman of the Board may appear for the Board, and represent the Board, in any civil action brought in connection with any function carried out by the Board pursuant to this title or as otherwise authorized by law.

We are asked whether that subsection, despite its broad language, might properly be interpreted to allow the Board to represent itself only where the Board takes a legal position in litigation adverse to that of another Federal agency. We have reviewed the statute and its legislative history and conclude that the provision granting litigating authority to the Board must be read more expansively, in accordance with its plain meaning.

The congressional grant of litigating authority to the Board had its origins in § 202(a) of the Senate bill, S. 2640. The House bill, H. 11280, contained no comparable provision. The only discussion of the litigating authority provision that we have found in the reports and floor debates on the Reform Act appears in the report of the Senate Governmental Affairs Committee, S. Rept. No. 969, 95th Cong., 2d sess. (1978). That report states that:

> [t]he Board is to be represented by its own attorneys whenever the Board is a party to any proceeding in court, except that the Board is to be represented by the Solicitor General of the United

> States in any proceeding before the Supreme Court. This will include instances where the Board is involved in court proceedings under any provision of this title, including defending disciplinary actions * * * intervening in appellate proceedings * * * or any enforcement actions * * *. [*Id.*, at 31.]

That history provides no readily apparent basis for interpreting the words of § 202(a) more restrictively than they appear on their face.

The report adds, moreover, that the statutory grant of litigating authority to the Board is consistent with similar provisions adopted for independent commissions such as the Federal Energy Regulatory Commission (FERC). In the conference report on the Energy Organization Act, Pub. L. No. 95-91 91 Stat. 565, which established the FERC, the litigating authority given that body was explained as follows:

> The Senate bill provided that the Board may appoint its own attorneys to represent itself in any civil action, except in the case of litigation before the Supreme Court * * * .
>
> The comparable House provision stated that the litigation by the Commission shall not be subject to the supervision of the Attorney General * * * . It provided no exception in the case of litigation before the Supreme Court * * * .
>
> The conferees adopted the Senate provision. The conferees do not contemplate that this authority will be employed to litigate independently of the Department of Justice in cases arising under administrative statutes that apply government wide, such as the Freedom of Information Act or the Privacy Act of 1974. [H. Conf. Rept. 539, 95th Cong., 1st sess. 72 (1977).]

This explanation of a litigating authority provision nearly identical to that of the Board indicates fairly clearly that Congress did not intend to limit the grant of authority to situations in which Federal agencies take inconsistent legal views.*

A grant of broad litigating authority to the Board is consistent generally with the structure contemplated for this entity by Congress in the Reform Act. The Civil Service Commission was divided into two separate agencies, the Office of Personnel Management and the Merit Systems Protection Board. While the senior officials of OPM, like their predecessors with the Commission, serve at the pleasure of the President, the members of the Board were given an extra degree of independence from the President. Those members may only be removed for cause. 5 U.S.C. § 1202(d) (Supp. II, 1978). This kind of statutorily created independence is common where

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*We wish to add a cautionary note with respect to the last sentence of that FERC history. The suggestion that an agency granted broad litigating powers must nonetheless turn to the Department of Justice for representation on matters arising under statutes applicable Government-wide is an unusual one, and one that we have not considered previously. In quoting the FERC history we therefore do not mean to express any view as to the import of the sentence.

an agency is charged with the performance of quasi-judicial functions. *See, Myers* v. *United States,* 272 U.S. 52 (1926); *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935). It is likewise common for such entities to exercise independent litigating authority—*e.g.,* 15 U.S.C. § 56 (litigation by the Federal Trade Commission). Nothing in the language or history of the statute establishing this particular Board suggests that Congress intended a different arrangement here.

Thus, since the language of § 202(a) is clear and its legislative history supplies no evidence that Congress understood that language to have other than its plain meaning, we believe that the provision should be interpreted literally. We conclude, as provided in that subsection, that the Chairman of the Merit Systems Protection Board may designate attorneys to represent the Board in any civil action brought in connection with Board functions or as otherwise authorized by law. Of course, should questions concerning the scope of the Board's litigating authority arise in the contest of specific litigation, we would be happy to look into those questions for you.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

September 12, 1979

79-67 MEMORANDUM OPINION FOR THE ACTING DIRECTOR, EXECUTIVE OFFICE FOR U.S. ATTORNEYS

Assistant U.S. Attorney—Residence Requirement (28 U.S.C. § 545)

Your Office requested our opinion whether a prospective appointee to the position of Assistant U.S. Attorney for the Eastern District of North Carolina satisfies the residency requirement of 28 U.S.C. § 545(a) (1976). That section provides:

> Each United States attorney and assistant United States attorney shall reside in the district for which he is appointed, except that these officers of the District of Columbia and the Southern District of New York may reside within 20 miles thereof.

The U.S. Attorney for the Eastern District of North Carolina wishes to appoint Mr. A, who currently resides in the Middle District of North Carolina, as an Assistant U.S. Attorney for the Eastern District of North Carolina. It would be a hardship for A's family to move to the Eastern District because his wife is completing her undergraduate degree at a university in North Carolina.

According to the information provided to us, A is willing to establish a residence in the Eastern District to avoid conflict with the residency requirement. He plans to rent an apartment at which he usually will be available during the workweek. His family would relocate when his wife completes her undergraduate work. A is also willing to change his voting registration to Wake County in the Eastern District and take other measures necessary to satisfy the residency requirement.

The term "residence" generally refers only to physical presence, not to legal domicile or voting residence. *Weible* v. *United States,* 244 F. (2d) 158, 163 (9th Cir. 1957); *In Re National Discount Corp.,* 196 F. Supp. 766, 769 (W.D.S.C. 1961). A person can have only one domicile, but may have more than one residence or no residence at all. *Corwin Consultants, Inc.* v. *Interpublic Group of Companies, Inc.,* 512 F. (2d) 605, 610 (2d Cir.

1975). The meaning of the term varies depending on its context and must be interpreted in light of the statute in which it appears. *See, Guessefeldt* v. *McGrath,* 342 U.S. 308, 311-12 (1951). In *In Re National Discount Corp., supra,* 196 F. Supp. at 769, the court stated:

> In statutory construction, it is settled that 'reside' is an elastic term to be interpreted in the light of the purpose of the statute in which such term is used; 'reside' is a term whose statutory meaning depends upon the context and purpose of the statute in which it occurs.

It appears from the legislative history that the purpose of the residency requirement was to ensure the availability of the attorneys. The residency requirement for Assistant U.S. Attorneys first was enacted in 1896, in a general appropriation measure. Legislative, Executive and Judicial Expenses Appropriations Act, ch. 252, § 8, 29 Stat. 181 (1896). Residency has been a requirement since that time, although exceptions were provided for the Southern District of New York and the District of Columbia. In the debates of the bill amending the statute to except the District of Columbia, congressional concern focused on the attorneys' physical presence within the district, not on legal domicile. Representative McLaughlin, speaking in favor of the bill, commented that the residency provision requires the attorneys to "move into" the district and "live in" the district. 87 CONGRESSIONAL RECORD 3269 (1941). Representative South, opposing the bill, stated, "it will be to the best interest of the people whom they serve to require them to live among such people during their tenure of office." *Id.* It was suggested that other metropolitan areas might experience problems similar to those of New York and the District of Columbia, but no additional exceptions were made.

The prior law and revision note appearing in the United States Code under a precursor of § 545(a) stated that "the residence requirement of this section has no relation to domicile or voting residence * * * ." *See* 28 U.S.C. § 545 (1976), prior law and revision note.

In our opinion, the residency requirement of § 545(a) would be satisfied if Mr. A rents an apartment in the Eastern District and lives there during the workweek. It is not legally necessary that he change his voting registration.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

September 21, 1979

79-68 MEMORANDUM OPINION FOR THE GENERAL COUNSEL, IMMIGRATION AND NATURALIZATION SERVICE

Outer Continental Shelf—Drilling Rigs—Alien Workers (43 U.S.C. § 1333)

We have your request for our views concerning the applicability of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, to persons working on drilling rigs on the Outer Continental Shelf. The question arises in the context of recent amendments to the Outer Continental Shelf Lands Act, the increase in drilling activity on the Shelf, and protests by various domestic groups that alien workers should not be employed on rigs on the Shelf except in conformance with immigration law requirements.

You have provided us with your memorandum dated January 16, 1979, which concludes that the immigration laws do not apply on the Outer Continental Shelf. We have reviewed that memorandum and reach the same conclusion as far as drilling rigs are concerned. Our reasons, however, are somewhat different and depend largely on an analysis of the recent amendments.

We understand that the immigration laws have never been applied to drilling rigs on the Outer Continental Shelf. Furthermore, until recently your agency has never had occasion to confront this question. In 1953 Congress enacted the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, primarily for the purpose of asserting Federal jurisdiction over the minerals of the Shelf. The original Act is basically a guide to the administration and leasing of offshore mineral-producing properties. Congress adopted the following formula for borrowing domestic law for the Shelf (43 U.S.C. § 1333(a)(1)):

> The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources

therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State * * * .

As enacted in 1953, this language presented two questions of interpretation: whether drilling rigs were included as "artificial islands and fixed structures * * * for the purpose of exploring etc., and whether the immigration laws were among the "laws * * * extended * * * to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State."

You note that the courts have concluded that a drilling rig is a vessel rather than a "fixed structure" within the meaning of § 1333(a)(1). *E.g., Boatel, Inc.* v. *Delamore,* 379 F.(2d) 850 (5th Cir. 1967), and cases collected therein. This was because a rig was designed to float to the place where it will be used and to be attached to the seabed in a relatively impermanent manner, permitting its later removal.

In 1978 Congress amended the Outer Continental Shelf Lands Act. Two of those amendments are crucial here. First, it eliminated the reference to "fixed structures" in § 1333(a)(1) and substituted a reference to "all installations and outer devices permanently or temporarily attached to the seabed." Outer Continental Shelf Lands Act Amendments of 1978, 92 Stat. 635, § 203(a). It is unquestioned therefore that drilling rigs are now within the language of § 1333(a)(1). *See, e.g.,* H. Conf. Rept. 1474 at 80. The question which remains, however, is whether the immigration laws are adopted by the pertinent language of this provision. That, in our view, requires reconciling § 1333(a)(1) with another 1978 amendment that, with certain exceptions, restricts crews of drilling rigs to U.S. citizens or aliens admitted for permanent residence. Section 30, Outer Continental Shelf Lands Act, as added by § 208 of the Outer Continental Shelf Lands Act Amendments, 92 Stat. 669.

If § 1333(a)(1) were considered alone, there are arguments suggesting that the immigration laws should be applied on drilling rigs. Based on a literal reading of that provision, it is certainly possible to conclude that the immigration laws should apply. The 1953 law adopts Federal law "to the same extent as if the Outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State." The immigration laws apply, of course, to Federal enclaves within States. It appears that § 1333(a)(1) was drafted so that it would include Federal laws which, read by themselves, might be interpreted as being limited in their application to the continental United States. *See* W. M. Christopher, "The Outer Continental Shelf Act: Key to a New Frontier," 6 Stan. L. Rev. 23, 42 (1953).[1]

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[1]This point is similarly argued by our Land and Natural Resources Division in a brief (pp. 46–47) filed on behalf of the Environmental Protection Agency concerning the application of the Clean Air Act to the Outer Continental Shelf. The matter is pending in the U.S. Court of Appeals for the Ninth Circuit. *Exxon Corp.* v. *E.P.A.,* No. 78–1932 *et al.*

This conclusion is supported by the legislative history of the 1953 Act. The House had passed a bill that provided: "Federal laws now in effect or hereafter adopted shall apply to the entire area of the outer continental shelf." H. 5134, § 9(a), reprinted in Outer Continental Shelf, Hearings before the Senate Committee on Interior and Insular Affairs, 83d Cong., 1st sess., p. 681 (1953). This Department, writing to the Senate Committee, had commented on the House bill, as you note, and pointed out that it was unclear how the bill would apply where Federal laws by their own terms only applied to places other than the Shelf. Letter from Assistant Attorney General Rankin of May 26, 1953, reprinted in S. Rept. 411, 83d Cong., 1st sess. 32 (1953). It appears that the amendment employing the Federal enclave "within a State" formula was substituted as a response to this criticism, *cf., id.* 23; W. M. Christopher, *op. cit.* Furthermore, specific language dealing with employment of aliens, which had appeared in the original Senate bill,[2] was deleted in committee with the explanation that "since all applicable Federal laws are extended to the seabed and subsoil of the outer shelf, the specific provisions respecting aliens are believed unnecessary." S. Rept. 411, 83d Cong., 1st sess. 24 (1953). Thus, the fact that the Immigration and Nationality Act defines "United States" in a manner that does not include the Continental Shelf, 8 U.S.C. § 1101(a)(38), is not controlling.[3]

As you suggest, the 1953 Act imposed something less than complete sovereignty over the Shelf. This is confirmed by the United Nations Convention on the Continental Shelf, 15 U.S.T. 472, which entered into force for the United States in 1964.[4] *See, Treasure Salvors* v. *Unidentified Wrecked and Abandoned Sailing Vessel,* 569 F.(2d) 330 (5th Cir. 1978) (extension of jurisdiction over the Outer Continental Shelf Act not extension for all purposes). The history of the 1978 amendments suggests, however, that, as a general matter, § 1333(a)(1) should be given broad scope. Two key committee reports state that "Federal law is to be applicable to all activities on all devices in contact with the seabed for exploration, development, and production." H. Conf. Rept. 1474, 95th Cong., 2d sess. 80 (1978); H. Rept. 590, 95th Cong., 1st sess. 128 (1977). The conference report went on to emphasize that one of the purposes of the amendment

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[2]S. 1901, 83d Cong., 1st sess., § 4(g), reprinted in Outer Continental Shelf Hearings, *supra*, at 2. Under this bill the Attorney General was required to certify that aliens employed on structures covered by the bill were lawfully admitted under the Immigration and Nationality Act.

[3]We cannot, therefore, accept the statement at p. 5 of your memorandum that the Senate bill was reported "notwithstanding the Justice Department's conclusion." The change, in fact, appears to be a result of the Department of Justice comment.

[4]The convention provides that "The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources." Art. 2. The Department of State has expressed the view that immigration control over installations exploiting the natural resources of the Shelf would not violate the convention. Letter of January 15, 1979, from Assistant Legal Adviser, Oceans, Environment and Scientific Affairs, to you. In any event, as a matter of domestic law, the Act, if inconsistent with the convention, would nevertheless prevail *Reid* v. *Covert,* 354 U.S. 1, 18 (1957).

and its legislative history was to make clear that the customs laws applied to drilling platforms. The report asserted that this had, in fact, been the intent of the original 1953 Act. H. Conf. Rept. 1474, at 80–81. Logically, it may be observed that there would seem to be no reason why the customs laws ought to apply on the Shelf while the immigration laws would not. Having thus analyzed § 1333(a)(1) in both a textual and historical context, it would be possible to conclude that, standing alone, it is broad enough to require application of the Immigration and Nationality Act to drilling rigs on the Shelf.

It is necessary, however, to consider the effect of specific language on immigration requirements enacted by Congress in 1978. Section 30 of the Outer Continental Shelf Act, as added by § 208 of the Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1356 (1979 Supp.).[5] These new requirements lead us to a contrary conclusion. In general, the amendment requires that rigs be manned by U.S. citizens or aliens lawfully admitted to the United States for permanent residence. 43 U.S.C.

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[5]The full text of this provision reads:

Sec. 30. DOCUMENTATION, REGISTRY AND MANNING REQUIREMENTS.—

(a) Within six months after the date of enactment of this section, the Secretary of the Department in which the Coast Guard is operating shall issue regulations which require that any vessel, rig, platform, or other vehicle or structure—

(1) which is used at any time after the one-year period beginning on the effective date of such regulations for activities pursuant to this Act and which is built or rebuilt at any time after such one-year period, when required to be documented by the laws of the United States, be documented under the laws of the United States;

(2) which is used for activities pursuant to this Act, comply, except as provided in subsection (b), with such minimum standards of design, construction, alteration, and repair as the Secretary or the Secretary of the Department in which the Coast Guard is operating establishes, and

(3) which is used at any time after the one-year period beginning on the effective date of such regulations for activities pursuant to this Act, be manned or crewed, except as provided in subsection (c), by citizens of the United States or aliens lawfully admitted to the United States for permanent residence.

(b) The regulations issued under subsection (a)(2) of this section shall not apply to any vessel, rig, platform, or other vehicle or structure built prior to the date of enactment of this section, until such time after such date as such vehicle or structure is rebuilt.

(c) The regulations issued under subsection (a)(3) of this section shall not apply—

(1) to any vessel, rig, platform, or other vehicle or structure if—

(A) specific contractual provisions or national registry manning requirements in effect on the date of enactment of this section provide to the contrary;

(B) there are not a sufficient number of citizens of the United States, or aliens lawfully admitted to the United States for permanent residence, qualified and available for such work; or

(C) the President makes a specific finding, with respect to the particular vessel, rig, platform, or other vehicle or structure, that application would not be consistent with the national interest; and

(2) to any vessel, rig, platform, or other vehicle or structure, over 50 percent of which is owned by citizens of a foreign nation or with respect to which the citizens of a foreign nation have the right effectively to control, except to the extent and to the degree that the President determines that the government of such foreign nation or any of its political subdivisions has implemented, by statute, regulation, policy, or practice, a national manning requirement for equipment engaged in the exploration, development, or production of oil and gas in its offshore areas.

§ 1356(a)(3) (1979 Supp.). Unlike the reference to the customs laws quoted above, Congress made no assertion as to whether it thought that the Immigration and Nationality Act applied through the 1953 Act or the 1978 amendment to § 1333(a)(1).[6] The only conclusion that makes sense, however, is to assume that § 30 is intended to be a self-contained statement of the extent to which principles of immigration control are to be applied. The purpose of the conference committee was to "reconcile the dual concerns of providing the fullest possible employment for Americans in U.S. Outer Continental Shelf activities and eliminating to the fullest possible extent the likelihood of retaliation by foreign nations against American workers in foreign offshore activities." In addition, exceptions were included "to avoid any disruption in OCS [Outer Continental Shelf] activities by this manning requirement." H. Conf. Rept. 1474 at 123-24. If the Immigration and Nationality Act were assumed to be in force on drilling rigs, then the exceptions found in the new controls would be meaningless since the immigration laws do not include authority to create exceptions parallel to those in § 30, and the 1978 amendments do not purport to modify the Immigration and Nationality Act. As a result the delicate balance that Congress attempted to strike in § 30 would be upset.

We cannot assume that Congress undertook such a meaningless exercise. *See* 2A Sutherland, *Statutory Construction* § 46.06 (Sands, ed. 1973). Thus, the specific coverage of § 30 should be given precedence over the more general application of the provision for assimilating Federal law on the Outer Continental Shelf. *Id.* at § 46.05 note 11.[7] The force of this argument is emphasized by examining the exceptions in some detail.

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[6]Our attention has been directed to unpublished transcripts of mark-up sessions of the Conference Committee and the House Ad Hoc Select Committee on the Outer Continental Shelf which indicate that the applicability of the immigration laws was briefly discussed. The transcripts show that at the House Committee mark-up, committee counsel indicated that the law was uncertain and that he could not say what it was. It does not appear that the members expressed any views of their own. House of Representatives, Ad Hoc Select Committee on the Outer Continental Shelf, Mark-up Session, H.R. 1614, July 26, 1977, Tr. 133-A, 133-H, 133-I. At a meeting of the Conference Committee, counsel advised that the immigration laws applied only to American owned and operated platforms; Senator Johnston (La.) expressed a similar view. Transcript of July 20, 1978, Conference Committee on S. 9 at 9, 14-15. The latter interpretation presents difficulties of its own since there seems to be no basis under § 1333(a)(1) or the immigration law for excluding foreign-owned operations taking place on the Outer Continental Shelf from the broad scope of the immigration laws, although § 30 makes such a distinction. Under all the circumstances, we hesitate to interpret this uncertain evidence as showing that Congress shared any common intent concerning applications of the immigration laws.

[7]Another interpretation might be to assume that the immigration laws apply but that exceptions have been impliedly authorized by § 30. It seems more logical, however, to assume, as noted, that Congress, by passing § 30, gave it precedence over 43 U.S.C. § 1333(a)(1), than to reason that Congress meant to alter provisions of the immigration laws, a completely separate statute. Moreover, the latter intepretation would create practical difficulties since both your agency and the Coast Guard would be mandated to enforce essentially similar regulations. This would create unnecessary duplication and give rise to the possibility of inconsistent interpretation and administration. In addition, we do not believe that § 30 divests your agency of jurisdiction over the immigration laws and assigns it to the Coast Guard. If this had been intended Congress would have so indicated, rather than direct the Coast Guard to issue regulations implementing § 30, which makes no reference to the immigration laws.

First, there is an 18-month delay in the effective date of the restrictions from the date of enactment. The Coast Guard has 6 months to issue regulations, which take effect 1 year later. 43 U.S.C. § 1356(a)(1) and (3); H. Conf. Rept. 1474, p. 125.

Second, the restrictions do not apply at all to rigs that are foreign-owned or foreign-controlled unless the President makes certain findings based on lack of reciprocity by other nations. 43 U.S.C. § 1356(c)(2). Third, since the requirement only extends to "manning" or "crewing," specialists, professionals, or other technically trained personnel who handle temporary operations would not be included, H. Conf. Rept. 95-1474 at 125; 43 U.S.C. § 1356(a)(3). Fourth, existing contracts that provide for foreign manning are preserved. 43 U.S.C. § 1356(c)(1)(A). Fifth, the President may make a specific finding that application of the amendment to a particular rig is not in the national interest. 43 U.S.C. § 1356(c)(1)(C).

The only exception in the amendment that parallels the immigration laws is for aliens performing services where there are not a sufficient number of citizens or resident aliens available to perform such services. 43 U.S.C. § 1356(c)(1)(B). The conference report states: "This is virtually the present standard of the immigration law." H. Conf. Rept. 95-1474 at 124. *Compare* 8 U.S.C. § 1101(a)(15)(H)(ii). Implicit in that statement, however, appear to be the assumption that an exception, independent of the immigration laws, is being created.[8]

In considering the effect of the 1978 amendments on the Outer Continental Shelf Act, we must view the statute as a whole. *See* 2A Sutherland, *Statutory Construction,* § 46.05 (Sands, ed. 1973). We conclude that Congress, in enacting the 1978 amendments, did not intend the Immigration and Nationality Act to apply to drilling rigs on the Outer Continental Shelf.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

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[8]The fact that § 30 operates independently of the immigration laws is also supported by the fact that § 30 appears to apply in some situations where the immigration laws would not. Thus, § 30 directly covers "any vessel, rig, platform, or other vehicle or structure." If the immigration laws were to apply, it would be only by incorporation through 43 U.S.C. § 1333(a)(1), which, as noted, does not apply to "vessels," such as supply ships, but only to artificial islands and installations and other devices "permanently or temporarily attached to the seabed."

September 21, 1979

79-69 MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF DEFENSE

National Guard—Technician Dress and Grooming Regulations—Executive Order No. 11491—Review of Decisions of Federal Labor Regulations Authority

This responds to your request for the opinion of the Department of Justice concerning Federal Labor Relations Council (Council) decisions on the negotiability of National Guard technician dress-and-grooming regulations. The question arose in administrative proceedings instituted by labor organizations on behalf of the technicians. Accompanying the request was a petition to the Attorney General from the Adjutants General of the 50 States, the Virgin Islands, Puerto Rico, and the District of Columbia, and a memorandum in support of their position that the Council's decisions are without legal support. As framed in that memorandum, the questions on which our opinion is requested are whether the Council has jurisdiction to direct negotiations concerning a military regulation applicable only to National Guard technicians and promulgated pursuant to statute by the Department of Defense, and, if so, whether the Council applied an invalid standard of review and thus erroneously determined that the regulation is negotiable.

In our view, the Council did have jurisdiction to determine the negotiability of the regulation in question. Although the method for appealing its decisions is disputed, it does appear that administrative and judicial remedies are available to the dissatisfied party. It would be inappropriate under these circumstances for us to comment on the second question.

The Background

Executive Order No. 11491 was issued in 1969 to govern labor-management relations in the executive branch of the Federal Government.[1] It established the Federal Labor Relations Council to administer and interpret the order[2] and the Federal Service Impasses Panel (Panel) to settle negotiation impasses.[3] It also set forth guidelines for negotiation of collective bargaining agreements.[4] Section 11(a), as amended prior to 1979, provided:

> (a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual; published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision; a national or other controlling agreement at a higher level in the agency; and this order.[5]

Generally, the procedures for settling disputes as to negotiability were as follows: if an issue developed whether a proposal was negotiable, either party could seek a determination from the head of the agency concerned.[6] If the agency head determined an issue was not negotiable, a labor organization could appeal this determination to the Council. If, after a Council decision, the parties were unable to settle their differences, either party could request the Federal Service Impasses Panel to consider the matter.[8] Failure to obey a Panel order directing settlement was an unfair labor practice[9] and a complaint could be filed with the Assistant Secretary of Labor for Labor-Management Relations.[10] The Assistant Secretary's

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[1]This order was amended by Executive Orders Nos. 11616, 11636, 11838, 11901, 12073, 12107, and 12126. Executive Orders Nos. 12107 and 12126 conformed the order to the procedures established by the Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101-7135. Unless otherwise specified, all citations to Executive Order No. 11491 refer to the order as amended prior to Executive Order No. 12107.

[2]Exec. Order No. 11491, § 4.

[3]Exec. Order No. 11491, § 5.

[4]Exec. Order No. 11491, § 11.

[5]This version of § 11(a) appears in Executive Order No. 11838 (Feb. 6, 1975).

[6]Exec. Order No. 11491, § 11(c)(2).

[7]Exec. Order No. 11491, § 11(c)(4).

[8]Exec. Order No. 11491, § 17.

[9]Exec. Order No. 11491, § 19(a)(6).

[10]Exec. Order No. 11491, § 6(a)(4).

decision could be appealed to the Council.[11] A party dissatisfied with the Council's decision on the unfair labor practice could seek relief in a Federal district court.[12]

Title VII of the Civil Service Reform Act, 5 U.S.C. §§ 7101–7135, revised these procedures, but did not affect matters pending as of January 11, 1979, the effective date of the Act:[13]

> No provision of this Act shall affect any administrative proceedings pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted.[14]

The Council and the Panel have considered numerous cases on the negotiability of the National Guard technician dress and grooming regulations. National Guard technicians are civilians employed full-time for the administration and training of the National Guard and the maintenance and repair of supplies issued to the National Guard or the Armed Forces.[15] Technicians must be members of the National Guard.[16] They are employees of the Department of the Army or the Department of the Air Force,[17] but technician employment and administration are delegated by the Secretaries of these departments to the Adjutants General of the States and territories.[18]

Pursuant to regulatory authority,[19] the Secretaries of the Army and the Air Force have required National Guard technicians to wear military uniforms when performing technician duties, and to comply with grooming standards of the appropriate service.[20] Controversy arose when bargaining units of the National Guard technicians proposed amendments to modify the requirement that uniforms be worn. When National Guard officials refused to negotiate the matter, the unions, following the procedures of Executive Order 11491, requested a determination from the head of the National Guard Bureau. In each case, he determined that negotiation was barred by Bureau regulations. Thereafter, the unions petitioned the Council for review. They argued that negotiation is not barred

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[11]Exec. Order No. 11491, § 4(c)(1).

[12]*See, e.g., Montana Chapter of Assoc. of Civ. Tech., Inc.* v. *Young*, 514 F.(2d) 1165, 1168 (9th Cir. 1975); *National Treasury Employees Union* v. *Fasser*, 428 F. Supp. 295, 297 (D.D.C. 1976).

[13]The section specifying the effective date is Civil Service Reform Act of 1978, Pub. L. No. 95–454, § 907.92 Stat. 1227.

[14]Civil Service Reform Act of 1978, Pub. L. No. 95–454, § 902(b), 92 Stat. 1224, 5 U.S.C. § 1101 note.

[15]32 U.S.C. § 709(a).

[16]32 U.S.C. § 709(b).

[17]32 U.S.C. § 709(d).

[18]32 U.S.C. § 709(c).

[19]32 U.S.C. § 709(a), relating to the employment of National Guard technicians.

[20]Technician Personnel Manual 200 (213.2), Subchapter 2–4, provides in part: "Technicians in the excepted service will wear the military uniform appropriate to their service and federally recognized grade when performing technician duties and will comply with uniform standards of the services."

because, one, the regulation was not issued at or above the level of a primary national subdivision of the agency, and two, no compelling need for the regulation exists. The Council found that the National Guard Bureau is a primary national subdivision of the Department of Defense within the meaning of section 11(a) of the order, but that no compelling need existed for the regulations in question.[21] It decided, therefore, that the proposals of the union were subject to negotiation.

In most of these cases, the parties still could not reach an agreement. The unions requested the Federal Service Impasses Panel to consider the negotiation impasses. The Panel issued recommendations that the parties adopt language in their agreements that the employees should have the option of wearing either a uniform or an agreed-upon standard civilian attire, and that the parties should agree upon exceptions to cover occasions on which the wearing of the military uniform may be required.[22] When these suggestions were rejected, the Panel issued orders directing the parties to adopt the Panel's recommended language in their agreements.[23] Some of these cases are still pending before the Panel.

Discussion

It is our opinion that the Council had the authority under Executive Order No. 11491 to determine the negotiability of the dress-and-grooming regulations. That order explicitly gave the Council authority to resolve negotiability disputes.[24] It applied, with certain exceptions, to all employees and agencies of the executive branch.[25] It does not appear to us that any of the exceptions are relevant here. The Adjutants General contend that the exception provided in § 3(b)(3) of the order removes them from its application. This section provides:

> (b) This Order * * * does not apply to—
>
> (3) any other agency, or office, bureau, or entity within an agency, which has as a primary function intelligence, investigative, or security work, when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with national security requirements and considerations * * * .

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[21] *See* Council Consolidated Decision on Negotiability Issues, Nos. 76A-16, 76A-17, 76A-40, 76A-43, 76A-54 (Jan. 19, 1977); Consolidated Decision on Negotiability Issues, Nos. 76A-75, 76A-76, 76A-84 (Jan. 19, 1977).

[22] *See, e.g.,* Panel Reports and Recommendations for Settlement, *In the Matter of State of New York and New York Council Assoc. of Civilian Tech. Inc.,* 78 FSIP 32 (Sept. 28, 1978); *In the Matter of Penn. National Guard and Penn. State Council Assoc. of Civilian Technicians, Inc.,* 77 FSIP 29 (Jan. 20, 1978); *In the Matter of Kansas Army Nat'l Guard and Local R14-87, Nat'l Assoc. of Gov't Employees,* 77 FSIP 30 (Nov. 2, 1977); *In the Matter of Mass. Air National Guard and Local 3004, AFL-CIO,* 77 FSIP 18 (Aug. 26, 1977).

[23] *See, e.g.,* Decisions and Orders, *In the Matter of Mass. Army Nat'l Guard and Local 1629, Nat'l Federation of Federal Employees,* 77 FSIP 31 (Aug. 22, 1978); *In the Matter of Oregon Army/Air Nat'l Guard and Local 2986, AFL-CIO,* 77 FSIP 53 (Aug. 22, 1978); *In the Matter of California Nat'l Guard and Local R12-105, Nat'l Assoc. of Gov't Employees,* 77 FSIP 70 (April 13, 1977).

[24] Exec. Order No. 11491, §§ 4(c)(2), 11(c)(4).

[25] Exec. Order No. 11491, §§ 2(a), 3(a).

The Adjutants General reason that they, as heads of their agencies, have determined that the wearing of the uniform by the technicians is required as a matter of security and that this determination cannot be reviewed by the Council because it is left to the "sole judgment" of the agency head. We disagree because the National Guard does not have as its primary function "intelligence, investigative or security work." The primary function of the National Guard is to maintain and assure the strength and organization of reserve components of the Armed Forces.[26] This is not the type of security work excepted from the order. The maxim *noscitur a sociis* (a word is known by the company it keeps) applies here to limit the term "security work" to the type of work associated with intelligence and investigative work.[27]

Whether the Council applied an invalid standard of review is not a matter for the Department of Justice to determine. Under the order, the Council is the final administrative authority.[28] There is no right to appeal to the Attorney General, and it would be inappropriate for the Department of Justice to comment on the decision.[29] The right of appeal lies elsewhere. Issues arising out of the controversy now are pending before the Federal Labor Relations Authority[30] and at least one Federal court.[31] There is a long line of opinions of the Attorneys General to the effect that it is not proper to express an opinion upon a judicial question that is pending in, or must ultimately be decided by, the courts.[32] Accordingly, we decline to comment on the Council's decisions in these cases.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

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[26]32 U.S.C. § 102. Section 709(e)(2) deals with the military security standards applicable to individual members of a reserve component. It does not define the primary function of the National Guard.

[27]*Cf., Third Nat'l Bank* v. *Impac. Limited, Inc.* 432 U.S. 312 (1977), *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

[28]Exec. Order No. 11491, § 11(c)(4).

[29]*See* 11 Op. Att'y Gen. 407, 408 (1865); 10 Op. Att'y Gen. 347, 349 (1862); 6 Op. Att'y Gen. 289 (1854).

[30]The Federal Labor Relations Authority was created by the Civil Service Reform Act of 1978, 5 U.S.C. § 7105. It is the "successor" to the Council. Section 7123 of the Act provides for judicial review of final orders of the Authority.

[31]*See, Nevada Nat'l Guard* v. *United States,* No. 79-7235 (9th Cir., filed May 31, 1979).

[32]*See, e.g.,* 41 Op. Att'y Gen. 266, 272 (1956); 37 Op. Att'y Gen. 34, 42 (1932); 33 Op. Att'y Gen. 86, 87 (1922).

September 24, 1979

79-70 MEMORANDUM OPINION FOR THE LEGAL ADVISER, DEPARTMENT OF STATE

Conflicts of Interest—18 U.S.C. § 207—Former Executive Branch Officer

This memorandum responds to your June 5, 1979 request for our opinion on the applicability of 18 U.S.C. § 207 to Mr. A, a former Department of State officer who has been approached by the Government of the Republic of Panama to represent Panama in connection with legislation being considered by Congress to implement the 1977 Panama Canal Treaty. As explained below, we conclude that, although § 207(a) bars Mr. A from representing the Government of Panama before the other branches of Government in this matter, it does not bar him from undertaking legislative activity on Panama's behalf.

I. Facts

The facts, as we understand them, concerning Mr. A's relationship to the original Panama treaty negotiating process appear in a July 13, 1979 memorandum ("the memorandum") submitted to us by his firm. As stated in the memorandum, Mr. A served from late 1974 until early 1976 as an Assistant Secretary of State, and thereafter, until December 31, 1976, as an Under Secretary of State. At that time, negotiations with representatives of Panama concerning the treaty were "the direct and sole responsibility" of Ambassador Ellsworth Bunker. Mr. A played no part in the negotiations. According to the memorandum, Ambassador Bunker's office was not itself under Mr. A's supervision, although the Ambassador's negotiating staff included personnel who were under Mr. A's supervision.

Ambassador Bunker's negotiating instructions from the President were developed through a process of interagency consultation. Mr. A participated with others in the development of Department of State policy positions on the issues under consideration. According to the memorandum: "The primary issues considered in the treaty negotiations during Mr. A's

tenure in the government were procedural issues—*i.e.*, issues relating to the pace of the negotiations." In this connection, he accompanied other officials on a visit to Panama, and participated in discussions with General Torrijos on the pace of negotiations. He also participated in conveying to General Torrijos the support of the Joint Chiefs of Staff for the two Panama treaties.

Mr. A, both during and since his Government service, has testified before both Houses of Congress and has spoken publicly about the significance of the Panama negotiations to United States relations with Latin America.[1] He met with a number of Senate and House Members when Congress had before it several resolutions designed to stop the negotiations while they were in progress. Further, during his Government service and for several months thereafter, Mr. A served as a member of the Board of Directors of the Panama Canal Company, although, according to the memorandum, neither the Company nor its board played any role with respect to the treaties or implementing legislation.

According to the memorandum, Mr. A, while in Government service, obtained "relatively little confidential information on the Panama Canal treaties." The memorandum states that he possesses no confidential information gained while he was in the Government that is relevant to the implementing legislation now under consideration by Congress.

II. Discussion

Whether Mr. A may lawfully represent Panama during Congress' consideration of legislation implementing the Panama Canal Treaty depends on the applicability of 18 U.S.C. § 207 (1976).[2] In pertinent part, § 207 provides criminal sanctions for:

> (a) Whoever, having been an officer or employee of the executive branch of the United States Government * * * after his employment has ceased, knowingly acts as agent or attorney for anyone other than the United States in connection with any judicial or other proceedings, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and in which he participated personally and substantially as an officer or

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[1]In connection with Mr. A's public speeches in support of the treaties since he left the Government, the State Department has informed us that it furnished him with material that was otherwise publicly available, but that he was acting in a personal capacity in these efforts. We further understand that Mr. A was one of several experts, both pro and con, consulted by a Senator as he developed his position on treaty ratification; again, the Department of State furnished Mr. A with certain otherwise publicly available information in connection with his activities.

[2]Except as otherwise noted, references in this opinion to 18 U.S.C. § 207 apply to that statute as written before July 1, 1979. Section 207 has now been amended, effective July 1, 1979, by the Ethics in Government Act of 1978, title V, Pub. L. 95-520, 92 Stat. 1864.

employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, while so employed. * * *

Whether § 207(a) bars Mr. A's proposed efforts on behalf of Panama thus depends on whether proceedings involving implementation of the Treaty would, in any respect, be covered by the statute and, if they would, whether the statute reaches legislative activity in connection with this matter.

A. Treaty Implementation Covered by § 207(a)

Although we have carefully considered the views of Mr. A's firm on these questions, we conclude, first, that the implementation of the Panama Canal Treaty, at least as it may involve judicial proceedings or proceedings before the executive branch of Government, is a "particular matter" involving specific parties in which the United States is a party and has a direct and substantial interest and in which Mr. A participated personally and substantially as an officer of the U.S. Government.

First, although Mr. A did not actually participate in treaty negotiations, he did participate in formulating the Department of State's—and thereby the United States'—position with respect to the treaty. Such activities would be encompassed within the terms "recommendation" and "rendering of advice," which are among the enumerated methods of participation covered by the statute. It is irrelevant that many other Government officials participated, or, given the overall significance of the treaties, that the policy issues during Mr. A's tenure were, in some sense, "procedural." He headed an office within the Department of State that was keenly interested in the negotiations. The policy input of a person in this position must be regarded as "substantial participation" under § 207(a).

We further conclude that the treaties with Panama constitute a "particular matter involving a specific party or parties." Unlike general legislation or rulemaking, treaties are intended to affect specific participating parties, namely, their signatories. In form, treaties closely resemble contracts, which are expressly covered by the statute. They are signed after the type of quasi-adversarial proceedings or negotiations that precede or surround the other types of "particular matters" enumerated in § 207(a). The phrase "involving a specific party or parties" has been read to limit the section's concern to "discrete and isolatable transactions between identifiable parties." B. Manning, *Federal Conflict of Interest Law* 204 (1964). Such a characterization aptly describes the treaty negotiation process.

Finally, we conclude that any proceeding involving the executive branch of Government, the branch which negotiated the treaty, or any judicial proceeding that concerns the implementation of the treaty would be the same matter or "particular matter" as the negotiation with which Mr. A was associated. From a review of the treaty, it is evident that both parties understood the necessity of subsequent steps by the United States to set the *de facto* terms, as well as the tone, of the two nations' agreement. Articles III

and IV of the Panama Canal Treaty, "Canal Operation and Management" and "Protection and Defense," respectively, leave the United States free to exercise its responsibilities under the treaty as it chooses, subject only to general principles and requirements. 77 Dept. of State Bull. 485–488 (1977). Any "judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter" specifically involving the Governments of Panama and the United States as parties, concerning the implementation of the treaty, must be viewed as part of the last stage of the single negotiating or diplomatic process by which the nations reach their final agreement.

B. Legislative Activities Excluded from § 207(a)

The question remains, however, whether—notwithstanding our conclusion that a proceeding that concerns implementation of the Panama Canal Treaty and involves specific parties would be part of the same particular matter involving specific parties with respect to which Mr. A had personal and substantial responsibility while in office—§ 207(a) is inapplicable because Mr. A's proposed activities would solely involve Congress' consideration of proposed legislation. On this issue, we agree with Mr. A's firm that wholly legislative activity is not barred by § 207(a).

Whether § 207(a) applies to legislative activity is not clearly settled either by the language or history of the statute. None of the kinds of proceedings specified in that statute is legislative in nature, and it is generally settled that proceedings, such as general rulemaking, that do not typically involve specific parties, are outside the ambit of § 207(a). *See* Attorney General's Memorandum Re the Conflict of Interest Provisions of Public Law 87–849, 18 U.S.C. 201 note (1976). It would appear reasonable to conclude, however, that some legislation, *e.g.*, private bills, would appear to be particular matters involving specific parties as to which application of the § 207(a) bar would advance the policy goals of the Act. The question of the statute's scope is, therefore, a close one.

We nonetheless conclude that legislative activity is not within the scope of "particular matters" covered by § 207(a). Assuming that, in theory, certain kinds of legislation could justly be described as proceedings "involving a specific party or parties," most legislation cannot. To bring within the ambit of § 207(a) those legislative activities that might be deemed to fall within the specified kinds of proceedings would require the drawing of some line to separate the exceptional categories of legislation from the typical legislative proceedings that more closely resemble general rulemaking. Congress has not, in § 207(a), made any attempt to draw such a line. It would be inappropriate, in construing a criminal statute, to infer a nonobvious distinction between permissible and proscribed activity that Congress has not squarely considered and that would render uncertain the

applicability of the criminal sanctions involved.[3] This is especially so in an area where the activities proscribed by statute are not among those that led Congress to enact the prohibition.

In this connection, although the acts of a subsequent Congress do not control the interpretation of an earlier statute, it must be noted that Congress, in 1978, specifically amended § 207(a) in a way that expressly excludes legislative activity.[4] In so doing, Congress acted on the apparent assumption that it was clarifying, not changing, pre-existing law in this respect. The assumption is evident, first, in a report of the Senate Committee on Governmental Affairs that interpreted a proposed new version of § 207 that would not have changed the language of § 207(a) with regard to the inclusion or exclusion of legislative activity. The Committee said, with respect to the proposed revision:

> A former official is also allowed [under § 207(a)] to appear before Congressional committees and give testimony even on particular matters involving specific parties in which he participated personally and substantially while in office. [S. Rept. No. 170, 95th Cong., 1st sess. 152 (1977).]

Because Congress had not yet rewritten § 207(a) to make the exclusion of legislative activity express, the Senate committee's interpretation must have reflected its understanding of the range of proceedings covered by the language of the former § 207(a).

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[3]The legislation history of § 207(a) strongly supports the conclusion that Congress did not consider the applicability of the postemployment ban to legislative activity. The language of both the House and Senate reports emphasizes Congress' concern with "judicial as well as administrative proceedings," H. Rept. 748, 87th Cong., 1st sess. 11 (1961); *see also* S. Rept. 2213, 87th Cong., 2d sess. 5 (1962), excluding, by implication, any consideration of the legislative forum.

[4]As amended, § 207(a) now provides criminal sanctions for:

> Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to—
>
> (1) any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and
>
> (2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and
>
> (3) in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed; * * *

The Office of Government Ethics regulations interpreting the new § 207(a) specifically permit legislative activity. 44 F.R. 19979 (1979), to be codified at 5 CFR § 737.5(c).

This conclusion is buttressed also by the premise stated throughout the legislative history that, insofar as § 207(a) was being revised substantively, the new conflict of interest provisions would be more stringent than the old. *See, e.g., id.* at 32. If the former version of § 207(a) included legislative activities, the new version would in fact be more lenient in this regard.

We conclude that Congress' understanding in 1978 concerning the scope of § 207(a) was correct. The language of § 207(a) necessarily excludes most legislation from the kinds of matters it covers, and no guidance appears that suggests a line to be drawn between different kinds of legislative activity with respect to the applicability of the statute.

Conclusion

For the foregoing reasons, we conclude that Mr. A may participate in legislative activities connected with implementing the Panama Canal Treaty.[5] It should be noted that our interpretation of § 207(a) would bar his representation of Panama before the judicial or executive branches in any proceeding connected with the implementation of the treaty.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

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[5]This Office has not considered the effect, if any, of the Code of Professional Responsibility in the present context, either with respect to any steps that may be required of Mr. A to preserve the confidences and secrets of his former client, the United States, *see* Canon 4, or the effect, if any, of his past and present relationship with that client on his ability to exercise fully independent professional judgment on behalf of Panama. *See* Canon 5.

September 26, 1979

79-71 MEMORANDUM OPINION FOR THE ASSISTANT TO THE PRESIDENT FOR DOMESTIC AFFAIRS AND POLICY

Interstate Commerce Commission—Directed Rail Carrier Service—Back Pay—49 U.S.C. § 11125 (Supp. II, 1978)

This confirms my oral advice that it is our opinion that the Interstate Commerce Commission might determine that it was reasonable and necessary for a carrier, providing service over The Rock Island routes pursuant to a directed service order, to pay back wages owing to The Rock Island employees from The Rock Island in order to bring those employees back to work for the directed carrier. We understand that The Rock Island owes, but is presently unable to pay, back wages to its employees for work performed during August. Apparently the employees have taken the position that they will not return to work for a directed carrier or anyone else until back wages have been paid.

Section 11125(b)(3), 49 U.S.C. (Supp. II, 1978) specifically provides that "A directed carrier is not responsible, because of the direction of the Commission, for the debts of the other carrier." Although this provision expressly relieves the directed carrier of any obligation to assume existing debts of the defaulting carrier, in our view it does not preclude a determination that assumption of an existing debt is a permissible means of assuring the resumption or continuation of service.

The provision protects the directed carrier from suits by creditors of the nonoperating carrier; the directed carrier does not become liable for a defaulting carrier's debts by virtue of the Commission's directed service order. The provision, however, does not prohibit the directed carrier from paying an existing debt of the nonoperating carrier if such payment is required to enable the directed carrier to provide the service ordered by the Commission. The language of subsection (b)(3) quoted above is not a limitation on the payment by the directed carrier of the railroad's existing debts. However, the reimbursement provision, subsection (b)(5), is a limitation on such payments.

That subsection requires a finding by the Commission that an expense incurred by the directed carrier was "incurred in or attributable to the handling, routing, and moving the traffic over the lines of the other carrier for the period during which the action of the Commission is effective" before it can be included for reimbursement by the Government. The Commission must find that the payment here was necessary to move traffic over The Rock Island line before it can consider the expenses incurred to be reimbursable.

It is important to note that The Rock Island's financial posture will not be affected by the directed carrier's payment of back wages; the directed carrier simply will be substituted for the several employees as claimants against The Rock Island for the back wages.

The directed carrier would advance the back wages to the employees in return for the employees' assignment to the directed carrier of their individual wage claims against The Rock Island. The directed carrier, as assignee, would then be in a position to recover these payments from the trustee in bankruptcy for The Rock Island. Claims for wages are entitled to priority in a railroad reorganization.

The Commission, in our view, would be entitled to find that the directed carrier's costs associated with advancing the back pay to the employees, and recovering the wage claims from The Rock Island, were necessary and reasonable expenses in the computation of Government reimbursement to the directed carrier under 49 U.S.C. 11125(b)(5) (Supp. II, 1978). Should the directed carrier be unable to recover from The Rock Island the full amount of the back wage payments, the shortfall could also be reasonably included in the directed carrier's expenses, again assuming that the Commission determines that the payment of back wages was a necessary expense "incurred in or attributable to * * * moving the traffic over [The Rock Island] lines" during the period of the directed service order.

It should be pointed out that the Commission in its regulations issued under § 11125 has provided that, in the event a directed carrier does not need all the employees of the nonoperating carrier to provide the directed service, the cost of terminating the unneeded employees is an obligation of the nonoperating carrier and is not the responsibility of the directed carrier. *Ex Parte No. 293* (Sub No. 3), *Implementation of P.L. 93-236,* 248 I.C.C. 251, 273 (1975). These regulations on their face do not foreclose a determination by the Commission that a directed carrier in the exercise of sound business judgment might conclude that the payment of the nonoperating carriers, obligations to employees incurred before the period of directed service was, in fact, necessary to assure the resumption of the ordered service and therefore was attributable to moving traffic over The Rock Island lines.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

September 27, 1979

79-72 MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL CRIMINAL DIVISION

Attorney General—Delegation of Authority—18 U.S.C. § 2516

This responds to your request for our opinion whether Attorney General Order No. 799-78, signed by former Attorney General Bell on August 15, 1978, and left intact by Attorney General Civiletti, continues in force. The order specially designates—

> the Assistant Attorney[s] General in charge of the Criminal Division * * * the Tax Division, and * * * the Office of Legal Counsel [severally] to exercise the power conferred by Section 2516 of Title 18, United States Code, to authorize applications to a Federal judge of competent jurisdiction for orders authorizing the interception of wire or oral communications by [Federal investigative agencies] * * * .

For the reasons set forth below, it is our opinion that the order remains valid despite the resignation of Mr. Bell.

The relevant language appears at the beginning of § 2516 as follows:

> (1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction * * * .

This language cannot reasonably be construed to limit the life of a designation to the period of incumbency of the Attorney General who made it. Moreover, the legislative history of Pub. L. No. 90-351, Title III, 82 Stat. 197, 211, approved June 19, 1968, by which § 2516 was enacted, reveals nothing to indicate that Congress considered this point. Thus, § 2516, standing alone, does not compel Attorney General Civiletti, who is satisfied with the designations of his predecessor in office, to issue an order of his own to preserve them. Nor can such a requirement be found in administrative custom or judicial precedent. To the contrary, both confirm that lawful delegations of authority survive the particular officer making the delegation.

It is axiomatic that in the absence of a limiting provision of law or a limiting provision within the delegation itself, a valid delegation of authority or other rule or regulation continues in force until revoked by someone with authority to revoke it, and accordingly continues without regard to the departures from office of its originator and intervening successors.[1]

The reason for adherence to the principle was well stated in a case involving this Department and presenting essentially the same question you have posed, *United States* v. *Morton Salt Co. et al.*, 216 F. Supp. 250, 255-256 (D.C. Minn. 1962), *aff'd,* 382 U.S. 44 (1965). There the Acting Deputy Attorney General, who, on January 5, 1961, gave departmental attorneys an authorization to appear before a grand jury, was replaced by an incoming Deputy Attorney General on January 21, 1961. The authorization of January 5 was not filed with the grand jury until February 20, 1961. The defendants asserted that it was ineffective because the person who issued it was no longer in office on February 20. The District Court responded as follows:

> This contention is clearly untenable in that it is the authority from the duly designated official in the office of the Attorney General which the statute requires, and if that individual thereafter resigns, dies, or is otherwise separated from his office, the authority to act under the authorization is not terminated. In other words, when a designated official acts within the scope of his authority, the authorization must continue until it is revoked or is otherwise terminated. If this were not true, a change of administration or resignation from office by the official who acted within his authority when the designation was made would create a chaotic condition in the administration of the affairs of the Department of Justice.

In re Weir, 520 F. (2d) 662 (C.A. 9th Cir. 1975), produced a similar pronouncement concerning a grant of immunity under 18 U.S.C. § 6003(a) that a District Court had issued a grand jury witness on November 1, 1973, after the Attorney General had authorized it. Following the refusal of the witness to testify at proceedings ensuing from that event, he refused on February 25, 1975, to testify before a new grand jury, contending that the Government should have been required to show that the Department of Justice had again reviewed the matter of the immunity grant. The court held that such action by the Department, which was no longer headed by the Attorney General who had authorized the immunity grant, was not necessary, stating, *id.*, at p. 667:

> The rules and orders of an Attorney General continue to govern the Department of Justice (notwithstanding the advent of new Attorneys General) until they are changed or altered. This is the customary way in which administrative agencies operate.

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[1]Perhaps the best evidence of the acceptance of this truism of administration is the absence from the *Federal Register* of the myriad of agency orders and notices proclaiming the continuity of procedures, delegations of authority, etc., that would be occasioned by a contrary rule.

Finally, it is pertinent to mention that, while your question was not explicitly in issue in *United States* v. *Nixon,* 413 U.S. 683 (1974), the case involving the validity of the Watergate Special Prosecutor's subpoena *duces tecum* of White House tapes and documents, the Court obliquely passed on it. In the course of discussing the provisions of the charter given the Special Prosecutor by Acting Attorney General Bork on November 2, 1973, 38 F.R. 30739, as amended on November 19, 1973, 38 F.R. 32805, the Court said, "So long as this regulation is extant it has the force of law." 418 U.S., at 695. Since the Special Prosecutor's subpoena was served on April 27, 1974, and Attorney General Saxbe, who took over from the Acting Attorney General on January 4, 1974, did not reissue or amend the charter, the quoted sentence evidences the Court's understanding that the change in office had no effect on its validity.

Administrative practice and judicial expressions are but a reflection of common sense and compel our conclusion that former Attorney General Bell's Order No. 799–78 making designations under 18 U.S.C. § 2516 remains in effect.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

October 1, 1979

79-73 MEMORANDUM OPINION FOR THE GENERAL COUNSEL OFFICE OF PERSONNEL MANAGEMENT

Federal Computer Systems—Access by Contractor Employees—Authority to Screen for Security Purposes (31 U.S.C. § 18a; 5 U.S.C. §§ 301, 552a; 44 U.S.C. § 3102)—Due Process

You have asked for our views concerning the authority of executive branch agencies to implement Transmittal Memorandum No. 1 to Office of Management and Budget (OMB) Circular No. A-71, dated July 27, 1978. The Transmittal Memorandum, among other things, requires Federal agencies to establish personnel security policies for screening all individuals participating in the design, operation, or maintenance of Federal computer systems or having access to data in Federal computer systems. You have asked us to confine our opinion to the question of an agency's authority to investigate and screen non-Federal employees before granting them access to unclassified information in Federal computer systems.

We conclude that Federal agencies have the authority to implement the Transmittal Memorandum by screening contractor employees[1] in any reasonable manner, but that such implementation must be consistent with due process of law.

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[1]Although your request referred to the authority to investigate non-Federal personnel, including employees of contractors and prospective contractors, we are unaware of any non-Federal employees who would come within the purview of the Transmittal Memorandum who would not be contractor personnel. For example, the Transmittal Memorandum says (at p. 3) that "[t]hese policies should be established for government and contractor personnel."

The Transmittal Memorandum was intended to promulgate policy and define the responsibilities of various executive branch agencies for computer security. This function appears to be within the broad authority of the Director of the Office of Management and Budget to "develop improved plans for the organization, coordination, and management of the executive branch of the Government with a view to efficient and economical service." 31 U.S.C. § 18a (1976).

The memorandum makes it the responsibility of the head of each executive agency to assure an adequate level of security for all agency computer data whether processed in-house or commercially. In the area of personnel security, it requires that each agency at a minimum—

> [E]stablish personnel security policies for screening all individuals participating in the design operation or maintenance of Federal computer systems or having access to data in Federal computer systems. The level of screening required by these policies should vary from minimal checks to full background investigations commensurate with the sensitivity of the data to be handled and the risk and magnitude of loss or harm that could be caused by the individual. These policies should be established for government and contractor personnel. Personnel security policies for Federal employees should be consistent with policies issued by the Civil Service Commission. [p. 3.]

It should be noted that the memorandum contemplates a range of screening procedures varying from minimal checks to full background investigations depending upon the risk of harm and the sensitivity of the data. It may be that adequate security can be assured in many cases without an actual investigation of contractor employees. For example, in some instances submission of information or certification by the employer may be sufficient. In other cases it may be advisable to obtain verification of an employee's arrest record, or lack thereof. There will, no doubt, also be instances where a full background investigation of a contractor is warranted. The memorandum directs the head of each agency to exercise discretion in choosing a screening method to fit the circumstances of particular data-processing contracts.

We have found three statutory sources of agency authority to take action to assure the security of agency records. The head of every executive or military department has the authority to "prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers and property." 5 U.S.C. § 301 (1977). Although that section specifically notes that it does not authorize the withholding of information from the public, it does appear to authorize regulations of the sort contemplated by OMB to assure the security of data-processing records and property.

The Privacy Act of 1974 gives Federal agencies a more specific mandate. That Act was passed in response to a congressional finding that

> [t]he increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information * * *. [Pub. L. 93-579, § 2(a)(2), quoted at 5 U.S.C. § 552a note.]

In order to prevent such harm to individual privacy, the Privacy Act requires that each agency establish (1) rules of conduct for persons involved in the design, operation, or maintenance of any system of records; and (2) appropriate administrative, technical, and physical safeguards to ensure the security and confidentiality of records. 5 U.S.C. § 552a(e) (9) and (10). Although the Privacy Act applies only to systems of records that contain information about individuals,[2] 5 U.S.C. § 552a(a), the Act does provide that an agency, consistent with its authority, shall cause the requirements of the Act to be applied to government contractors who operate a system of records to accomplish an agency function. Moreover, the employees of a contractor are to be considered employees of the agency for purposes of criminal penalties under the Act. 5 U.S.C. § 552a(m).

The head of each Federal agency is also required by 44 U.S.C. § 3102 to provide for "effective controls over the creation and over the maintenance and use of records in the conduct of current business" and in cooperation with the Administrator of General Services to "promote the maintenance and security of records deemed appropriate for preservation."[3] To the extent that computer records are involved in the current conduct of agency business or deemed appropriate for preservation, this section would provide further authority for the imposition of controls on access to computer information.

Due Process

Although we conclude that the head of a Federal agency has authority to screen contractor employees before granting them access to Federal data-processing systems, there are legal and constitutional limits to the exercise of any authority. We will discuss the application of due process to this situation because we understand that some agencies have expressed concern about *Greene* v. *McElroy,* 360 U.S. 474 (1959). In that case the Supreme Court found that the authority of the Department of Defense to screen contractor employees for work on classified projects was not specific enough to permit action that would deprive a person of his or her ability to pursue his or her chosen profession without the safeguards of confrontation and cross-examination.

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[2]The Act defines "individual" as "a citizen of the United States or an alien lawfully admitted for permanent residence." 5 U.S.C. § 552a(a)(2).

[3]The scope of the term "records" as used in this section can be found in 44 U.S.C. § 3101. That definition appears to be sufficiently broad to encompass data-processing materials.

The plaintiff in *Greene* was an aeronautical engineer and general manager of a corporation that had defense contracts that required it to exclude from its premises persons not having security clearances. Although the plaintiff had been granted security clearances on previous occasions, he was eventually deprived of his clearance on the basis of alleged Communist associations and sympathies. He was notified of specific written allegations and was permitted to present evidence to refute the allegations at several hearings concerning the revocation of his clearance. However, he was denied access to the source of much of the information against him and was not permitted to confront or cross-examine witnesses against him. As a result of the loss of his clearance, he resigned from his position and was effectively barred from the practice of his profession. Proceeding very cautiously, the Supreme Court held that in authorizing or acquiescing in Department of Defense procedures to restrict dissemination of classified information, neither the President nor Congress intended to dispense with safeguards of confrontation or cross-examination. Accordingly, it invalidated the Defense Department procedures as beyond the scope of the agency's authority.

In a subsequent case, *Cafeteria & Restaurant Workers Union* v. *McElroy,* 367 U.S. 886 (1961), the Supreme Court distinguished and limited its holding in *Greene. Cafeteria Workers* involved a cook who was barred from her job at a naval facility upon failure to meet security requirements. Noting that the due process issue had not been resolved in *Greene*, the Court held that the Due Process Clause will be involved if an agency's action in excluding certain contractor employees is likely to result in the foreclosure of other employment for them in the data-processing field. We would suggest that in any such case the agency general counsel be consulted for more particular guidance concerning the application of due process principles.[4]

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

[4]In this connection, *see, Doe* v. *United States Civil Service Commission,* 483 F. Supp. 539 (D.S.D. N.Y. 1980).

October 3, 1979

79-74 MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Judges—Appointment—Age Factor

Representative Pepper, Chairman of the House Select Committee on Aging, has expressed concern over the practice of considering the age of candidates for judicial appointment and excluding from consideration those who are older than age 60. This brief memorandum discussed the legality of that practice.

The practice is lawful. The Constitution gives the President the power to appoint Federal judges. Art. II, § 2, cl. 2. In making these appointments, the President is constitutionally entitled to exercise his discretion and to follow policies that in his view will serve the interests of the Nation. The practice of considering the age of judicial candidates reflects such a policy.*

Representative Pepper suggests that this practice is inconsistent with the Age Discrimination in Employment Act of 1967, as amended (the "Act"). *See* 29 U.S.C. § 621 *et seq.* The Act provides, *inter alia,* that "[a]ll personnel actions affecting * * * applicants for employment * * * in those units of the * * * judicial [branch] of the Federal Government having positions in the competitive service * * * shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a).

Whatever this language means, it does not purport to bind the President in making appointments for judicial office. Candidates for judicial office are not "applicants for employment" in the ordinary sense of that phrase. Moreover, by limiting the applicability of the statute to "units of the

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*The practice is not barred by any other provisions of the Constitution. It is doubtful that the President's power to appoint persons to high Government office is subject to any restraint such as those grounded in the First and Fifth Amendments, which may regulate in some respects the hiring and firing of some kinds of Government employees. In any case, the practice of considering a judicial candidate's age abridges no such restraint. It presents no First Amendment question. It deprives no one of liberty or property. It establishes an age classification that is fully as rational and defensible from a constitutional standpoint as age classifications that have been upheld in other contexts. *Cf., Massachusetts* v. *Murgia,* 427 U.S. 307 (1976); *Palmer* v. *Ticcione,* 576 F. (2d) 459 (2d Cir. 1978).

* * * judicial [branch] * * * having positions in the competitive service," Congress may have intended to exclude noncompetitive positions from the coverage of the statute, at least with respect to the judicial branch. The operative language was added to the Act by Pub. L. No. 93-259, 88 Stat. 74. We have found nothing in the legislative history of that amendment that would support or require a contrary conclusion.

Representative Pepper suggests that the "policy" of the Act is violated nonetheless. With all due respect, that argument is of doubtful merit. The Act does not apply to all appointments in the Federal Government; and it expresses on policy whatever, so far as we can determine, with respect to judicial appointments or candidates for judicial appointment. Indeed, if Congress had purported to bar the President from considering age in the selection of judicial appointees, the Act would present a substantial constitutional question. Congress has power to prescribe qualifications for office; but the power of appointment belongs to the President, and it cannot be usurped or abridged by Congress. *See, Buckley* v. *Valeo,* 424 U.S. 1 (1976); *cf., Springer* v. *Philippine Islands,* 277 U.S. 189 (1928). There is no settled constitutional rule that determines how these two powers—the power of Congress to prescribe qualifications and the power of the President to appoint—are to be reconciled, but it seems clear that there must be some constitutionally prescribed balance. The balance may shift depending on the nature of the office in question. For example, Congress has required that the President appoint members of both parties to certain kinds of boards and commissions; there is serious question whether Congress could constitutionally require the President to follow the same practice with respect to his Cabinet.

The question of age discrimination in the selection of candidates for judicial office presents a similar problem. The power to appoint Federal judges, who hold office on good behavior, is by tradition and design one of the most significant powers given by the Constitution to the President. It provides one of the few administrative mechanisms through which the President can exert a long-term influence over the development and administration of law in the courts. The President's present power to exert that influence to the fullest by preferring candidates for appointment who are likely to have long, rather than short, careers on the bench is therefore a matter of constitutional significance. Whether Congress could deny the President that power by requiring him to disregard utterly the age of candidates for appointment has never been considered by the courts, but because of the gravity of the constitutional questions it raises, we would be most reluctant to construe any statute as an attempt to regulate the President's choice in that way, absent a very clear indication in the Age Discrimination in Employment Act of 1967.

JOHN M. HARMON
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Office of Legal Counsel

October 10, 1979

79-75 MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Constitutional Convention—Limitation of Power to Propose Amendments to the Constitution

You have requested our opinion on a question that involves the "Convention Clause" of Article V of the Constitution:

> The Congress * * * on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which * * * shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress * * * .[1]

Your question is whether this clause authorizes a general or a limited convention process. Does a "Convention for proposing Amendments," called by Congress on application of two-thirds of the legislatures of the States, have general power to propose amendments on any subject that commands the attention of the delegates? Under what circumstances, if any,

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[1]The entire text of Article V follows:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

may the powers and the proposals of the convention be limited to a particular field? This question has been warmly debated among constitutional scholars and officers of Government.[2] It has never been answered or even addressed by any court. Our views are set forth below.

I. The Convention of 1787

In the summer of 1787 delegates from 12 of the 13 United States assembled in Philadelphia. They had been called to Philadelphia by Congress, and their purpose was to consider and propose amendments to the Articles of Confederation and constitution of the young Nation. They labored through the summer and produced a new and enduring document, the very Constitution that your question requires us to construe.

One of the important questions that confronted the delegates in Philadelphia was whether they should honor the procedural limitations that governed the amendment process. These limitations were created by Article XIII of the Articles of Confederation and by the Act of Congress pursuant to which the convention had been called. Under the Act the convention was to consider and propose amendments to the Articles, and the amendments were to become effective when approved by Congress and each of the States.[3] The Act was declaratory of the Articles themselves. The Articles allowed for amendment, but they declared that the Union of the 13 States would be "perpetual" and that the government could not be altered unless the alteration were "agreed to in a Congress of the United States * * * and * * * confirmed by the Legislatures of every State." Article XIII.

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[2] *See* Dellinger, "The Recurring Question of the 'Limited' Constitutional Convention," 88 Yale L.J. 1623 (1979); Van Alstyne, "Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague," 1978 Duke L.J. 1295; Rhodes, "A Limited Federal Constitutional Convention," 26 U. Fla. L. Rev. 1 (1973); Bonfield, "The Dirksen Amendment and The Article V Convention Process," 66 Mich. L. Rev. 949 (1968); Note, "Proposed Legislation on the Convention Method of Amending the United States Constitution," 85 Harv. L. Rev. 1612, 1629 (1972); Black, "Amending the Constitution: A Letter to a Congressman," 82 Yale L.J. 189, 202–03 (1972); Special Constitutional Convention Study Comm., American Bar Assoc., "Amendment of the Constitution by the Convention Method Under Article V" (1974); Pullen, "The Application Clause of the Amending Provision of the Constitution" (1951) (unpublished thesis on file at University of North Carolina Library); Orfield, *Amending the Federal Constitution* (1942); Jameson, *A Treatise on Constitutional Conventions* (4th ed., 1887); Bonfield, "Proposing Constitutional Amendments by Convention," 39 Notre Dame Lawyer 659 (1964); Black, *Handbook of American Constitutional Law* (West Pub. Co., 1927); Brickfield, "State Applications Asking Congress to Call a Federal Constitutional Convention," House Comm. on the Judiciary, 87th Cong., 1st sess. (Comm. print, 1961); Brickfield, "Problems Relating to a Federal Constitutional Convention," House Comm. on the Judiciary, 85th Cong., 1st sess. (Comm. print, 1957); Dixon, "Article V: The Comatose Article of Our Living Constitution?" 66 Mich. L. Rev. 931 (1968); "Ervin, Proposed Legislation to Implement the Convention Method of Amending the Constitution," 66 Mich. L. Rev. 875 (1968); Graham, "The Role of the States in Proposing Constitutional Amendments," 49 ABAJ 1175 (1963); Kauper, "The Alternative Amendment Process: Some Observations," 66 Mich. L. Rev. 903 (1968); Packard, "The States and the Amending Process," 45 ABAJ 161 (1959); Forkosch, "The Alternative Amending Clause in Article V," 51 Minn. L. Rev. 1053, 1075 (1967).

[3] 1 Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 120 (2d ed., 1836) (hereinafter "Elliot").

The requirement of unanimous consent stood squarely in the way of what a majority of the delegates wanted to do. They wanted to propose sweeping changes in the old system, and they had no reason to believe that their proposals would be universally accepted. Rhode Island had not even bothered to attend the convention. Congress, whatever views it might otherwise have entertained, stood to be abolished by the proposed reform. If the Framers adhered to the amendment procedure set out in the Articles and in the statute, they faced a prospect of failure. Because they greatly feared the consequences of failure,[4] they boldly chose to ignore the law.[5] They drafted their new Constitution in secret session; and when they emerged at the end of the summer, they proposed that their plan should take effect upon ratification, not by Congress or by the legislatures of the States, but by popular conventions in the States. Moreover, they proposed that ratification by conventions in nine States would be "sufficient for the Establishment of this Constitution *between the States so ratifying the Same.*" *See* Constitution of the United States, Article VII, Clause 1. [Emphasis added.] In a word, the Framers invited conventions in nine States to abolish the Union.

Congress received this plan and demurred, transmitting it to the States. Conventions in 11 States approved it, and the plan went into effect. In March, 1789, a new Congress (a Congress of the eleven United States of America) assembled in New York; and it was clear by then that a fundamental change had occurred. In accordance with the Framers' design, under the compulsion of political necessity and in the face of positive law to the contrary, a confederation of 13 States had been abolished by action of a dedicated majority; and a new government, resting on different principles, had been established among 11 of the former confederates.[6]

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[4]George Washington, who was not given to overstatement, summarized the desperate condition of the Confederacy in the following way:

> That something is necessary, all will agree; for the situation of the General Governmt. (if it can be called a governmt.) is shaken to its foundation, and liable to be overset by every blast. In a word, it is at an end, and unless a remedy is soon applied, anarchy and confusion will inevitably ensue.

Letter to Thomas Jefferson, May 30, 1787, reprinted in 29 *Writings of Washington* 224 (Fitzpatrick ed., 1931).

[5]As Edmund Randolph put it, "There are great seasons when persons with limited powers are justified in exceeding them * * * ." 1 Max Farrand, *The Records of the Federal Convention of 1787,* 262 (rev'd ed., 1966) (hereinafter, "Farrand"). George Mason agreed that "there were besides certain crises, in which all ordinary cautions yielded to public necessity." 1 Farrand at 338. At another point in the debate James Wilson declared that "[t]he house on fire must be extinguished, without a scrupulous regard to ordinary rights." 2 Farrand at 469.

[6]The abolition of the Articles of Confederation and the establishment of the new Constitution was a peaceful revolution. It was an act of will that altered a frame of government in a way that was inconsistent with existing law governing how such alterations were to be made. Madison himself admitted that this was the best legal argument against what the Framers had done: Their proposal was defective because the new Constitution was to be approved and established in a way that was contrary to positive law. *The Federalist,* No. 40, at 263 (Cooke ed., 1961). Madison, a good lawyer, had no answer for that argument on the merits. There was no answer. He could only say that if the proposal were carried into execution on the approval of conventions in nine States, a justification could be found, not in positive law, but in the fundamental democratic principles to which the Declaration of Independence had referred—the "Laws of Nature and of Nature's God" that conferred upon all men a right to alter bad governments in the face of existing legal forms. *Id.* at 265.

We have begun our discussion with this page of history to illustrate two points that have caused no little confusion in the traditional debate over limited, in contrast to general, conventions. We want to put them behind us.

First, the Convention of 1787 shows that law cannot execute itself. The people and their officers execute the law; and when enough of them choose to disregard it, law is ineffective. Whatever Article V of the Constitution may require or permit in the way of legal limitation on the process of amendment by convention, it can be no more effective than was its predecessor, Article XIII of the Articles of Confederation, if the citizens and their representatives undertake to disregard it.

The second point is related to the first. Some have argued that the Convention of 1787 demonstrates the illimitable nature of the convention process and the futility of academic inquiries into the legal parameters of that process, whatever they may be. We do not share that view. It is true that in revolutionary times, as in 1787, law may be disregarded and, indeed, overturned. But for 200 years this has been a Nation under law; and because the history of the Convention of 1787 shows so clearly how the observance and preservation of law, even fundamental law, depends ultimately on the consent of the people and their representatives, it demonstrates the importance and the urgency of questions such as the one you have raised. If it is for the people and their officers to execute Article V, it is our duty to understand what Article V requires and what it permits.

II. The Procedural Nature of Article V

Article V contains two provisions that expressly limit the scope of the alterations that may be made in the Constitution. The first—"that no Amendment which may be made prior to the Year One Thousand Eight Hundred and Eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the First Article"—was legally and politically significant when drafted, but it has no present force. The second—that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate"—establishes a constitutional principle of fundamental importance.

These limitations on the amendability of the Constitution are significant for our purposes because they are the only limitations on subject matter that are expressly set out in Article V. With regard to all possible amendments, except those prohibited by these provisions, Article V is restrictive only insofar as it restricts the procedures by which amendments may be proposed and ratified. The question we must answer is whether there are circumstances in which the procedures mandated by Article V may operate

in such a way as to confine the constitutional power of an Article V convention to a given field.[7]

We will state our conclusions in advance. First, we think that if a convention for proposing amendments were called under Article V, the constitutionally mandated procedures would operate to deprive the convention of power to make constitutionally viable proposals except with respect to subjects within a predetermined field. That field, however broad or narrow, would be defined by the extraordinary legislative act that initiates the convention process, the "Application" of the legislatures of the States. We will explain that conclusion and the reasons for it in Sections III and IV below.

Second, we think that Article V gives Congress no power to provide for the ratification of any constitutional proposal that is not developed and proposed in accordance with the procedures contemplated by Article V. Just as Congress would have no power to submit one of its own constitutional proposals for ratification unless two-thirds of the Members of both Houses were in accord that the proposal was necessary and desirable, Congress would have no power to provide for the ratification of any proposal propounded by a constitutional convention unless that proposal were responsive to the application that justified the gathering of the convention in the first instance. We will explain that conclusion and the reasons that support it in Section IV.

III. The Role of the Legislatures of the States

Our analysis is dictated by the form of the procedure set out in the constitutional text. That procedure involves at least five different acts or steps: an initial "Application" by two-thirds of the legislatures of the States; a "call" to convention issued by Congress; a parliamentary convocation—the convention itself—attended by delegates selected and commissioned in a manner not specified by Article V; a designation by Congress of a "Mode of Ratification" for any proposal made by the convention; and ratification of any such proposal by three-fourths of the States in accordance with the mode prescribed by Congress. For our purposes, the critical step in this process is the first one, the "Application" of the legislatures of the States. What is this "Application?" What part does it play in the convention process? What power does it give to the legislatures of the States?

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[7]The notion that the Constitution may give Congress power to impose adventitious subject matter restrictions on the convention process is one that finds no support in the text of Article V or in the drafting history. Congress, of course, has power to make "laws which shall be necessary and proper for carrying into Execution" the powers conferred upon it by Article V; but there is nothing in Article V that suggests that it would be necessary or proper for Congress to create subject matter restrictions that do not flow from the operation of Article V itself. Indeed, as we will discuss below, the history of the clause suggests rather clearly that it would be altogether unnecessary and improper for Congress to do so. The Framers created the convention procedure for the very purpose of preventing Congress from blocking amendments desired by the legislatures of the States and the delegates of the people in convention.

The participants in the traditional debate over limited in contrast to general conventions have given widely, sometimes wildly, different answers to these questions. Some have argued that the application can be nothing more than a neutral request for a convocation, a request that a forum be established in which constitutional questions may be debated and proposals made. Even if the legislatures have a specific problem in mind, even if they request a convention because they want the Constitution to be changed in some particular way, they must leave it entirely to the delegates to determine the course that the convention will take. Indeed, if their application manifests anything other than an unqualified desire for a convention with power to discuss and propose any amendment the delegates may want to propose, it is void. It cannot provide a constitutional basis for a convention under Article V.[8]

At the other extreme, some have thought that the application process is designed to give the legislatures plenary power to determine both the form and the content of the proposals that the convention may submit to the States for ratification. Not only may the legislatures request that Congress call a convention to consider a particular problem or a particular proposal, they may frame amendments and demand that the convention do nothing more than vote on those amendments as framed. This view has been espoused in one form or another by several scholars,[9] and it lies at the heart of some of the applications[10] that have been submitted to Congress by the States from time to time.

We cannot adopt either of these views—the view that the legislatures have no power to determine what work the convention may or must do, or the view that the legislatures have plenary power to propose amendments and to require that the convention do nothing more than emit them or quash them as it finds them good or bad. The first theory is mistaken. The second is viable, if at all, only in the most limited circumstances. The correct interpretation, we believe, lies elsewhere. The textual and historical reasons for that opinion are given in the paragraphs that follow.

Text. "Congress * * * on the Application of two thirds of the Legislatures of the States, shall call a Convention for proposing Amendments * * * ." This language lends little support to the notion that the

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[8] *See, e.g.*, Black, "Amending the Constitution: A Letter to a Congressman," 82 Yale L.J. 189, 202–03 (1972).

[9] *See, e.g.*, Van Alstyne, "Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague," 1978 Duke L.J. 1295.

[10] The applications have come in a wide variety of forms. The following passage from a recent resolution adopted by the legislature of the State of Kansas (May 19, 1978) requests a convention for the "sole and exclusive" purpose of proposing an amendment, the specific terms of which are prescribed by the applicant:

> Be it further resolved: That alternatively, the Legislature of the State of Kansas hereby makes application to the Congress of the United States to call a convention for the sole and exclusive purpose of proposing an amendment to the Constitution of the United States which would require that, in the absence of a national emergency, the total of all appropriations made by the Congress for a fiscal year shall not exceed the total of all estimated federal revenues for such fiscal year.

legislatures of the States may demand that Congress call a constitutional convention for the sole purpose of voting up or down on proposals that the legislatures themselves have brought forward. The Framers were good draftsmen. When they wanted to give one body of government a veto over the proposals of another, they were able to use words that clearly expressed that purpose. In Article V itself they gave the States power to approve or disapprove what a constitutional convention might propose; but the language of Article V gives no indication that they intended this ratification process to be a second negative, a veto cast or withheld after the convention itself had voted up or down on someone else's work. As portrayed in the text, the convention is a respondent, not a censor. It is a "Convention for proposing Amendments." It responds to an application and call by making proposals for constitutional change.

What is the correct reading of the text? The polar view—the view that every Article V convention must be a general convention—is sometimes defended on textual grounds. It is said that the text has a plain meaning; that the legislatures are entitled to apply for a "convention" and a "convention" only and that this convention, being a "Convention for proposing Amendments," must be a convention for proposing amendments on any subject the delegates think proper.[11]

This argument is unpersuasive. The text does not say that the legislatures are to apply for a convention and a convention only. It says that they are to make an "Application." The text does not say that the convention must be a convention for proposing amendments on any subject the delegates think proper. It says that the convention will be a "Convention for proposing Amendments." These words are generic. They could describe a process in which the legislatures request, and Congress calls, a general convention, a convention for proposing amendments on any subject whatever. They could describe a process in which the legislatures request, and Congress calls, a convention for proposing amendments to deal with some particular problem or constitutional issue. There is little in the text that encourages us to prefer the one interpretation to the other. There is nothing in the text that requires us to choose between the two.

When we turn from the text and consult the relevant historical materials, the meaning of the convention clause comes more clearly into focus. We have outlined much of the relevant history in detailed notes, which are appended to this memorandum. In the discussion that follows we will describe the portions of that history that have decisive bearing on the question at hand.

The Effort to Revise the Articles. Although the Articles of Confederation allowed for amendment and specified that the unanimous consent of the States and Congress would be necessary before any alteration could

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[11] *See* Black, *supra*, at 203.

occur, they established no regular method by which proposals for change could be formulated and submitted to the States and Congress. Thus when it became clear in the mid-1780s that changes in the Articles were necessary, the advocates of change were obliged to fashion *ad hoc,* irregular procedures in an effort to build consensus for the proposals they wished to bring forward. They drew on recent experience. Extraordinary intercolonial convocations had done much to spark and direct the rebellion against Great Britain. An interstate convention, the Continental Congress, had produced the Articles of Confederation. Convention procedures had been used or proposed in some States to make or alter fundamental law.[12] With these precedents in view, the activists set about to revise the Articles through a convention process.

Virginia took the lead. In 1786 it invited all the States to send delegates to a convention at Annapolis "to take into consideration the trade of the United States" and to propose a measure that would empower the national government to establish a uniform system of trade regulation.[13] Only five States accepted this invitation; and Hamilton and Madison, two of the youngest delegates, who had high hopes for a stronger union, were able to persuade the others that little could be accomplished by so few. Hamilton drafted a report that recommended that a second convention be called. This convention would be attended by delegates from all the States and it would have power to consider, not trade and commerce only, but

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[12]By 1787, five State constitutions provided for amendment by way of convention. Three of these appear to have provided for a convention the powers of which could be limited to a particular subject matter. Georgia's Constitution of 1777 provided:

> No alteration shall be made in this constitution without petitions from a majority of the counties, and the petitions from each county to be signed by a majority of voters in each county within this State; at which time the assembly shall order a convention to be called for that purpose, *specifying the alterations to be made,* according to the petitions preferred to the assembly by the majority of the counties as aforesaid. [Emphasis added.]

1 Poore, *Federal and State Constitutions, Colonial Charters and other Organic Laws* 383 (1872) (hereinafter "Poore"). Pennsylvania's constitution of 1776 provided:

> The said council of censors shall also have power to call a convention, to meet within two years after their sitting, if there appear to them an absolute necessity of amending any article of the constitution which may be defective, explaining such as may be thought not clearly express, and of adding such as are necessary for the preservation of the rights and happiness of the people: But the articles to be amended, and the amendments proposed, and such articles as are proposed to be added or abolished, shall be promulgated at least six months before the day appointed for the election of such convention, for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject. [2 Poore at 1548.]

The provision for amendment in Vermont's Constitution of 1786 was almost identical to that of the quoted portion of Pennsylvania's Constitution. *Id.* at 1874–75. The reference to "amending any article * * * which may be defective" and the requirement for promulgating the "articles to be amended, and the amendments proposed, and such articles as are proposed to be added or abolished" indicates to us that the convention was to be limited to certain topics. The two other States—Massachusetts and New Hampshire—had constitutions that appear to have allowed the convention more latitude. *See* 1 Poore at 972 (Massachusetts Constitution of 1780); 2 Poore at 1293 (New Hampshire Constitution of 1784).

[13]Commager, *Documents of American History* 132 (9th ed., 1973).

any matter that required constitutional correction. Hamilton's report was approved. When it was published, it became the "direct occasion of the gathering of the convention in Philadelphia that framed the constitution of the United States."[14]

Before we describe the nature of the proceedings in Philadelphia, we want to emphasize a legal point that is often overlooked in conventional accounts. The Annapolis Convention and its successor in Philadelphia demonstrate clearly and concretely that under the Articles of Confederation a convention could be convened for the purpose of considering constitutional problems and formulating proposals for change; and it could be given narrow or broad powers depending on the nature of the task assigned to it. The Articles did not spell this out. They did not establish procedures for the formulation of constitutional proposals. But they were permissive. They permitted the States and Congress to establish such procedures; and when the States and Congress exerted that power, the result was first a limited convention in Annapolis[15] and then a general convention in Philadelphia one year later.

In our view this is the most important single fact in the development of Article V. When the Framers drafted Article V, they were not writing on a clean slate. They had come together to rewrite a document that had already permitted a creative convention process to go forward, first at Annapolis and then at Philadelphia itself; and when we view their work from that perspective, the question of purposes and intents comes more sharply into focus. The Framers "constitutionalized" the convention process. Did they mean to confirm and preserve the flexible procedure that was permitted under the Articles, or did they mean to replace it with a rigid new system in which only one sort of convention, a general convention, was possible? As we review their work, we shall keep that question before us.

The Proceedings of the Convention of 1787. The delegates to the Philadelphia Convention agreed rather early that they should create a regular mechanism by which the new Constitution could be amended.[16] To

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[14]Farrand, *The Framing of the Constitution* (1932).

[15]The Annapolis Convention was clearly a convention with limited powers. The delegates were so sensitive on that point that they felt there might be some question whether their recommendation of a general convention was strictly within their commission, and they took care to justify it. Hamilton wrote:

> If in expressing this wish [for a general convention], or in intimating any other sentiment, your Commissioners should seem to exceed the strict bounds of their appointment, they entertain a full confidence, that a conduct, dictated by an anxiety for the welfare of the United States, will not fail to receive an indulgent construction. [Commager, *Documents of American History* 133 (9th ed., 1973).]

Madison's later comment that the Annapolis Convention "did not scruple to decline the *limited task* assigned to it, and to recommend to the States a Convention with *powers adequate* to the occasion," and that the public mind "favored the idea there of a Convention with *fuller powers* for amending the Confederacy," recognized that a constitutional convention's powers might vary according to its mandate. Preface to Debates in the Convention of 1787, 3 Farrand at 545, 546. [Emphasis added.]

[16]A complete account of the proceedings relevant to Article V is set out in Appendix I.

accommodate that agreement, the committee that had been assigned the task of preparing the first draft of the Constitution, the Committee of Detail, submitted a modest proposal that was accepted by the convention after a brief debate. The form of the proposal was predictable, given the events of the preceding few years:

> On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose. [2 Farrand at 188.]

We see, then, that when the Framers first undertook to fashion an amendment mechanism, they borrowed on the procedure that the States themselves had fashioned under the Articles. It was a mechanism that involved an interstate convention, called on application of the States. Two other features of this proposal deserve our attention. First, there was no requirement for ratification of the convention's action. Was such a requirement implicit? Second, the subject of the States' application, the "thing" for which they were to apply, was "an amendment of" the Constitution. What did the Framers mean by that language? Further proceedings would clarify that point.

Eleven days after the original proposal was accepted, it was reconsidered. There were objections. Elbridge Gerry noted that it contained no requirement for ratification of the mandatory action taken by the convention, and he feared that a majority of the convention might therefore bind the Union to innovations that would subvert the constitutions of the States.[17] Alexander Hamilton noted that the provision gave the State legislatures a right to "apply for alterations" but gave no similar right to the national legislature. This omission was problematical, because the national legislature would be the first to perceive the necessity of amendments, and the State legislatures would not apply for alterations "but with a view to increase their own power."[18] Finally, James Madison, with his usual foresight, objected that the convention process was vague and uncertain: How was the convention to be formed? By what rule was it to decide the questions before it? What would be the force of its acts?[19]

As a result of these objections the proposal of the Committee of Detail was replaced, after intervening changes, with a proposal drafted by Madison:

> The Legislature of the U— S— whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U.S. [2 Farrand at 559.]

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[17] 2 Farrand at 557–58.
[18] 2 Farrand at 558.
[19] *Id.*

This provision did three things: First, to satisfy Hamilton, it gave the national legislature power to propose amendments on its own motion whenever two-thirds of both Houses thought it necessary to do so. Second, to satisfy Madison, it eliminated the convention as a device for formulating amendments and replaced it with a system in which the national legislature would propose amendments on the application of two-thirds of the legislatures of the States. Finally, to satisfy Gerry, it provided that no amendment would become effective unless it were ratified in final form by three-fourths of the States.

Madison's proposal was a significant one. It was a near predecessor of Article V, and it clarified the point that concerns us most. What role did the Framers intend for the legislatures of the States to play in the amendment process? Given the terms of Madison's proposal, there were two possibilities. It is conceivable that the legislatures were to apply to Congress for some unspecified change, any change, in the hope that Congress would propose amendments in the areas where they, the legislatures, thought amendments were necessary. The other possibility was that they were to apply to Congress for the changes that they, the legislatures, favored. They were to apply for amendments to the Constitution and to demonstrate to Congress, through their applications, that there was consensus among them as to the need for change in particular areas.

It cannot be argued with any force that Madison's proposal contemplated the first procedure, the application for a pig in a poke. The proposition was not that two-thirds of the legislatures would bestow on Congress, through their applications, a general commission to propose whatever amendments it thought necessary. Under Madison's system Congress had that power already, whenever there was consensus among two-thirds of both Houses. Rather, as Madison himself later confirmed, the legislatures were to apply to Congress for amendments to the Constitution, amendments that they, the legislatures, favored; and whenever there was consensus among two-thirds of them as to the need for an amendment or amendments, Madison's proposal required Congress to make specific proposals responsive to that consensus.

Two days before they finished their work, just five days after Madison's proposal had been accepted, the Framers reviewed the amendment mechanism once again. Roger Sherman spoke first. He feared that three-fourths of the States (the number needed for ratification of proposals initiated either by Congress or by the State legislatures) might "do things fatal to particular States," and he thought that the Constitution should therefore contain certain limitations on the kinds of amendments that could be made in it. In particular, he thought that no amendment should be permitted that would affect a State in its "internal police or deprive it of its equality in the Senate."[20] He ultimately prevailed on the latter point.

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[20]2 Farrand at 629.

Second, George Mason noted that Congress was the only agency that was given power to propose amendments. He feared that Congress might abuse that power by refusing to propose amendments that would be beneficial to the people.[21] Gouverneur Morris and Elbridge Gerry then suggested that instead of giving Congress power to propose amendments on the application of the legislatures, the Constitution should require Congress to call a convention on application of the legislatures. This was the critical stage in the development of Article V. The Framers accepted the suggestion that Morris and Gerry had brought forward, and the result was the Convention Clause as we know it today. What was the purpose of the change?

We must be clear on what was changed and what was not. There was only a slight alteration in the text. It came in the words that described the powers of Congress: Madison's language—"Congress * * * on Application * * * shall propose Amendments to this Constitution"—became "Congress * * * on Application * * * shall call a Convention for proposing Amendments." There was no alteration in the description of what the legislatures were to do. They were to make an "Application" in each case. In procedural terms the change was equally modest. In both instances the legislatures were to make an "Application," and a separate body (Congress or the convention) was to propose amendments. The procedural change came with the introduction of an intervening step, a "call" to convention. This change was necessary for the simple reason that the convention, unlike Congress, is not a standing body. It must be called into being before it can do its work.

In substantive terms the change was dramatic. Morris and Gerry stripped Congress of power to propose amendments and relegated it to the ministerial function of calling a convention. The critical question is whether they intended to do anything more than this. They intended to alter the role of Congress. Did they intend to alter the role of the States? The whole point of the application process, under Madison's approach, was that it provided the legislatures of the States with a means of obtaining proposals responsive to their own views concerning the need for constitutional change. In relieving Congress of power to make those proposals, did Morris and Gerry intend as well to strip the legislatures of power to apply for favored amendments, or did they intend merely to replace one proposing authority (Congress) with another (the convention)?

Fortunately, the brief record of the debate over Morris' and Gerry's proposal gives us some insight into that question. As soon as the proposal was made, James Madison rose to comment on it. He said he did not see why Congress "would not be as much bound to propose amendments applied for by two thirds of the States as to call a Convention on the like application." He saw no objection, however, against providing for a convention

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[21] *Id.*

"for the purpose of amendments, except only that difficulties might arise as to the form, the quorum etc. which in Constitutional regulations ought to be as much as possible avoided."[22]

Madison's statement goes to the heart of the question before us. It illustrates three points. First, it shows conclusively that under his proposal the legislatures of the States were entitled to apply for amendments to the Constitution, and that Congress was duty bound to make responsive proposals whenever two-thirds of them had done so: Congress was "bound to propose amendments applied for by two thirds of the States." Second, it suggests rather strongly that the convention proposal was an attempt to diminish the power of Congress over the process of amendment initiated by the applications of the legislatures. That was how Madison interpreted it. He was saying that although he had no substantial objection to the convention device, he could see no real reason for it, given its purpose. It provided neither more nor less protection from congressional abuse than the procedure he had fashioned, for "Congress would be as much bound to propose amendments applied for by two thirds of the States as to call a convention on the like application."

Finally, Madison's statement tells us a good deal about the intended role of the legislatures of the States. His statement is significant both for what it says and for what it does not say. Remember that the purpose of Madison's application procedure was not to give Congress power to propose amendments. (Congress had that power already.) The purpose was to give the State governments a right to apply for amendments. If Morris and Gerry had intended to change all that, stripping the legislatures of power to demand proposals responsive to their views, the mere substitution of one proposing authority for another would have been the least significant part of their plan. Madison's statement betrays no hint that such a radical change was in the offing. Indeed, Madison's statement suggests that the role of the legislatures would be unaltered under Morris' and Gerry's proposal: Congress would call a convention for proposing amendments "on the like application."

The Ratification Debates. The notion that the amendment procedure should make some provision for the regular governments of the States and should be responsive in part to their views concerning the need for constitutional change was not a radical notion in 1787. In fact, as we have seen, this was one of the few propositions that was not debated in connection with the amendment question. The Framers had real doubts about the role that the new national legislature should play in the amendment process. They were also concerned that the Constitution should not be so freely amendable that a majority of the States would be able to oppress the others by altering the supreme law of the land in some discriminatory way. But if the Constitution were to be amended at all, there was not much

[22] 2 Farrand at 629-30.

doubt that the States as States were proper parties to suggest where the amendments should come and to demand that proposals responsive to their views be formulated.

This should come as no surprise. Repeated assertions of Federal power have enhanced the role of the Federal Government in our national life, but in 1787 the State governments were the most important governments in the Union. It was they who had created the Union; and when questions arose concerning the adequacy of the Articles, they were very much the parties in interest. For that reason alone it was politic, and perhaps even necessary from the standpoint of securing ratification of the new Constitution, that the States, acting through their regular governments, should have been given a means of obtaining viable proposals for change responsive to their own views concerning the need for change. We have suggested that the Framers intended to provide them with such a means; and when the Framers published their work and undertook to defend it, they and their allies took care to reassure the States on that point. A few of the relevant remarks, made during the critical months when ratification of the new Constitution was still in doubt, are set forth below.

Many opponents of the new Constitution found it so objectionable that they argued that the question of revising the Articles should be submitted to a second general convention at which the imperfections in the document produced by the Framers could be eliminated. Alexander Hamilton, taking his cue from John Jay, argued forcefully in *The Federalist* that even if the new Constitution were thought to be imperfect, it would be far easier to remove the imperfections by amending it after it had been adopted than by convening a second general convention for that purpose prior to ratification. His argument on that point is perhaps the clearest statement by any of the Framers concerning the nature and significance of the Convention Clause.[23]

At a second general convention, Hamilton said, many questions would arise; and "[m]any of those who form the majority on one question may become the minority on a second, and an association dissimilar to either may constitute the majority on a third."[24] As a result, at a second general convention there would be "an immense multiplication of difficulties and casualties in obtaining the collective assent to the final act."[25] By contrast, under the new Constitution, if it were adopted, reformers would be able to utilize the surgical amendment process set out in Article V. It would be unnecessary to attempt more than one improvement at a time. Proposed amendments "might be brought forward singly * * * . [T]he will of the requisite number would once bring the matter to a decisive issue. And consequently, whenever nine or rather ten States were united in the desire of

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[23] *See, The Federalist,* No. 85, at 591-93 (Cooke ed., 1961).
[24] *Id.* at 592.
[25] *Id.*

a particular amendment, that amendment must infallibly take place * * * . [T]wo-thirds [nine] may set on foot the measure, three-fourths [ten] must ratify."[26] Could the national legislature frustrate this process? It could not. The national legislature controlled one of the two amendment mechanisms, but not the other. Congress would be obliged to call a convention on the applications of two-thirds of the States. Would the legislatures be able to muster the necessary two-thirds? They would. "However difficult it may be supposed to unite two-thirds or three-fourths of the state legislatures, in amendments which may affect local interests, [there cannot] be any room to apprehend any such difficulty in a Union on points which are merely relative to the general liberty or security of the people. We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority."[27]

Hamilton was saying, in sum, that if the State legislatures wanted to perfect the new Constitution or "to erect barriers against the encroachments of the national authority," they could utilize the convention procedure, they could bring measures forward with that end in mind, and they could do this without submitting to the difficulties of a "general" convention in which disagreements over other points might prevent or impede remedial action. The State legislatures could use the convention procedure without hazarding a general convention.

Madison made a related observation regarding the role of the State governments. He said that the Framers had foreseen "that useful alterations will be suggested by experience." They had therefore created an amendment mechanism that "equally enables the general and the State governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other."[28] Some have attempted to cast this statement in a different light, but we think that Madison's meaning is clear. The State governments, like the national government, would discover faults or "errors" in the Constitution from time to time; and the State governments, like the Federal Government, had been given a mechanism by which their views regarding the correction of these faults could be given constitutional effect. The State governments were entitled to ask for the correction, not of errors perceived by others, but of errors perceived by themselves. What gave them this right? It was the convention procedure set out in Article V.

Other statements by the Framers bear this point out. Washington, who had presided over the Convention of 1787, said flatly that the "constitutional door is open for such amendments as shall be thought necessary by nine States."[29] Nine, of course, was the number required to originate the

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[26] *Id.*

[27] *Id.* at 593.

[28] *The Federalist,* No. 43, at 296 (Cooke ed., 1961).

[29] Letter to John Armstrong, April 25, 1788, reprinted in 29 *Writings of Washington* 466 (Fitzpatrick ed., 1939).

amendment process. Judge Dana of Massachusetts said that if specific amendments were generally wished for, "two thirds of the several States [could] apply for the call of a convention to consider them."[30] In Virginia, Wilson Nicholas predicted that the convention procedure would prove to be a convenient method of amendment because, among other things, "the conventions which shall be called will have their deliberations confined to a few points, no local interests to divert their attention; nothing but the necessary alterations."[31] As against the critics of the new Constitution who thought that amendments should be obtained prior to ratification, Madison answered that "they cannot but see how easy it will be to obtain subsequent amendments. They can be proposed when the legislatures of two thirds of the States shall make application for that purpose."[32]

Hamilton, Madison, Washington, and their allies were perhaps guilty of over-argument, but we cannot believe that they were dissembling. We think their remarks about the ease and desirability of introducing subsequent amendments to the Constitution through the convention process show clearly that they envisioned that the States could use that process for the purpose of introducing into the Constitution particular amendments deemed necessary by the States and that they could do this without reopening the constellation of other issues that the delegates in Philadelphia had so lately resolved. The legislatures could invoke the convention process for a particular purpose without risking a general convention.[33]

Summary. After reviewing the text in light of the relevant historical materials, we are inclined to think that the Convention Clause has been misnamed. It should have been named the "Application Clause," because its basic purpose was to provide the regular governments of the States with

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[30]2 Elliot at 138.

[31]3 Elliot at 102.

[32]2 Elliot at 629–30.

[33]The Federalists' praise of the convention procedure as a convenient device for introducing postratification amendments died out rather quickly after the ratifying convention in New York, the last key State to ratify the Constitution, narrowly gave its approval and then immediately circulated a letter urging the States to petition for a second general convention to redo what the Framers had done. The Virginia Assembly followed with a slightly narrower petition for a convention to consider the defects that had been suggested in the various State ratifying conventions. The Federalists vigorously opposed the drive for a second general convention, perceiving correctly that it would work to the advantage of the anti-Federalists, reopening divisive issues. Juxtaposed to their arguments in support of Article V, their opposition to the initiative of New York and Virginia lends further support to the view that the convention process was thought to be a flexible procedure could be used broadly (as New York proposed), or narrowly (as Hamilton suggested), depending on the nature of the consensus among the originating States. *See* Appendix III.

For some of the pertinent original sources, *see* Madison, Letter to George Eve, January 2, 1789, 11 *Papers of James Madison* 405 (Rutland ed., 1977); 3 Elliot at 630; 5 *Writings of James Madison* 299, 311–12 (Gaillard Hunt ed., 1904). *See also* Madison, Letter to G. L. Turberville, November 2, 1788, 5 *Writings of James Madison* 299–300 (Gaillard Hunt ed., 1904); Madison, "General Remarks on the Convention," 3 Farrand at 455; Jefferson, Letter to William Short, December 8, 1788, 14 *Papers of Thomas Jefferson* 344 (Boyd ed., 1958); Jefferson, Letter to William Carmichael, December 25, 1788, 14 *Papers of Thomas Jefferson* 385 (Boyd ed., 1958).

a means of applying for amendments to the Constitution; and the convention procedure was simply a device, one of two devices considered by the Framers during the evolution of the clause, through which the demands of 13 contentious States were to be reconciled. As described by the Framers and invoked by the States, the process was a flexible one, much like the nonconstitutional process that had been worked out by the States themselves under the Articles. The legislatures could use Article V to gather a general convention to build consensus for an integrated, comprehensive revision of the Constitution or for multiple amendments. New York and the anti-Federalists pressed for such a convention in 1788 and 1789. On the other hand, if the legislatures feared the divisiveness of a general convention (as did Madison and his allies), yet were in substantial agreement regarding some particular problem or issue, they could, as Hamilton suggested, generate specific proposals through the convention procedure without risking a general convention.

IV. Legal Aspects of a Limited Application by the Legislatures

If we had been able to conclude that the legislatures of the States are entitled to apply for one thing and one thing only—a general convention—our inquiry would be at an end. Because we have concluded that the legislatures may invoke the convention process for different purposes and with limited objects in view, we must consider two additional questions. First, if different legislatures apply for different kinds of conventions, how does Congress respond? Faced with applications at variance with each other, how does Congress judge whether the legislatures have made the sort of application that can provide a basis for a call to convention? Second, if Congress does call a convention on the basis of an application for something other than a general convention, what power does the convention have? Does it have power to go beyond the application and make ratifiable proposals that are not in accord with the tenor of the application and call?

The answer to each of these questions follows rather clearly and easily from what we have already said about the role of the legislatures of the States and the function of the application procedure. When we have established this connection—the connection between the role of the legislatures, the function of the application procedure, the role of Congress in determining whether a convention should be called, and the power of the convention itself—the political and legal logic of the Convention Clause will come sharply into focus.

Counting Application. If one-half of the legislatures apply for a convention for proposing amendments on the subject of reapportionment and the other half apply for a convention for proposing amendments to abolish the electoral college, how should Congress respond?[34] Article V

[34]The historical response of Congress to the problem presented by applications for convention is described in some detail in Appendix II. The nature of some of the early applications and their bearing on the interpretation of Article V are described in Appendix III.

says that Congress must call a convention whenever two-thirds of the legislatures have made an "Application." If two-thirds or more of them have applied for a convention, does it matter that they are divided among themselves regarding the work that the convention should do?

The historical materials that we have already discussed suggest that it matters very much indeed. The States cannot launch an amendment unless there is a consensus among two-thirds of them that will provide a political basis for the proposal. Recall Hamilton's argument in *The Federalist*—if the new Constitution were adopted, the States would be able to obtain amendments that would curb the powers of the central government, but it would take two-thirds of them to float any given proposal—two-thirds to set the measure on foot. Washington said much the same thing. Madison's analysis was the most revealing of all. Madison said that Article V "equally enables" Congress and the legislatures of the States to originate the "amendment of errors" perceived at one level of government or the other. In other words, the power of the legislatures to initiate the amendment process is equal to that of Congress. When can Congress originate "the amendment of errors"? Congress can propose a constitutional amendment if, but only if, there is an extraordinary agreement among two-thirds of the Members of both Houses that an amendment is necessary. If one-half of the Members favor an amendment on the electoral college, Congress has no power to propose an amendment on either subject. Do the States have greater power? We are willing to take Madison at his word. Their power is equal to that of Congress, not greater. Unless there is general agreement among two-thirds of the legislatures over the nature of the change, or the area where change is needed (be it a general revision of the Constitution or a change in some specific area), the amendment process cannot go forward via the convention route.

When we view the application process in that light, we begin to understand the political wisdom of Article V. The Framers wanted to make the Constitution amendable, but they understood the trauma of the amendment process. They had experienced it themselves. Through a great exertion, they had established a new frame of government, and they did not want additional proposals for change to be loosed on the young republic unless there were a firm basis for believing that the process would be worth the political cost. To provide a guarantee of that sort, they established an exclusive two-track system for formulating viable, ratifiable constitutional proposals. Under that system no proposal for change can be issued by any authority unless there is a preexisting consensus supportive of change among an extraordinary majority at one level of the government or the other.

How, then, does Congress determine when to call a convention? If the foregoing analysis is correct, Congress must answer two questions of fact. What do the legislatures want? How many of them want it? The Constitution does not simplify the task. It does not specify a form of words or a style of application through which the wishes of the legislatures are to be

transmitted to Congress. It permits them to apply for different things in different ways. But in the end Congress' job is straightforward and unmysterious. Congress must simply assess the applications that are made, determine whether there is common ground among them, and call a convention whenever two-thirds of the applications exhibit a consensus supportive of some particular constitutional change.

This view of the role of Congress in counting divergent applications has been advocated by a substantial number of commentators. *See* Appendix II, note 3. It has also played an important role in the arguments of some of the dissenters, who object at the threshold to the very idea of applications of limited subject. The argument is this: If applications of limited subject were permitted, Congress would be obliged to respond to them. It would be obliged to review them for content and make judgments from time to time about the nature of the consensus they express, if any. Moreover, if Congress were ever to call a convention on the basis of limited applications of limited subject, it might even be required or empowered to take legislative action in connection with the call that would limit the power of the convention in accordance with the tenor of the applications. But the drafting history of the Convention Clause shows that the Framers did not want the national legislature to interfere with the convention process. They did not want Congress to make substantive judgments that could block or channel the development of constitutional proposals via the convention route. Accordingly, the State legislatures cannot be permitted to file applications of limited subject in the first place. They must file uniform applications for a convention process that are neutral with respect to subject. Only then—only when the task of Congress is limited to that of counting uniform applications for a convention with general powers—can the possibility of impermissible congressional intervention be eliminated.

We agree with the foundations of this argument, but the conclusions are flawed, in our view. It is perfectly clear that the Framers intended that the national legislature would have no independent power to determine what a constitutional convention may or may not do; but it stands history on its head to argue that the Framers must therefore have intended to deny that power to the State legislatures and to abandon the question of constitutional change to a transient majority of delegates at a convention with general powers. Conscientious scholars may differ over these points; but as we have stated above, we think the relevant historical materials demonstrate that the application procedure was designed to give the regular governments of the States an opportunity to apply for amendments favored by them, that the two-thirds requirement, which is present in both amendment mechanisms, was designed to ensure that no ratifiable constitutional proposal could ever be floated unless it were responsive to a preexisting consensus among an extraordinary majority at the one level of government or the other, and that the Framers inserted the convention device into the application process, not to frustrate either of these purposes, but to guarantee that an entity other than Congress would be charged with the duty of responding substantively to the applications of the States.

Aside from the historical considerations, there is another difficulty here. The basic constitutional choice is between a flexible application procedure and a rigid application procedure—between a procedure in which the legislatures are free to apply for what they want, and a procedure in which they may apply for a general convention only. The choice between these two procedures simply cannot be made on the ground that the one gives Congress power to frustrate the desires of the other participants in the convention process, whereas the other does not. Under the flexible procedure the legislatures are free to do precisely what they are entitled to do under the rigid one, and Congress is empowered to do neither more nor less. Under the flexible procedure the legislatures are free to apply for a general convention, if two-thirds of them are willing to solicit and entertain proposals on any subject; and Congress must respond whenever two-thirds of them have done so. The real difference between the two procedures lies, not in the way they allocate power between Congress and the legislatures, but in the way they allocate power between the legislatures and the convention itself. Under the rigid procedure the role of the convention is to follow wherever its delegates lead; and the convention is invariably empowered to do so, whatever the desires of the legislatures may be. Under the flexible procedure the convention is the servant of the legislatures. Its function is to respond to the extraordinary consensus that was the predicate for the call. For all the reasons given above, we think the latter conception is the one to be preferred. It is the more defensible of the two, given the history and logic of Article V.

Before passing to the final question, the question of the power of the convention, we want to say a word about a point raised at the beginning of our discussion. How does Congress treat an application that requests, not only that a convention be called to consider a particular problem or proposal, but that the convention do nothing more than approve and issue a specific amendment containing terms that have been drafted by the applicant? At the outset we stated that applications of this kind, which on their face appear to foreclose any possibility of adjustment or compromise, are viable only in very limited circumstances. We are now in a position to see why that is so. If a legislature demands that a convention do nothing more than accept a predetermined draft, it drastically reduces the potential for agreement between its application and the applications of other States. Even among applications directed at the same general problem, an application that affirmatively excludes any approach but its own adds little if anything to the consensus required for the call to convention. We must take "application" at face value. If the applicant wants a convention for the sole and exclusive purpose of issuing its own proposal and none other, there can be no common ground between its views and the views of any other applicant unless the other is willing to forego everything else and acquiesce in the narrow demand. The other is, of course, free to acquiesce by modifying its application. But if its application remains at variance with the one, there is grave doubt that Congress could find, on the face of the applications, any zone of actual agreement between the two.

The Power of the Convention. If our conclusions regarding the role of the legislatures and the function of the two-thirds requirement are correct, the ultimate question—the question of the convention's power—almost answers itself. We need to make only one additional analytical point.

Anyone is free to make constitutional proposals, but no proposal can be accepted by the States and become part of the Constitution unless it is formulated in accordance with the procedures set out in Article V. The Department of Justice or the State of Michigan can make constitutional proposals; but these proposals however, meritorious or inviting, cannot be ratified by the States. Congress itself can make proposals, but it can submit them for ratification only if it has complied with the constitutional procedures governing the formulation of proposals for change. Congress can submit proposals for ratification only if two-thirds of the Members of both Houses find them necessary.

As we have suggested in the preceding discussion, the meaning of the Convention Clause is simple and clear. A constitutional convention convenes, if at all, to make proposals responsive to a substantive consensus among the legislatures of the States. The consensus may be general or narrow. It may call for a general reexamination of the Constitution, or it may be a relatively specific agreement among the legislatures about the desirability of a particular change. In any case, the function of the two-thirds requirement in the application process is to ensure that no convention will be convened and no proposal made unless there is an agreement among an extraordinary majority of the governments of the States that would justify a responsive proposal and the ratification effort. As Hamilton put it, it takes two-thirds to set the measure on foot. That being so, it is unimportant that the delegates to a constitutional convention may have a moral or legal duty to respect the tenor of the application and call that brought them there. They may well have such a duty or duties, but the important point is that they have, in our view, no power to issue ratifiable proposals except to the extent that they honor their commission. They have no more power to go beyond the consensus that summoned them to convention than does Congress to propose amendments that are not responsive to a consensus among two-thirds of its Members.

We have one final word. Congress has been given power to specify a mode of ratification for constitutional proposals that have developed in accordance with Article V. It has no power to provide for the ratification of any constitutional proposal except those that have been formulated in accordance with Article V. Congress could not, for example, provide for the ratification of a constitutional proposal submitted for ratification by a bare majority of its Members. Likewise, it could not provide for the ratification of a proposal emitted by a constitutional convention for which less than two-thirds of the States have applied.

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APPENDIX I

Proceedings of the Convention of 1787

When the delegates met in Philadelphia, their discussion first centered on a plan of the union submitted by Edmund Randolph on behalf of the Virginia delegation. The 13th resolution of that plan dealt with the question of amendment:

> Resd. that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.[1]

This resolution, in a slightly modified form ("that provision ought to be made for [hereafter] amending the system now to be established, without requiring the assent of the National Legislature),[2] was first debated on June 5. Although Pinckney "doubted the propriety or necessity of it,"[3] Elbridge Gerry favored the provision:

> The novelty & difficulty of the experiment requires periodical revision. The prospect of such a revision would also give intermediate stability to the Govt. Nothing had yet happened in the States where this provision existed to proves [sic] its impropriety.[4]

The convention then postponed further deliberation on the provision.[5]

The provision "for amending the national Constitution hereafter without consent of National Legislature" was next discussed on June 11.[6] Several members "did not see the necessity of the [resolution] at all, nor the propriety of making the consent of the National Legislature unnecessary."[7] George Mason, however, urged that the provision was necessary:

> The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence. It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such an abuse may be the fault of the Constitution calling for amendment.[8]

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[1] 1 Farrand at 22.
[2] 1 Farrand at 121.
[3] *Id.*
[4] 1 Farrand at 122.
[5] *Id.*
[6] 1 Farrand at 202.
[7] *Id.*
[8] 1 Farrand at 202–03.

Edmund Randolph supported Mason's arguments. The convention, however, postponed action on the words "without requiring the consent of the national Legislature." The other portion of the clause ("provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary") was passed without dissent.[9]

The provision as passed was then referred to the Committee of Detail. That committee fashioned the first draft of the Constitution and submitted it to the convention on August 6. Article XIX of that draft provided for amendment as follows:

> On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose.[10]

This provision was considered on August 30. Gouverneur Morris suggested that "the Legislature should be left at liberty to call a Convention, whenever they please."[11] Notwithstanding this suggestion, the provision was agreed to without dissent.

On September 10 Gerry moved to reconsider Article XIX. Since the Constitution was "to be paramount to the State Constitution," he feared that "two thirds of the States may obtain a Convention, a majority of which can bind the Union to innovations that may subvert the State Constitutions altogether."[12] Alexander Hamilton seconded Gerry's motion. He did not object to the consequences feared by Gerry, for "there was no greater evil in subjecting the people of the U.S. to the major voice than the people of a particular State."[13] Rather, Hamilton argued:

> It had been wished by many and was much to have been desired that an easier mode for introducing amendments had been provided by the Articles of Confederation. It was equally desirable now that an easy mode should be established for supplying defects which will probably appear in the new System. The mode proposed was not adequate. The State Legislatures will not apply for alterations but with a view to increase their own powers—The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments, and ought also to be empowered, whenever two thirds of each branch should concur to call a Convention—There could be no danger in giving this power, as the people would finally decide in the case.[14]

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[9] 1 Farrand at 203.
[10] 2 Farrand at 188.
[11] 2 Farrand at 468.
[12] 2 Farrand at 557–58.
[13] 2 Farrand at 558.
[14] *Id.*

Madison "remarked on the vagueness of the terms, 'call a Convention for the purpose,' as sufficient reason for reconsidering the article."[15] Specifically, Madison raised the questions, "How was a Convention to be formed? by what rule decide? what the force of its acts?"[16] After this debate, Gerry's motion to reconsider carried.[17]

Roger Sherman then moved that the following language be inserted into the Article: "or the Legislature may propose amendments to the several States for their approbation, but no amendments shall be binding until consented to by the several States."[18] James Wilson moved that the approval of only two-thirds of the States should be necessary, but this motion was defeated.[19] Wilson then moved to require the approval of three-fourths of the States, and this motion was approved with dissent.[20]

Madison then moved, and Hamilton seconded, that the convention postpone consideration of the amended proposition and that it take up the following:

> The Legislature of the U— S— whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U.S.[21]

Rutledge objected, on the ground that "he could never agree to give a power by which the articles relating to slaves might be altered by the States not interested in that property and prejudiced against it."[22] In order to obviate his objection, it was agreed to add to Madison's proposition the proviso "that no amendments which may be made prior to the year 1808 shall in any manner affect the 4 and 5 sections of the VII article."[23] As amended, Madison's proposition was adopted.[24]

The Committee of Style made minor changes in Madison's amended proposition and reported it as Article V to the convention.[25] On September 15, Sherman initiated debate on this provision by expressing his fears that

> three fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them

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[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] 2 Farrand at 558–59.
[20] 2 Farrand at 559.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] 2 Farrand at 602.

> of their equality in the Senate. He thought it reasonable that the proviso in favor of the States importing slaves should be extended so as to provide that no State should be affected in its internal police, or deprived of its equality in the Senate.[26]

George Mason also objected to the provision, for he

> thought the plan of amending the Constitution exceptionable & dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.[27]

Morris and Gerry then moved to amend the provision "so as to require a Convention on application of two-thirds of the states."[28] Madison responded that he

> did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call a Convention on the like application. He saw no objection however against providing for a Convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided.[29]

The Convention thereupon agreed to Morris' and Gerry's proposal.[30]

Sherman then moved to strike the requirement of three-fourths for ratification, in order to leave "future Conventions to act in this matter, like the present Conventions according to circumstances."[31] This motion failed, as did Gerry's motion to eliminate ratification by convention.[32] Sherman then moved to add a further proviso "that no State shall without its consent be affected in its internal police, or deprived of its equal suffrage in this Senate."[33] Madison objected, on the ground that incorporation of "special provisos" would lead every State to "insist on them, for their boundaries, exports, etc."[34] The motion was defeated; so too was Sherman's next motion to strike out Article V altogether.[35] Morris then moved to add the single proviso "that no State, without its consent shall be deprived of its equal suffrage in the Senate." According to Madison, this motion was "dictated by the circulating murmurs of the small States" and was thus agreed to.[36] This completed deliberations on Article V.

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[26] 2 Farrand at 629.
[27] *Id.*
[28] *Id.*
[29] 2 Farrand at 629–30.
[30] 2 Farrand at 630.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] 2 Farrand at 630–31.
[36] 2 Farrand at 631.

APPENDIX II

Congressional Handling of Convention Applications

The States have filed more than 350 applications for conventions.[1] These applications have been on a wide variety of subjects; and as we have suggested, most authorities are of the view that applications on different subjects should not be aggregated for the purpose of determining whether a sufficient number of States has applied for a convention.[2] Congress has traditionally been of that view, for it has never, despite the large number of applications, called a convention.

On two occasions the Senate has approved legislation to establish convention machinery. In 1971 and 1973 the Senate passed identical bills written by Senator Ervin that were premised on the proposition that a convention might be called to consider a particular subject. The bills provided that any call to convention would "set forth the nature of the amendment or amendments for the consideration of which the convention is called." To enforce this restriction, they provided that each convention delegate would take an oath committing himself not to propose or vote for any proposed amendment not relating to the subject described in the call. The bills also allowed Congress to disapprove the submission of any proposed amendment to the States if Congress found that the proposal related to or included a subject that differed from the one specified by Congress.[3] These provisions were founded on the conclusion of the Senate Judiciary Committee that "the bill properly limits the scope of the convention to the subject or subjects" that caused the States to seek constitutional amendment in the first instance.[4]

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[1] 125 CONGRESSIONAL RECORD (daily ed., January 15, 1979) (remarks of Senator Helms).

[2] *See, e.g.*, Bonfield, "The Dirksen Amendment and the Article V Convention Process," 66 Mich. L. Rev. 949, 970 and n. 85 (1968). The opposite view is advanced by a few commentators who reason that even disparate demands show a widespread desire for constitutional changes. *See, e.g.*, Orfield, *Amending the Federal Constitution*, 42 (1942). It is generally agreed, however, that applications on different subjects cannot be taken as an indication of general dissatisfaction with the entire Constitution. *See, e.g.*, Note, 70 Harv. L. Rev. 1067, 1072 (1957).

[3] S. 215, 92d Cong., 1st sess. §§ 6(a), 8(a), 11(b)(1), 117 CONGRESSIONAL RECORD 36805 (1971); S. 1272, 93d Cong., 1st sess., 119 CONGRESSIONAL RECORD 22731-37 (1973).

[4] S. Rept. 336, 92d Cong., 1st sess. 10 (1971).

APPENDIX III

The Early Applications of the States

The States made few applications for conventions during the first 100 years after the Constitution was ratified. A majority of these early applications were for general conventions.[1] It has been argued that the States must therefore have thought themselves empowered to ask for general conventions only, and that this in itself is evidence that an Article V convention may not be called for a limited purpose.[2] We do not accept this view.

The earliest applications were made by Virginia in 1788 and by New York in 1789. The Virginia application referred to the numerous objections that had been made to the new Constitution:

> We do, therefore, in behalf of our constituents, in the most earnest and solemn manner, make this application to Congress, that a convention be immediately called, of deputies from the several States, with *full power to take into their consideration the defects of this constitution that have been suggested by the State Conventions,* and report such amendments thereto as they shall find best suited to promote our common interests, and secure to ourselves and our latest posterity the great and unalienable rights of mankind.[3] [Emphasis added.]

The New York application voiced a similar sentiment:

> The People of the State of New York having ratified the Constitution agreed to on the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, by the Convention then assembled at Philadelphia, in the State of Pennsylvania, as explained by the said ratification, in the fullest confidence of obtaining a revision of the said Constitution by a General Convention; and in confidence that certain powers in and by the said Constitution granted, would not be exercised, until a Convention should have been called and convened for proposing amendments to the said Constitution: In compliance, therefore, with the unanimous sense of the Convention of this State, who all united in opinion that such a revision was necessary to recommend the said Constitution to the approbation and support of a numerous body of their constituents;

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[1]Brickfield, "Problems Relating to a Federal Constitutional Convention," 85-88, House of Representatives Judiciary Committee Print, 85th Cong., 1st sess. (1957). *See also* American Bar Association, *Amendment of the Constitution by the Convention Method Under Article V*, 59-72 (1974).

[2]Black, "Amending the Constitution: A Letter to a Congressman," 82 Yale L.J. 189, 201-03 (1972).

[3]1 ANNALS OF CONGRESS 248-49 (Gales & Seaton, eds. 1789).

> and a majority of the members of which conceived several articles of the Constitution so exceptionable, that nothing but such confidence, and an invincible reluctance to separate from our sister States, could have prevailed upon a sufficient number to assent to it, without stipulating for previous amendments: And from a conviction that the apprehensions and discontents which those articles occasion, cannot be removed or allayed, unless an act to revise the said Constitution be among the first that shall be passed by the new Congress; we, the Legislature of the State of New York, do, in behalf of our constituents, in the most earnest and solemn manner, make this application to the Congress, that a Convention of Deputies from the several States be called as early as possible, *with full powers to take the said Constitution into their consideration, and to propose such amendments thereto, as they shall find best calculated to promote our common interests, and secure to ourselves and our latest posterity, the great and unalienable rights of mankind.*[4] [Emphasis added.]

Because both Virginia and New York expressed a general concern over the adequacy of the Constitution, it is not surprising that they applied for a general convention. These applications do not support the contention that the applicants believed that they could ask for a general convention only. Indeed, the inclusion in these applications of language specifying that the requested convention should have "full" or "general" powers suggests rather clearly that the powers of an Article V convention were not thought to be invariably general but were thought to be dependent on the terms of the applications of the States. It is unnecessary to request that a convention have full or general powers if full or general powers are the only kind of powers that a convention can have.

Applications for conventions were made at two other points during the first 100 years. During the nullification controversy three States filed applications. South Carolina resolved that "it be expedient that a convention of the States be called as early as practicable to consider and determine such questions of disputed power as have arisen between the States of this confederacy and the General Government."[5] Alabama "recommended" to Congress "the call of a Federal Convention to propose such amendments to the constitution as may be proper to restrain Congress from exerting the taxing power for the substantive protection of domestic manufactures."[6] Georgia applied to Congress to call a convention, to the end, among others, "that the principle informed in a Tariff for the direct protection of domestic industry may be settled" and "a system of Federal

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[4]HOUSE JOURNAL 29-30 (1789); 1 ANNALS OF CONGRESS 271 (1789).
[5]SENATE JOURNAL 83, 22d Cong., 2d sess. (1833).
[6]*Id.* at 194-95.

taxation may be established, which shall be equal in its operation upon the whole people * * * .''[7] In our view, these resolutions make no application for a convention with unlimited powers; rather, they request a convention for the purpose of addressing problems broadly identified in the applications themselves.

Some States applied for conventions during the period just preceding the Civil War. President Buchanan had recommended that the Congress or the State legislatures might originate ''an explanatory amendment of the Constitution on the subject of slavery.''[8] President Lincoln, while refraining from any ''recommendation of amendments,'' had opined that ''the convention mode seems preferable, in that it allows amendments to originate with the people themselves.''[9] In accordance with that sentiment, several States—New Jersey, Indiana, Kentucky, Illinois, and Ohio—adopted resolutions applying to Congress for a convention. These resolutions were general in nature. Typically, they called for a ''convention for proposing amendments.''[10] One can argue that they indicate that the applicants believed their only recourse under Article V was to apply for a general convention, but one can argue with equal force that the form of these applications was dictated by the desire for a convention with unlimited power to avert the impending crisis.

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[7]The Georgia application actually presented to the Senate contained an enumeration of ''particulars'' more extensive than those cited in the text. Senate Journal 65–66, 22d Cong., 2d sess. (1833). However, the one authority known to us to have studied this matter extensively states that the Georgia House resolution, containing this larger enumeration, had been substantially narrowed by the Georgia Senate to the form quoted in the text, but the Governor's Office mistakenly transmitted the House resolution to the Congress. *See* Pullen, *supra* (note 2) at 42–44.

[8]55 CONGRESSIONAL GLOBE, 36th Cong., 2d sess., app. 4 (1860).

[9]4 *Collected Works of Abraham Lincoln,* 269–70 (Basler ed. 1953).

[10]*See* the resolutions cited in Pullen, *supra* (note 2), at 79–85.

October 12, 1979

79-76 MEMORANDUM OPINION FOR THE DIRECTOR OFFICE OF MANAGEMENT AND BUDGET

Bonneville Power Administration—Authority to Conduct Pilot Conservation Programs (16 U.S.C. §§ 832, 838)

This responds to your request for the views of this department whether the Bonneville Power Administration (BPA), an agency within the Department of Energy, would be authorized to engage in four energy-conservation pilot programs outlined in the letter to you from the Secretary of Energy dated August 10, 1979. These programs would be conducted in the fields of residential insulation, solar water heaters, irrigation pump testing, and small wind energy conversion systems.

The Department of Energy believes that the BPA has the authority to carry out those programs as long as they remain in the nature and within the dimensions of testing or pilot programs designed to determine the feasibility of full-scale implementation. The latter, the Department of Energy believes, would have to be authorized by Congress. It is our opinion that BPA is authorized to engage in and to expend funds on the programs as proposed by the Department of Energy, if the BPA Administrator considers them to be necessary.

The basic functions of the BPA are to operate and maintain the Federal electric power transmission system in the Pacific Northwest and to market the electric power generated by the Federal generating plants in that area. Act of August 20, 1937, § 2(b) 50 Stat. 732, 16 U.S.C. § 832(a) (b) (Bonneville Act); Federal Columbia River Transmission Systems Act, §§ 2(b), 8, 16 U.S.C. §§ 838, 838f, 88 Stat. 1376, 1377.

At first blush the conservation of electricity and the development of alternative sources of power may appear to have the effect of decreasing the demand for electric power and thus to be inconsistent with the statutory purposes of an entity established to transmit and market the power generated by the Federal hydroelectric installations in the Pacific Northwest. According to information furnished to us by the Department

of Energy, this would not be the effect of the conservation measures or of the development of alternative sources of energy. There is now a shortage of hydroelectric power in the Pacific Northwest, which, it is said, will last at least until 1983. Hence, not all demands for electricity can be filled from the Federal hydroelectric generating plants in the Northwest. Moreover, § 4(b) of the Bonneville Act, 16 U.S.C. § 832c(b), requires that priority be given to domestic and rural consumers. The proposed conservation of electricity by domestic and rural consumers and the development of alternative sources of power for the use of those consumers, therefore, would not lessen the overall demand for electricity. Instead, it would make more energy available for the use of nonpreference—usually industrial—customers; in other words it would be the equivalent of generating additional energy.

This effort to make the greatest use of the energy generated by the Federal hydroelectric generating facilities in the Northwest would be consistent with § 2(b) of the Bonneville Act, 16 U.S.C. § 832a(b), "to encourage the widest possible use of all electricity energy that can be generated and marketed and to provide reasonable outlets therefore," and with § 4(d) of Pub. L. No. 93-454, 16 U.S.C. § 838(b)(d), providing that the Secretary of Energy through the Bonneville Administrator shall "maintain the electrical stability and electrical reliability of the Federal system."

Moreover, § 2(f) of the Bonneville Act, 16 U.S.C. § 832a(f), confers on the BPA Administrator extremely broad powers. That section authorizes the Administrator "[s]ubject only to the provisions of this Act * * * to enter into such contracts, agreements, and arrangements * * * as he may deem necessary." It gives very wide discretion to the Administrator. The Comptroller General noted in his letters of September 21, 1951 (B-105397), to the Secretary of the Interior, and of July 19, 1979 (B-11485B), to Representative Weaver that the legislative history of that provision

> * * * indicates that its purpose was to free the Administration from the requirements and restrictions ordinarily applicable to the conduct of Government business and to enable the Administrator to conduct the business of the project with a freedom similar to that which has been conferred on public corporations carrying on similar or comparable activities. In view of such broad authority, it appears that the scope of the activities contemplated under the act and the appropriate means of accomplishing same, are matters for determination by the Administrator * * *.

However, as broad as the authority of the Administrator may be, it is circumscribed by the basic statutory functions of the EPA, *i.e.*, to transmit and market the power generated by the Federal hydroelectric power projects in the Northwest. It is not his office to increase the amount of available power, at least not on a permanent basis. That would require congressional action.

On the other hand, § 11 of Pub. L. No. 93–454, 16 U.S.C. § 8381, which establishes a revolving fund for the BPA, permits expenditures from this fund without further appropriation for a number of purposes, including:

> (3) electrical research, development, experimentation, tests, and investigation related to construction, operation, and maintenance of transmission systems and facilities; and
>
> * * * * * * *
>
> (6) purchase of electric power (including the entitlement of electric plant capability) (i) on a short-term basis to meet temporary deficiencies in electric power which the Administrator is obligated by contract to supply * * * .

We have been advised that the programs that BPA intends to undertake are in the nature of research and pilot programs designed to determine whether conservation measures, such as home insulation and irrigation pump testing, and new methods of generating energy, such as solar heaters and small wind-energy conversion systems, would be more efficient methods of filling the energy gap in the Northwest than the building of new dams or purchasing power from thermal or nuclear power plants. Moreover, BPA analogizes the saving of energy to the generation or acquisition of additional energy. Section 11(b)(6) of Pub. L. No. 93–454, 16 U.S.C. § 838i(b)(6), authorizes BPA to expend funds for that purpose on a short-term basis.

We therefore conclude that if the Administrator of BPA determines that it is necessary to engage in the four pilot programs mentioned in the letter of the Secretary of Energy, BPA would be authorized to conduct them.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

October 23, 1979

79-77 MEMORANDUM OPINION FOR THE ACTING ASSOCIATE ATTORNEY GENERAL

Small Business Administration and Community Services Administration—Eligibility of Community Development Corporations for Participation in Certain Government Procurement Programs (15 U.S.C. § 637(a), 42 U.S.C. § 2985a)

This responds to your request for our opinion with respect to a question of statutory construction as to which there is disagreement between the Small Business Administration (SBA) and the Community Services Administration (CSA). The question is whether community development corporations (CDCs), which are financed by CSA, may participate in SBA's program to increase the use of small businesses as Government procurement contractors. The issue arises because of an apparent conflict between the legislation governing SBA and that governing CSA's activities.[1] For the reasons that follow, it is our opinion that the two statutes can be satisfactorily reconciled in a manner that gives effect to Congress' intent to allow CDCs to participate in these SBA programs.

The statutes in question are § 742(a)(2) of the Economic Opportunity Act, as amended, 42 U.S.C. § 2985a(a)(2), and § 8(a) of the Small Business Act, as amended, 15 U.S.C. § 637(a). In order to participate in SBA's so-called "§ 8(a)" program, which is designed to assure that a greater share of Government procurement contracts are awarded to small businesses, an

[1]We understand that this issue is presently involved in litigation being handled by the Civil Division. *Delta Foundation, Inc., et al.* v. *Weaver, et al.*, Civ. No. 79-1662 (D.D.C.). In that case, Electro National Corp., the wholly owned subsidiary of a CDC (Delta Foundation, Inc.), has claimed the right to participate in the SBA small business procurement program. We have been informed that apart from the question of the statutory propriety of the corporation's participation because it is owned by a CDC, there is no other factor that would bar the corporation from participation.

applicant must be "socially and economically disadvantaged." 15 U.S.C. § 637(a)(1)(C). Such a concern is one

> (A) which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals; or in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and
> (B) whose management and daily business operations are controlled by one or more of such individuals. [15 U.S.C. § 637(a)(4).]

This is the definition adopted by Congress in the SBA amendments of October 24, 1978. By its terms, the definition is focused on directing assistance to individuals; this theme is confirmed in the legislative history of the SBA amendments.[2]

Several days after the passage of the SBA amendments, Congress passed amendments to the Economic Opportunity Act. In an amendment to § 742(a)(2), approved November 2, 1978, Congress stated:

> Within 90 days * * * the Administrator of the Small Business Administration, after consultation with the Director [of the CSA], shall promulgate regulations to insure the availability to community development corporations of * * * programs under § 8(a) of the Small Business Act. [42 U.S.C. § 2985a(a).]

The legislative history of this provision emphasizes the mandatory nature of the Small Business Administrator's responsibility to make available § 8(a) programs to CDCs. For example, the Senate report states:

> Although the 1972 amendments to the Economic Opportunity Act specified that the Small Business Administration should prescribe such regulations as were necessary and appropriate to insure the availability of Small Business Administration (SBA) programs to CDC's, SBA has failed to issue any regulations and has refused, either directly or indirectly, to make its programs available to community development corporation enterprises.
>
> The 1972 amendments were intended "to lead to the issuance of guidelines that will maximize the availability of SBA programs to CDC's receiving financial assistance under the title VII program."
>
> S. 2090 would revise the 1972 language to mandate that the SBA "promulgate regulations to insure the availability to community development corporations of such programs as shall further the purposes of this title, including programs under section 8(a) of the Small Business Act." SBA regulations enabling CDC's to participate in the procurement preference minority set aside

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[2] *See, e.g.*, S. Rept. 1070, 95th Cong., 2d sess. 25 (1978); H. Conf. Rept. 1714, 95th Cong., 2d sess. 20-21 (1978).

> program, should be issued immediately. [S. Rept. 892, 95th Cong., 2d sess. 25 (1978); quotation concerning legislative intent from S. Rept. 792, 92d Cong., 2d sess. 40 (1972).]

The amendment was further explained in the Senate report as limiting SBA's discretion: "[l]anguage which indicated 'as may be necessary and appropriate' was deleted because it was cited by SBA as a reason for not issuing regulations." *Id.* at 38. Congress, in enacting this provision anticipated action by the SBA alone to make the § 8(a) program available to CDCs:

> The amendment which establishes eligibility for Community Development Corporations (CDC) for the Small Business Administration Section 8(a) set-aside program will not require CSA modification of its existing regulations and has little, if any, CSA regulatory impact. The amendment will, however, have a substantial favorable economic impact on the approximately fifty CDCs presently funded by CSA, since CDCs will be eligible for the first time to participate in the federal procurement set-aside program. [*Id.* at 29.]

In the light of the clear direction to the SBA contained in § 742(a)(2) and confirmed by the legislative history, there is little room for an argument that the SBA is unable to allow CDC participation in § 8(a) programs. To the extent that there is an argument it rests on the notion that a CDC (or wholly owned affiliate of a CDC) is by definition not an organization "owned" by individuals as required by the definition for "socially and economically disadvantaged" organizations set forth above. A CDC is either "a nonprofit organization responsible to residents of the area it serves which is receiving financial assistance under part A of this subchapter [VII]," or is "any organization more than 50 per centum of which is owned by such an organization, or otherwise controlled by such an organization, or designated by such an organization for the purpose of this subchapter." 42 U.S.C. § 2981a.

The individual ownership requirement of § 8(a) cannot be read to exclude CDCs from participation in the program. Congress must be presumed to know that CDCs by definition are not more than 51 percent individually owned, yet it mandated their participation. Section 742 must, therefore, be read to include control by the same individuals as the SBA Act is intended to benefit.[3]

This interpretation is compelled by the legislative history and does not render either statute ineffective. *Cf.*, *Morton* v. *Mancari*, 417 U.S. 535,

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[3]The CSA makes the argument that ownership insofar as it means title cannot be fractionalized since one may either have absolute title or may share title in an undivided fashion, as in joint tenancy or tenancy in common. The CSA thus takes the position that the phrase "51 per centum owned" must mean a corporate or contractual arrangement under which 51 percent control resides in socially and economically disadvantaged individuals. We need not decide whether, in all cases, this is a reasonable interpretation of the term "ownership" as used in § 8(a).

551 (1974). CDCs assist in the development of similar businesses conducted by similar people as does the SBA § 8(a) program. Furthermore, the 51 percent rule in the SBA Act was intended particularly to get at the quite different problem of use of eligible disadvantaged individuals as "fronts" to obtain assistance for otherwise ineligible businesses. S. Rept. 95-1070, 95th Cong., 2d sess. 16 (1978).

The Small Business Administrator, pursuant to § 742(a)(2), has the obligation to confer with the Director of CSA and to prescribe regulations to effectuate these legal conclusions and thus to insure the availability to CDCs of § 8(a) programs. This must be done expeditiously, as the time period for compliance specified in the statute has already passed.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

October 26, 1979

79-78 MEMORANDUM OPINION FOR THE U.S. ATTORNEY, DISTRICT OF WYOMING

Conflict of Interest—18 U.S.C. § 207—Applicability to Former Assistant U.S. Attorneys

This responds to your inquiry whether Messrs. Steven Munsinger, Harold Stuckey, or any member of their firm may lawfully represent the defendant in a Federal criminal matter pending in your district.

Your memorandum discloses that Mr. Munsinger was Chief of the Criminal Division and Mr. Stuckey the First Assistant U.S. Attorney in the office of the U.S. Attorney, District of Colorado, until May 4, 1979, when they resigned to form their law firm. Your question stems from the visit of a Federal Bureau of Investigation (FBI) agent to the U.S. Attorney's office in Denver on June 26, 1978, to report to Assistant U.S. Attorney Rodney Snow allegedly false statements made by one Mr. A in order to obtain loans from banks in Colorado, Wyoming, and Utah. It appears that Munsinger, who was Snow's immediate supervisor, was present at the conference between the agent and Snow but did not participate in the discussion, during which Snow decided that a prosecution could better be handled in the District of Wyoming. Supplementary information you furnished us by telephone on October 25, 1979, is to the effect that the FBI investigation of A had not been conducted at the instance or with the knowledge of the U.S. Attorney's office in Denver and that the investigation was unknown to Snow and Munsinger, or to Stuckey, who supervised both, before the appearance of the agent.

Because Stuckey and Munsinger resigned on May 4 of this year, the response to your inquiry is governed by 18 U.S.C. § 207 (1976), as it existed before the amendments to it enacted by the Government in Ethics Act of 1978 came into force on July 1, 1979. More particularly, the provisions of former § 207 relevant here are subsections (a) and (b).

For convenience I will discuss § 207(b) first. In general it precludes a former Government employee for one year after leaving office from representing anyone else in a particular matter, including a criminal

investigation or prosecution, that was within the area of his official responsibility, as defined in 18 U.S.C. § 202 (1976), at any time during the last year of his Government service. Since the agent's appearance in Snow's office occurred within a year before the resignations of Stuckey and Munsinger, the questions under § 207(b) is whether the investigative results the agent brought to Snow constituted a "particular matter * * * which was under [the] official responsibility" of either Munsinger or Stuckey.

As described in your memorandum, the agent's presentation covered three separate though apparently related matters—that is, it covered a series of alleged criminal violations in Colorado, another series in Wyoming, and a third in Utah. To the extent the agent supplied Snow with evidence of criminal activity by A in Colorado, he submitted for Snow's consideration a particular matter potentially within the jurisdiction of the U.S. Attorney in Denver. If Snow had pondered this matter for several days before making his decision not to prosecute in Denver, there can be no question that "official responsibility" on the part of Munsinger and of Stuckey would have arisen. Since, however, there is nothing in the statute to condition official responsibility on a passage of time, it is clear that it arose when the agent presented his information to Snow even though the latter made his negative decision immediately. Nevertheless, this conclusion does not dispose of the matter, because the presently pending case in Wyoming, although it may possibly involve some facts that would have been useful in a prosecution in Colorado, is a different matter—that is, it entails separate alleged violations occurring in Wyoming. Whatever officials may have had responsibility for the investigation there during the year preceding May 4, 1979, Stuckey and Munsinger were obviously not among them. Thus, they are not forbidden by § 207(b) to represent A in the District of Wyoming.

The remaining question is whether either Stuckey or Munsinger is barred from representing the defendant by § 207(a), which permanently prohibits postemployment representation of another by a former Government employee in a matter in which he had "participated personally and substantially" while holding his Government position. Stuckey is not subject to this prohibition since he was not present at the meeting between the agent and Snow. We are of the opinion that Munsinger is also free of the prohibition. His silence during the meeting is, of course, not in itself controlling because the tacit decision of a superior not to overrule a subordinate might in some circumstances constitute substantial participation in a matter. Here, however, even the role of Snow, the subordinate, did not amount to personal and substantial participation. We have previously concluded that merely acquiring preliminary knowledge of a matter but not thereafter taking part in the work of the Government relating to it does not constitute the degree of participation contemplated by the statute. Because Snow is beyond the thrust of § 207(a), it cannot reach Munsinger.

In sum, we are of the opinion that 18 U.S.C. § 207 is not an impediment to the representation of the defendant by Stuckey, Munsinger, or other members of their firm.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

October 30, 1979

79-79 MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION

Indians—Offset by Government of Claims Arising Out of Gratuitous Payments—Authority of Attorney General to Withdraw Offset

This responds to your request for our opinion concerning the authority of the Attorney General to withdraw claims for gratuitous payments made by the Federal Government under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.* (1976) (Indian Self-Determination Act). The facts are as follows:

The Indian Claims Commission has previously determined under the Indian Claims Commission Act, 25 U.S.C. § 70 *et seq.* (1976), that the plaintiffs in *Turtle Mountain Board of Chippewa Indians et al.* v. *United States.* Ct. Cl. Dock. 113, 191, 221, 246, had aboriginal title to land that had the fair market value of $53,527.22 in February 1905, the date on which such title was extinguished by the United States. Accordingly, the Commission entered an interlocutory award in this matter in favor of the plaintiffs.* Your Division, which is representing the Government in this case, has concluded that certain payments totaling approximately $7,000,000 made to the plaintiffs under the Indian Self-Determination Act, 25 U.S.C. § 450 *et seq.* (1976), are gratuitous expenditures that under 25 U.S.C. § 70a (1976) may be asserted by the Government as offsets against the interlocutory award.

The Department of the Interior (Interior) has requested that the Department of Justice withdraw its asserted offset for certain payments made under the Indian Self-Determination Act. In support of its request, Interior advances several arguments. It objects to your conclusion that payments made under that Act were gratuitous payments within the meaning

*This case is now in the Court of Claims. It was transferred to that court when the Commission was dissolved on September 30, 1978, under 25 U.S.C. § 70v-3 (Supp. II, 1978).

of 25 U.S.C. § 70a. It also contends that if these payments can be characterized as gratuitous expenditures under 25 U.S.C. § 70a (1976), such a result was not intended by Congress in enacting the Indian Self-Determination Act. Interior argues that had this possible consequence been brought to the attention of Congress, it would have exempted such payments from treatment as gratuitous expenditures. Finally, it requests that, in light of Congress' inadvertence in not exempting such payments, the Department of Justice exercise its prosecutorial discretion and withdraw the offset.

The questions that you have asked are the following: whether it is mandatory under § 2 of the Indian Claims Commission Act to pursue a claim for gratuitous offsets, with respect to which there is a likelihood of recovery; where the executive department administering a grant program is of the view that funds expended were never intended to be available as offsets, whether it is proper as a matter of discretion for the Attorney General not to pursue the offset; and if question 2 is answered in the affirmative, who is authorized to make the determination and on what basis.

Because you have not asked us to address the question whether payments made under the Indian Self-Determination Act are gratuitous expenditures within the meaning of 25 U.S.C. § 70a (1976), we do not express any opinion on this question. For the purposes of this discussion, therefore, we assume as correct your statement that, if the Government presses its claim for offsets before the Court of Claims, there is a reasonable likelihood that it will succeed.

For the reasons set forth below, we conclude that the Attorney General has the discretion to withdraw the Government's claim for gratuitous offsets on policy grounds. In this instance, the decision to approve the withdrawal may be made by the Associate Attorney General.

I. Discretion of the Attorney General to Withdraw Claims Made in Litigation

It is an established principle of law that the "Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States* v. *Nixon,* 418 U.S. 683, 693 (1974). This authority has long been recognized as vested in the Attorney General as the President's surrogate in enforcing the laws and was formally delegated by the President to the Attorney General in 1933:

> As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer is transferred to the Department of Justice. [Executive Order 6166 § 5, reprinted in 5 U.S.C. § 901 note (1976).]

This delegation, together with 28 U.S.C. § 516 (1976), which reserves to officers of the Department of Justice under the direction of the Attorney General the conduct of all litigation to which the Government is a party, have been interpreted consistently by both the courts and the Attorney General as vesting the Attorney General with absolute discretion to determine whether to compromise or abandon claims made in litigation on behalf of the United States. *United States* v. *Newport News Shipbuilding & Dry Dock Co.*, 571 F.(2d) 1283, 1287 (4th Cir. 1978), cert. denied, 99 S. Ct. 212 (1979); *United States* v. *Cox*, 342 F.(2d) 167, 171 (5th Cir. 1965), cert. denied, 381 U.S. 935 (1965); 38 Op. Att'y Gen. 98 (1934), 38 Op. Att'y Gen. 124 (1934).

Referring to the Attorney General's power to control litigation, Attorney General Cummings stated:

> This power is plenary and carries with it the authority to make it effective, including authority to consider all matters germane to any case over which the Attorney General has obtained jurisdiction * * * . He may dismiss a suit or abandon defense at any stage when in his sound professional discretion it is meet and proper to do so. [38 Op. Att'y Gen. at 126.]

This power, however, is "to be exercised with wise discretion and resorted to only to promote the Government's best interest or to prevent flagrant injustice." 38 Op. Att'y Gen. 98, 102 (1934). The courts have recognized that the Attorney General, in exercising his discretion, is not restricted to considering only the litigative probabilities, but may make a decision to abandon a claim based on policy reasons. *See, Smith* v. *United States*, 375 F. (2d) 243, 247 (5th Cir. 1965), cert. denied, 389 U.S. 841 (1967); *Cox* v. *United States*, *supra*. Given this background concerning the discretion of the Attorney General, we next consider whether the Attorney General's power to withdraw the claim has been limited by the Indian Claims Commission Act.

II. Discretion of the Attorney General to Withdraw Claims for Offsets Made in Proceedings Under the Indian Claims Commission Act

Neither the Indian Claims Commission Act nor its legislative history indicates any intent on the part of Congress to limit the Attorney General's broad power to withdraw claims made by the United States. The only provision in the Act that could be so construed is 25 U.S.C. 70n (1976) authorizing the Attorney General to compromise claims presented to the Commission and requiring him to obtain the Commission's approval of any compromise. It could be argued that in granting the Attorney General the power to compromise claims presented to the Commission, Congress intended to deny him the power to withdraw claims asserted on behalf of the United States. However, such an interpretation has no support in the

Act's legislative history. Moreover, because 25 U.S.C. §§ 70n and 70u provide for the submission of the compromised claim to Congress for payment, a more reasonable interpretation of 25 U.S.C. § 70n would be that the authority requiring the approval of the Commission applies only to claims presented by Indian claimants. We adopt this interpretation as correct and conclude that the Attorney General's broad power to control the disposition of Government's claims made under 25 U.S.C. § 70a (1976) including counterclaims, offsets, and gratuitous offsets, is not limited by the Act, and this power may be exercised on policy grounds. The standard governing his decision is whether the disposition would "promote the Government's best interest or * * * prevent flagrant injustice." 38 Op. Att'y Gen. 98, 102.

III. As to the Exercise of Discretion

Your second question, inquiring whether it is proper as a matter of policy to withdraw the Government's claims on the ground that the Department of the Interior never intended that the funds expended under the Indian Self-Determination Act be considered as offsets, is not an appropriate question for this Office. Whether the competing policy considerations in this matter warrant withdrawal of particular claims for offsets is not a legal question, but rather presents a policy question that should be resolved by the appropriate officers in the Department of Justice. Because of the magnitude of the claim for offset and the policy questions involved, Department of Justice regulations require that any proposed withdrawal of the claim be forwarded to the Associate Attorney General for review and final action, along with your recommendations to that effect and a report on the matter. 28 CFR 0.164, 0.165 (1978).

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

October 31, 1979

79-80 MEMORANDUM OPINION FOR THE COMPTROLLER GENERAL OF THE UNITED STATES

Conflict of Interest—18 U.S.C. § 207—Applicability to the General Accounting Office

The Attorney General has asked me to respond to your request for my opinion whether 18 U.S.C. § 207, as amended, and the interim regulations published by the Office of Personnel Management (OPM) on April 3, 1979, interpreting that provision, apply to officers and employees of the General Accounting Office (GAO).

Title IV of the Ethics in Government Act of 1978, 5 U.S.C. App., gives the Director of the Office of Government Ethics and the Director of OPM broad authority with respect to the establishment of ethical standards for officers and employees of any "executive agency," as defined in 5 U.S.C. § 105. Although that definition includes the GAO, you suggest in your letter to the Director of OPM that inclusion of the GAO under OPM's regulatory jurisdiction in Title IV was a "technical oversight" because GAO is treated as part of the legislative branch for public disclosure purposes. Whether the ethics regulations issued by OPM pursuant to Title IV of the Ethics in Government Act are in general applicable to GAO is, in the first instance, a matter to be resolved by OPM, and I shall therefore not address that issue.

Your letter to the Director of OPM also raises a broader questions, *i.e.*, whether 18 U.S.C. § 207 applies of its own force to GAO. It is our opinion that § 207 does and that GAO accordingly is subject to the requirements of the interim regulations issued by OPM.

By its terms, § 207 applies to any person who has been "an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia." GAO would appear to be an "independent agency of the United States" under the plain meaning of this section.

GAO was established by 31 U.S.C. § 41, which provides in pertinent part:

> There is created an establishment of the Government to be known as the General Accounting Office, which shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States.

This statutory description of GAO as an "establishment of the Government * * * independent of the executive departments" would appear to be roughly the equivalent of the phrase "independent agancy of the United States" in 18 U.S.C. § 207.

Moreover, the term "agency" is defined for purposes of title 8, United States Code, to include—

> any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense. [18 U.S.C. § 6.]

This is an expansive definition which, in effect, establishes a presumption that a governmental entity is an agency for purposes of a given title 18 offense, including 18 U.S.C. § 207.

We are not aware of any discussion in the legislative history of the revision of the conflict of interest laws in 1962 or the more recent 1978 amendments to 18 U.S.C. § 207, Pub. L. No. 95-521, 96-28, regarding the application of § 207 other conflict of interest laws to the GAO. The introductory phrase in § 207(a), as amended by the Ethics in Government Act, describing the former officers and employees to whom § 207 applies, is identical to the introductory phrase in § 207 as first enacted in 1962. The House report on the 1962 law describes § 207(a) (and §§ 208 and 209, which were identical in terms of coverage) as applying to former officers and employees of the "executive branch" or an "independent agency," without further elaboration. *See, e.g.*, H. Rept. 748, 87th Cong., lst sess. 11, 12, 13, 23, 24 (1961). The Senate report describes §§ 207, 208 and 209 as applying to present and former Government employees only in very general terms.

There is no indication in the legislative history of the Ethics in Government Act that Congress believed it was in any way altering the coverage of the section. Accordingly, we cannot read too much into the statement you quote from the conference report on the Ethics Act that § 207 "is the major statute concerning restrictions on the postservice activities by officials and employees of the Executive Branch." S. Doc. 95-127, 95th Cong., 2d sess. 73 (1978). *See also* S. Rept. 95-170, 95th Cong., 1st sess. 31, 151 (1977). This statement is true, of course, as far as it goes, but it does not preclude a reading of § 207 as applying to independent agencies that may not be thought of as part of the executive branch.

There is thus nothing in the legislative history of § 207 to indicate that the term "independent agency of the United States" in § 207 (a) is not to be given its natural reading, a reading that would include the GAO. You suggest, however, that § 207 does not apply to the GAO because it is an agency of the legislative branch. You advert to a similar suggestion regarding the application of another conflict of interest statute to the same agency, 18 U.S.C. § 208, which was made by a leading commentator in this general area. B. Manning, *Federal Conflict of Interest Laws* 114 (1964).

It is true, as you point out, that 18 U.S.C. §§ 203 and 205 expressly apply to officers and employees in the executive, legislative, and judicial branches, and that 18 U.S.C §§ 207, 208 and 209 do not by their terms and were not intended to apply to officers and employees of the legislative and judicial branches. The question here, however, is whether the GAO was intended to be excluded from §§ 207, 208 and 209 as an agency of the legislative branch.

The argument for excluding the GAO from coverage under § 207 might be stronger if the statutes mentioned above referred only to executive, legislative, and judicial branches, because each governmental entity would then have to be placed in one of the branches for purposes of the conflict of interest provisions. GAO is often informally described as an agency of the legislative branch, *see, e.g., United States Government Manual* 52-57 (1978/79); *cf., Buckley* v. *Valeo*, 424 U.S. 1, 128 note 165 (1976). A statute provides for removal of the Comptroller General by joint resolution of the Congress, 31 U.S.C. §43, and the Comptroller General performs certain functions for the benefit of the Congress. If every governmental entity had to be placed in one of the three branches, it could be argued that GAO would more appropriately be regarded as an agency of the legislative branch.

But 18 U.S.C. §§ 203 and 205 apply to officers and employees "in the executive, legislative, or judicial branch of the Government, or in any agency of the United States" (emphasis added), thereby indicating that there are certain covered agencies that are not, for purposes of those provisions, part of any of the three branches. Similarly, 18 U.S.C. §§ 207, 208 and 209 refer both to employees of the "executive branch of the United States Government" and of "any independent agency of the United States." The term "independent agency" in those sections, read in *pari materia* with §§ 203 and 205, would also seem to include governmental entities that do not fit precisely into any of the three branches.

Accordingly, we construe the term "executive branch" in these provisions to refer to those agencies that are subject to the President's discretion and control. Similarly, we construe the inclusion of officers and employees of the legislative branch in 18 U.S.C. §§ 203 and 205—and the corresponding exclusion of officers and employees of the legislative branch in §§ 208 and 209—to encompass only those individuals who are properly regarded as officers or employees of the Congress or one of its

Houses or agencies and who are responsible in some immediate sense to the Congress for the performance of their duties. This would include, for example, the staffs of Members of Congress, committee staffs, the Secretary of the Senate, the Clerk of the House of Representatives, and other officers of the two Houses, and those officers and employees appointed by the Congress or one House thereof to perform functions in aid of the legislative process. The Office of Technology Assessment, created "within and responsible to the legislative branch of the Government," 2 U.S.C. § 472(a), and headed by a Board appointed by the President *pro tempore* of the Senate and the Speaker of the House of Representatives, 2 U.S.C. § 473(a), would be within the legislative branch for purposes of 18 U.S.C. §§ 202-209 under this test. So would the Congressional Budget Office, which is established as "an office of the Congress" and headed by a Director appointed by the Speaker of the House and President *pro tempore* of the Senate, 2 U.S.C. §601(a).

The GAO, on the other hand, is created as an "establishment of the Government" which is "independent" of the executive departments, 31 U.S.C. § 41, without any express statutory provision that it is in the legislative branch. Moreover, unlike the Technology Assessment Board and the Director of the Congressional Budget Office, the Comptroller General is appointed by the President, by and with the advice and consent of the Senate, 31 U.S.C. § 42. He holds office for a term of 15 years and is by statute removable for cause by joint resolution of the Congress, thereby involving the President in the removal as well, 31 U.S.C. § 43. The establishment of a fixed tenure of office, subject to removal for cause, has generally been regarded as intended to promote an element of independence of action. *Cf.*, *Humphrey's Executor* v. *United States*, 295 U.S. 602, 624-26 (1935). Thus, while the Comptroller General and GAO are independent of the executive branch, they apparently are expected to be somewhat independent of the legislative branch as well. I therefore am led to conclude that whatever their status for other purposes, the Comptroller General and officers and employees of the GAO are officers and employees of an "independent agency of the United States" for purposes of 18 U.S.C. § 207—§§ 208 and 209 as well. This description is not inconsistent with the occasional description of the GAO as an agency of the legislative branch. Independent regulatory commissions—which all would concede are covered by § 207—are sometimes described in the same fashion, *Humphrey's Executor* v. *United States*, 295 U.S. at 628-30.

We do not believe that our interpretation will have a disruptive impact on the operations of your agency. Soon after the conflict of interest laws were revised in 1962, the Comptroller General promulgated standards of conduct for employees of the GAO which called the employees' attention to the recently enacted conflict of interest provisions. 14 CFR § 6.6, 28 F.R. 9665 (Sept. 4, 1963). Those regulations noted, for example, that "[w]hile it is not clear whether the General Accounting Office comes within the scope of the terms used in section 208, the prohibition will for

the present be viewed as applying to officers and employees of the General Accounting Office." *Id.* § 6.6(a)(iii). The regulations also called employees' attention to 18 U.S.C. §§ 207 and 209, which apply to exactly the same agencies as § 208. Later versions of the regulations merely listed a number of criminal statutes of which GAO employees should be aware but without noting any questions whether the conflict of interest provisions actually applied to GAO. *See, e.g.*, 31 F.R. 5293, 5296-7 (April 2, 1966). The most recent GAO standard of conduct regulations likewise call employees' attention to a number of criminal statutes applicable to Government employees, including 18 U.S.C. § 207. 4 CFR § 6.13 (1979).

The prior regulations issued by the Comptroller General were issued on the authority of 31 U.S.C. § 52, which gives the Comptroller General the authority to promulgate regulations to carry out the work of the GAO. The citation to 31 U.S.C. § 52 was followed with the statement: "Interpret *or* apply 18 U.S.C. 201-218" (emphasis added). This citation of authority was carried forward until the present GAO conduct regulations were issued in 1977. 42 F.R. 47173, 47174 (Sept. 20, 1977). The present regulations state as the source of authority for their issuance: "31 U.S.C. 52, interpret *to* apply 18 U.S.C. 201-218" (emphasis added). This change presumably reflects a decision on the part of your agency to take the position that those criminal statutes do not apply of their own force, but rather are being applied by the Comptroller General as appropriate standards of conduct under his broad power to issue regulations. But, in any event, there has apparently not been a longstanding interpretation by your agency that the criminal statutes are not of their own force applicable to GAO. And, of equal significance, the substance of the statutory provisions has consistently been thought to state appropriate standards of conduct for present and former GAO employees. There is thus no room for the argument that departure from the plain meaning of the language in § 207 is required because the statute could not have been intended to apply to the GAO. *Cf.*, *United States* v. *Bramblett*, 348 U.S. 503, 509 (1955).

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

November 8, 1979

79-81 MEMORANDUM OPINION FOR THE ASSISTANT DIRECTOR, DOMESTIC POLICY STAFF

President—Consultation—Form—Public Utility Regulatory Policies Act of 1978 (§ 507(a)(1), 43 U.S.C. § 2007(a)(1))

Title V of the Public Utility Regulatory Policies Act of 1978, 43 U.S.C. §§ 2001-2012, is designed to expedite Federal action on proposed means of transporting oil from the West Coast to other parts of the United States. The Secretary of the Interior, with advice from other Federal agencies, reviews proposals and makes recommendations to the President. *Id.* § 505, 43 U.S.C. § 2005. Then the President, "after consulting with the Secretaries of Energy, the Interior, and Transportation," decides whether to approve a proposal and require expedited treatment. *Id.*, § 507; 43 U.S.C. § 2007. You have asked us for advice about the form of consultation required.

Consultation, of course, is an exchange of views. We believe that the statute permits the President to choose the form of exchanging views that he considers appropriate. Nothing in the words or the structure of the statute suggests that Congress intended to require a particular form of consultation. Nor does the legislative history; neither the conference committee, which added § 507, nor the Senate, which added most of what became Title V as a floor amendment, *see* 123 CONGRESSIONAL RECORD S. 16491-96, S. 16498-502 (daily ed., Oct. 6, 1977), mentioned the President's duty to consult.[1] Several other statutes require the President to consult with the executive branch officials before making a decision. *See, e.g.*,

[1]Under the amendment added on the Senate floor, the Secretary of the Interior was to make the final decision. The conference committee did not say why it assigned that function to the President, but it did emphasize that the President should take certain environmental factors into account. S. Rept. 1292, 95th Cong., 2d sess. 108 (1978). One might infer that Congress wanted the President to decide so that a wider range of policies could be considered.

12 U.S.C. § 36 note; 42 U.S.C. §§ 6272(c)(1)(A)(iii), 6272(e); 49 U.S.C. § 1531 note; 42 U.S.C. § 5155(a); *see also* 50 U.S.C. App. § 468(a) (eliminated by Reorganization Plan No. 3 of 1953, § 5(a)). None of these prescribes a form of consultation in either its text or its legislative history. *See, e.g.*, S. Rept. 1073, 95th Cong., 2d sess. 19 (1978).[2] If some habitual form of consultation had developed under these other provisions, and Congress, in enacting § 507, mandated that form, there would be less flexibility than we believe inheres in § 507.

Indeed, certain features of § 507 affirmatively suggest that Congress intended not to prescribe any particular form of consultation. For example, when read in conjunction with the Administrative Procedures Act, § 507 plainly permits either an oral or a written exchange of views. *Compare* § 507(a)(1), 43 U.S.C. § 2007(a)(1), *with* 5 U.S.C. § 554(a). Similarly, by requiring the President to make certain findings and explanations, *see* § 507(c), 43 U.S.C. § 2007(c), Title V suggests that no other formalities—such as a written record of the consultation—are necessary. *See, Camp* v. *Pitts*, 411 U.S. 138, 143 (1973); *see also, United States* v. *Nixon*, 418 U.S. 683, 705-13 (1974). And the Supreme Court has recently emphasized that agencies have considerable discretion to decide which procedures to follow in making the decisions with which they are charged. *See, Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-25 (1978). For these reasons, we believe that Title V permits the President to choose whatever form of consultation he considers appropriate.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

[2]Other statutes require the President to consult with Congress or with Members of Congress before making certain decisions. *See, e.g.*, 50 U.S.C. § 1542 (War Powers Resolution). But since the President's relationship to executive branch officials differs from his relationship to Congress, any established practices under these statutes do not control the interpretation of provisions like § 507.

November 23, 1979

79-82 MEMORANDUM OPINION FOR THE GENERAL COUNSEL, GENERAL SERVICES ADMINISTRATION

(1) Presidential Protection Assistance Act (18 U.S.C. § 3056 note)—Retroactive Effect
(2) Federal Improvements to Real Property Owned by a Former President—Title Thereto—Removal Of

This responds to your request for the views of the Department of Justice concerning the disposition of Government property located at former President Nixon's San Clemente residence. For the reasons discussed below, we conclude that the Presidential Protection Assistance Act of 1976, 18 U.S.C. § 3056 note, does not apply to the termination of Government services at the San Clemente estate and that the Government is not obligated to restore the property to its original state, as the owner requests. We further conclude that if Mr. Nixon sells the estate, the Government has an arguable right to the portion of the sale price attributable to Government improvements.

I.

Your first question is whether the Presidential Protection Assistance Act applies to the termination of Government services at the San Clemente estate. You tell us that all the Government property and improvements were placed on the San Clemente estate prior to the passage of the 1976 Act.

The Act itself does not provide an effective date. The general rule is that a statute takes effect on the date of its enactment if the time is not otherwise fixed by law. *Union Pac. Ry.* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913); *United States* v. *Gavrilovic*, 551 F. (2d) 1099, 1103

(8th Cir. 1977); 2 J. Sutherland, *Statutes and Statutory Construction* § 33.06 (4th ed. 1973). Statutes cannot be applied retroactively unless the words are so clear and imperative that they can have no other meaning or unless the legislative intent cannot be otherwise satisfied. *De Madulfa* v. *United States*, 461 F. (2d) 1240, 1247 (D.C. Cir. 1972), cert. denied, 409 U.S. 949 (1972). A statute such as this, which may interfere with antecedent rights, will not be applied retroactively unless that is " 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' " *Greene* v. *United States*, 376 U.S. 149, 160 (1964), quoting *Union Pac. Ry.* v. *Laramie Stock Yards Co.*, *supra*. Unless the clear, unequivocal intent of the Congress was that the Act be effective retroactively, it cannot be applied to the disposition of the San Clemente property.

The measure was introduced as a result of a thorough study of expenditures of Federal funds in support of Presidential properties by the Government Activities Subcommittee of the Committee on Government Operations in the 93d Congress. 121 CONGRESSIONAL RECORD 12983-85 (1975). The findings and conclusions of the subcommittee appear in a Committee on Government Operations report, "Expenditures of Federal Funds in Support of Presidential Properties," Fifteenth Report by the Committee on Government Operations, H. Rept. 1052, 93d Cong., 2d sess. (1974). This study was triggered by certain matters involving the Nixon properties at Key Biscayne, Florida, and San Clemente, California. H. Rept. 105, 94th Cong., lst sess. (Pt. 2) 2 (1975). The subcommittee received information concerning these two locations in a report from the General Accounting Office. General Accounting Office No. B-155950 (1974).

A study of the legislative history reveals no clear intent that the bill be applied retroactively. The House report on the bill states that the bill was designed to correct certain deficiencies in existing law and to tighten loose procedures. The list of things the bill was designed to accomplish does not include rectification of the problems at San Clemente. H. Rept. 105, 94th Cong., lst sess. (Pt. 2) 1-2 (1975). The recommendations of the GAO formed the basis for much of the bill and, according to Part 1 of the House report, those recommendations were intended to provide for better future controls over expenditures. H. Rept. 105, 94th Cong., 1st sess. (Pt. 1) 5-6 (1975). Similarly, the Senate report reveals only an intent to prevent future irregularities. In its statement on the need for the legislation, examples of abuses at Key Biscayne and San Clemente are recited, but there is no statement that this legislation retroactively would correct those particular abuses. Rather, the report summarizes: "H.R. 1244, as amended, is designed to prevent such misuse of the taxpayer's dollars by placing the responsibility for all expenditures in one centralized place; that is, the U.S. Secret Service." S. Rept. 1325, 94th Cong., 2d sess. 5 (1976).

Although subsequent expressions of congressional understanding of

legislation are entitled to very little weight,[1] we note that recent legislation indicates a congressional belief that the Presidential Protection Assistance Act of 1976 is not retroactive. On June 18, 1979, Senator Hart introduced a resolution stating:

> [I]t is the sense of the Senate that the Director of the Secret Service and the Administrator of General Services shall take such actions as may be necessary to obtain reimbursement in an amount by which any construction, renovation, improvements, equipment or articles paid for by the Federal Government of the United States have increased the fair market value of the estate known as San Clemente located in the State of California at the time of and upon its sale by former President Richard M. Nixon. [S. Res. 187, 96th Cong., 1st sess., 125 CONGRESSIONAL RECORD S. 7892 (daily ed., June 18, 1979).]

The resolution was referred to the Committee on Governmental Affairs but no further action has been taken. The substance of the resolution, however, has been adopted as an amendment to a 1979 appropriation bill. Treasury, Postal Service, and General Government Appropriation Act, 1980, Pub. L. No. 96-74, § 616, 93 Stat. 577 (1979). On August 3, 1979, Senator Pryor submitted the amendment (125 CONGRESSIONAL RECORD S. 11725 (daily ed., August 3, 1979)),which was later revised by Senator Hart to parallel more closely the language of the Presidential Protection Assistance Act. 125 CONGRESSIONAL RECORD S. 11814-15 (daily ed., Sept. 5, 1979). As enacted, § 616 provides:

> It is the sense of the Congress that, upon the sale of the estate known as Casa Pacifica located in San Clemente, California, former President Richard M. Nixon should reimburse the United States for the original cost of any construction, renovation, improvements, equipment or articles paid for by the Federal Government of the United States, or for the amount by which they have increased the fair market value of the property, as determined by the Comptroller General of the United States, as of the date of sale, whichever is less.

But the statute's language is permissive, not mandatory. It does not alter the effective date of the Act, nor expressly mandate that the Act be applied to the San Clemente property.[2] Thus, it does not alter the rights or obligation of any party involved in the San Clemente transactions.

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[1] *See, Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612, 639 n. 34 (1967); *Allyn* v. *United States*, 461 F.(2d) 810, 811 (Ct. Cl. 1972).

[2] Although some comments by Senator Stevens lend support to the argument that the Act itself should be applied to the Nixon property (*see* 125 CONG. REC. S. 11815 (daily ed., Sept. 5, 1979)), the debate taken as a whole illustrates that the Congress did not believe the Act could be applied retroactively but wanted formally to declare that the principles of the Act should be applied to all similarly situated property.

II.

Your next question is whether the Government has a legal obligation to comply with Mr. Nixon's request that all Government items be removed and that his property be restored to its original condition. The Presidential Protection Assistance Act, § 5(b), provides that if the owner of the property requests the removal of the improvements or other items, such items shall be removed and the nongovernmental property shall be restored to its "original state." Because this Act is not retroactive, however, it is not necessary to interpret the language of this provision. The rights and obligations of both the United States and Mr. Nixon must be determined without the assistance of that Act.

The threshold question regards the present title to the property in question. The Constitution gives to Congress the power to make all needful rules and regulations respecting the property of the United States. Constitution of the United States, Article IV, section 3, clause 2. Whether title to property of the United States has passed is a question of Federal law. *Jourdan* v. *Barrett*, 45 U.S. (4 How.) 169, 184-85 (1846); *Wilcox* v. *Jackson*, 38 U.S. (13 Pet.) 498, 517 (1839). At the time these improvements were placed on the property, there was no act of Congress stating whether title would remain in the United States or pass to the landowner.[3] Because only Congress can authorize the disposal of Federal property, it must be determined whether congressional authorization to purchase the property and place it on nongovernmental property worked a transfer of title. Although the specific statutory authority for the expenditures is unclear,[4] the expenditures apparently were made pursuant to Pub. L. No. 90-331, § 2, 82 Stat. 170 (1968), repealed by the Presidential Protection Assistance Act. Section 2 provided:

> Hereafter, when requested by the Director of the United States Secret Service, Federal Departments and agencies, unless such authority is revoked by the President, shall assist the Secret Service in the performance of its protective duties under section 3056 of title 18 of the United States Code and the first section of this joint resolution.

The general common law rule holds that when a person voluntarily and gratuitously places improvements on property not his own, such improvements become the property of the landowner, in the absence of an agreement to the contrary. *See, Chicago Title & Trust Co.* v. *Fox Theatres Corp.*, 164 F. Supp. 665, 671 (D.C. N.Y. 1958). This rule, consistent with the rules on trespass and conversion, grew out of the notion that a person who meddles with the property of another assumes the risk of doing so.

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[3]The Presidential Protection Assistance Act now provides that all improvements and other items acquired and used for the purpose of securing any nongovernmental property shall be the property of the United States.

[4]*See* H. Rept. 1052, *supra*.

Restatement of Restitutions, § 42(l), and *comment a* thereto. Here, however, there was no meddling or mistake as to ownership. All parties understood that the improvements were being constructed on Mr. Nixon's property. If not made at the request of Mr. Nixon, they were made with his knowledge and approval. The improvements benefited both Mr. Nixon and the United States, which had a duty to protect him. The improvements were used by the United States in carrying out Federal functions.[5]

The United States and a private party can agree that fixtures placed by the Government on the land of the private party do not automatically become the property of the landowner. In *United States* v. *Allegheny Co.*, 322 U.S. 174 (1944), a contractor installed Government-owned machinery in his mill pursuant to a contract with the United States. It was agreed that the equipment specially required for the work should remain the property of the United States although it could not be removed without damage to the contractor's building. Allegheny County, seeking to tax the equipment, denied that the Government had valid title to the machinery. The Court concluded that although the contractor had some legal and beneficial interest in the property as a bailee for mutual benefit, title to the property remained in the United States.[6] In *Crowell Land & Mineral Corp.* v. *United States*, 114 F. Supp. 31 (W.D. La. 1953), the United States installed a pipe under lands leased by it from plaintiff, and subsequently removed the pipe, allegedly after the time allowed by the lease. The plaintiff sued to recover the value of the pipe. Noting that forfeitures are not favored in the law, the court held that the pipe "undoubtedly was and remained the property of the United States," even if the period of time allowed by the contract had expired. Even in the absence of an express agreement, public policy may dictate that the party who constructed the improvements retain title.[7] We believe it was the tacit understanding of all parties here that title remained in the United States.[8] All Government-purchased property placed on the private property of prior "protectees" has been considered property of the Federal Government until

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[5]We assume that all purchases were authorized by the Government. For the purpose of determining the ownership and disposition, there is no need to distinguish property necessary to legitimate Federal function and property that may not have been necessary.

[6]Insofar as *Allegheny County* held that a tax measure by the value of Government-owned property may never be imposed on a private party, it was overruled by *United States* v. *City of Detroit*, 355 U.S. 466, 495 (1958). *See*, *United States* v. *County of Fresno*, 429 U.S. 452, 462-63 n. 10 (1977). Those rulings did not affect the holding of *Allegheny County* as to title.

[7]In *Chicago Title & Trust Co.* v. *Fox Theatres Corp.*, 164 F. Supp. 665, 671 (S.D. N.Y. 1958), the court wrote:

> Where, however, the buildings are erected by a lessee for trade purposes they have been held to be trade fixtures which, in the absence of provisions to the contrary in the lease, are the lessee's property and reasonable time thereafter. This rule is based upon a public policy long ago enunciated to encourage trade and manufacture.

[8]Transfer of title at the time of the improvements may conflict with Article II, section 1, clause 7 of the Constitution, which provides:

> The President shall, at stated Times, receive for his Services, a compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

actual abandonment by the United States under the authority of 40 U.S.C. § 483(h). The Government remained in control of improvements in performing its obligations to the former President. Congressional authorization to expend the funds did not transfer title to Mr. Nixon. Thus, we believe that title remained in the United States.

The question also arises as to the disposition of such property upon Mr. Nixon's sale of the estate. There apparently is no issue as to the disposition of property not affixed to the estate. These items, according to the study you have provided to us, are easily removable and Mr. Nixon asks that they be removed. They should be removed when they are no longer needed at that location. The more difficult question involves removal of the improvements that are affixed to the land and buildings. Examples of these improvements are a blockwall and fence, a bullet-resistant glass screen, window alterations, a sewer line, a gatehouse, and guardhouses.

The Government is generally under a duty to return the premises to the owner in as good a condition as when the improvements were made. This conclusion is based on an implied covenant against waste. *United States* v. *Bostwick,* 94 U.S. 53, 66–68 (1876); *United States* v. *Jordan*, 186 F.(2d) 803, 806 (6th Cir. 1951), *aff'd*, 342 U.S. 911 (1952). "As good a condition" does not, however, require removal of all the improvements. It would benefit neither the Federal Government nor Mr. Nixon to engage in the costly removal of these items which have minimal salvage value. Having consented to this installation when it was apparent that subsequent removal would not be economically or structurally feasible, Mr. Nixon cannot, we believe, successfully enforce his demand that they be removed. If the property is placed in as good a condition as existed prior to the improvements, Mr. Nixon is not damaged by the failure of the United States to comply with his request for removal of the items. Although they remain Government property until abandoned, the Government is not obligated to remove them.

III.

Your final question is whether the Government can require Mr. Nixon to reimburse the Government for the portion of the sale price attributable to the Government improvements. There is no clear answer to this question. Certainly Mr. Nixon cannot be required to reimburse the United States for these improvements so long as they are used to further a public purpose, that is, the protection of the former President. If the former President decides to sell the property and thus terminates the need for the protection at that site, however, it can be argued that he is obligated to remit to the United States the portion of the total proceeds attributable to the sale of the Government's property. This conclusion follows from the fact that title to the property remains in the Government and that retention of the proceeds by Mr. Nixon would result in his unjust enrichment.

The general rule is that persons who cause improvements to be made on the land of another are not entitled to restitution. *Restatement of Restitutions* § 42(1) (1937). Where the improvements are made with the knowledge and approval of the landowner and are necessary for his protection, however, the person who pays for the improvements is entitled to restitution. *Cf. Restatement of Restitutions*, § 112 (1937). A person who in good faith improves the property or another may require payment for the improvements placed upon the property or for the increased value of the land. *See, Crowell Land & Mineral Corp.* v. *United States*, 114 F. Supp. 31, 36 (W.D. La. 1953). If Mr. Nixon refuses to transfer the funds from the sale of Government property, the Government may have a cause of action in quasi-contract, seeking restitution for the sale of its property. Another basis of recovery would be an action for money had and received, which is predicated on the theory that the defendant has received money which in fact belongs to plaintiff, and in which the defendant never at any time had an ownership interest. *United States* v. *Elliot*, 205 F. Supp. 581, 585 (N.D. Cal. 1962). This action is equitable in nature, premised on the assertion that money is held by the defendant which in equity and good conscience should be delivered to plaintiff.[9] A government has the same rights to restitution as do private individuals or corporations, and the same procedural rules apply.[10] A government can seek restitution of public assistance payments fraudulently obtained,[11] money paid by mistake,[12] and kickbacks illegally paid to Government employees.[13] It also has been held that moneys collected under color of office without any legal authority are to be paid to the public authority on whose behalf they were illegally collected.[14]

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[9]*See, Bloomfield Steamship Co.* v. *United States*, 258 F. Supp. 891, 910 (S.D. Tex. 1964), *rev'd*, 359 F.(2d) 506 (5th Cir.1966) cert. denied, 385 U.S. 1004 (1966). An analogy here can be drawn to the law of partition in which a cotenant who has made permanent and valuable improvements on the property is entitled to recover the amount by which the improvements enhanced the sale value of the property. *See, Hunter* v. *Schultz*, 240 C.A. 2d 24, 31, 49 Cal. Rptr. 315 (1966); *Buttram* v. *Finley*, 73 Cal. App. 2d 536, 166 P.2d 654, 658 (1946); *Carson* v. *Broady*, 56 Neb. 648, 77 N.W. 80 (1898).

[10]*See, United States* v. *Carter*, 217 U.S. 286 (1910; *Sanborn* v. *United States*, 135 U.S. 271, 281 (1890)). In *United States* v. *R.J. Reynolds Tobacco Co.*, 416 F. Supp. 316, 325 n. 3 (D.N.J. 1976), the United States sought a declaratory judgment as to the legal relations of parties to a merger. The court emphasized that the United States stands before a court on an equal basis with private parties and is bound by the same general rules.

[11]*See, People* v. *Flores*, 17 Cal. Rptr. 382 (1961); *County of Champaign* v. *Hanks*, 41 Ill. App. 3d 679, 353 N.E. 2d 405 (1976).

[12]*Sanborn v. United States*, 135 U.S. 271, 281 (1890); *In re Griven's Estate*, 166 Kan. 630, 203 P.2d 207, 209-10 (1949).

[13]41 U.S.C. §§ 51-54. *United States* v. *Drumm*, 329 F. (2d) 109, 113 (lst Cir. 1964); *Continental Management, Inc.* v. *United States*, 527 F.(2d) 613, 620-21 (Ct. Cl. 1975).

[14]*Webster Co.* v. *R. T. Nance*, 362 S.W. 2d 723 (Ky. App. 1962). In *Webster Co.*, the court required a justice of the peace to pay to the county all traffic fees the justice illegally collected. The court reasoned that no officer is entitled to receive for the performance of his duties more than is authorized by the law. *Id.* at 724.

This is a unique situation, and it is difficult to predict whether a court would adopt the equitable arguments set forth above. To determine the rights of a former President in this situation, a court undoubtedly would give great weight to past practices.[15] In your letter you state:

> In past instances where Government services to a former president or vice president were being terminated at a privately owned location (including Mr. Nixon's Key Biscayne estate), all Government property that could be reasonably and economically removed was removed and only these items or improvements having a salvage value of far less than the cost of their removal were left on the property. In these instances it has been the practice of the General Services Administration to enter into a written agreement with the property owner wherein the owner agrees to allow the Government to abandon those items and/or improvements which could not be removed economically in exchange for whatever enhancement his property has gained by the addition of these Government items or improvements.

A court reasonably might examine these prior agreements and conclude that they define the rights of the parties here. In that case, the United States would not be entitled to reimbursement.[16]

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

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[15] *See generally, United States* v. *Midwest Oil Co.*, 236 U.S. 459, 474 (1918). In 1974, the Attorney General relied on historical practice to conclude that a President retains ownership of Presidential documents. 43 Op. Att'y. Gen. 1 (Sept. 6, 1974). In *Nixon* v. *Administrator*, 433 U.S. 425, 445 n. 8 (1977), the Court refused to reach this question. As with Government improvements to private property, Congress recently has enacted legislation specifying that the United States shall retain ownership. *See* Presidential Records Act of 1978, Pub. L. No. 95-591, § 2(a), 92 Stat. 2523 (codified in 44 U.S.C. § 2202).

[16] Past practice appears to reflect the proposition that refusal to remove property in such circumstances should be regarded as a constructive abandonment notwithstanding the subjective intent of the party refusing to remove. Such an argument is not without force. Acts indicating a desire neither to use nor to retake possession of property are inconsistent with an intent to retain ownership. *See, e.g., Ellis* v. *Brown*, 177 F. (2d) 677, 679 (6th Cir. 1949); *Gilberton Contracting Co.* v. *Hook*, 255 F. Supp. 687, 693-94 (E.D. Pa. 1966).

November 26, 1979

79-83 MEMORANDUM OPINION FOR THE ACTING DIRECTOR, EXECUTIVE OFFICE FOR U.S. ATTORNEYS

U.S. Attorneys—Removal of Court-Appointed U.S. Attorney (28 U.S.C. §§ 541, 546)

This responds to your request concerning whether the power to remove a U.S. Attorney appointed by a district court pursuant to 28 U.S.C. § 546 is vested in the President, the Attorney General, or the appointing court.[1] To our knowledge, the question is one of first impression.

Pursuant to 28 U.S.C. § 541(a), the President appoints U.S. Attorneys by and with the advice and consent of the Senate. Subsection (c) of that section provides that "[e]ach United States Attorney is subject to removal by the President." The question is whether the President's removal power under subsection (c) extends to U.S. Attorneys appointed by the court pursuant to § 546, or whether they can be removed only by the court that appointed them. In our view the first interpretation is the correct one.

Normally, as a rule of construction, the power to appoint carries with it the power to remove. *See, Myers* v. *United States*, 272 U.S. 52, 119 (1926), and the authorities there cited. *Myers*, indeed, stands for the proposition that this rule is of a constitutional nature in the case of executive officers appointed by the President by and with the advice and consent of the Senate. On the other hand, where Congress exercises its authority under Article II, section 2, clause 2, of the Constitution by vesting the power of appointing inferior officers in the President alone, the heads of departments, or the courts, it can also regulate the manner for the removal of those officers appointed by department heads and the courts.[2] *See, United*

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[1]The section reads as follows:

> The district court for a district in which the office of United States Attorney is vacant may appoint a United States Attorney to serve until the vacancy is filled. The order of appointment by the court shall be filed with the clerk of the court.

[2]There is no occasion here to discuss the question whether Congress can limit the power of the President to remove inferior officers where Congress has vested the appointment power in the President alone. *See, Myers* v. *United States*, 272 U.S. at 158-161.

States v. *Perkins*, 116 U.S. 483, 485 (1886); *Myers* v. *United States*, 272 U.S. at 160-163; *Carter* v. *Forrestal*, 175 F.(2d) 364, 366 (D.C. Cir. 1949).

In § 546, Congress has vested in the district courts the power to make interim appointments of U.S. Attorneys who, under *Myers*, are characterized as inferior executive officers. 272 U.S. at 159. Hence the power to remove court-appointed U.S. Attorneys would rest with the appointing court, unless Congress has exercised its authority to regulate their removal.

We believe that Congress has done so in § 541(c), which, as stated above provides that "[e]ach United States Attorney is subject to removal by the President." [Emphasis added.] In *United States* v. *Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963), the defendant contended that because 28 U.S.C. § 506 (the predecessor of § 546) vested the appointive power in the court, it also possessed the power of removal and that this combination provided "a nexus too close to comport with due process." The court rejected this contention, stating (p. 843):

> [T]he contention rests on an unfounded premise. While the normal appointive power carries with it the power of removal * * * the power in this instance is in no wise equivalent * * * President may, at any time, remove the judicially appointed United States Attorney pursuant to 28 U.S.C. § 504 [now § 541]. The language of subsection (b), [e]ach United States Attorney shall be subject to removal by the President * * * clearly authorizes the executive to remove any United States Attorney, regardless of the nature of his appointment. The statutory scheme for the temporary appointment by the judiciary of the United States Attorney comports in all respects with due process of law.

Although the case did not involve an executive attempt to remove an interim U.S. Attorney, it is, as far as we are aware, the only judicial statement directly in point. We believe it to be correct, as we discuss below.

Section 541(c) is part of 28 U.S.C. § 541, the first subsection of which provides for the appointment of U.S. Attorneys by the President by and with the advice and consent of the Senate. Subsection (c), however, should not be read as being limited to the U.S. Attorneys appointed by the President pursuant to subsection (a). To begin with the word "each" would be unnecessary if subsection (c) were confined only to those U.S. Attorneys. Moreover, the subsection would be surplusage because it has been firmly established, since *Parsons* v. *United States*, 167 U.S. 324 (1897), that the President has the power to remove U.S. Attorney appointed by him with the advice and consent of the Senate. Section 541(c), therefore, makes sense only if its application is not limited to Presidentially appointed U.S. Attorneys, whom the President can remove even without statutory authorization, but also is to be read as extending to "each" U.S. Attorney, including the court-appointed ones whom the President could not remove without congressional leave.

There are two considerations that presumably prompted Congress to give the President the power to remove court-appointed prosecutors. First, the duties of the U.S. Attorneys are of an executive nature. Although the legislative history is not illuminating, *see* 37 Cong. Globe 1028 (1863), *passim*, Congress may have felt at the time when the initial predecessor of § 546 was enacted in 1863 that the expeditious filling of the office of a U.S. Attorney in case of a vacancy could be best accomplished by the local court. But it is also true that the President is responsible for the conduct of a U.S. Attorney's Office and therefore must have the power to remove one he believes is an unsuitable incumbent, regardless of who appointed him. Indeed, *Myers* v. *United States* points out (at 119-122) that the power of removal may be even more important to the President than the power of appointment. Indeed, it is the power to remove, and not the power to appoint, which gives rise to the power to control. Second, as suggested in *United States* v. *Solomon*, due process problems could arise if a court through the exercise of its removal power were enabled to control the manner in which a prosecutor performs his official duties. We therefore are of the opinion that the power to remove a court-appointed U.S. Attorney rests with the President.

Your inquiry also asks whether the Attorney General has that power. We answer this questions in the negative in view of our interpretation of § 541(c) as constituting—at least in part—the specific exercise of legislative power under Article II, section 2, clause 2, vesting in the President the power of removing a court-appointed U.S. Attorney.

Whether the President should exercise the power of removal is, of course, a question of policy.[3] We note in this connection that *Carey* v. *United States*, 132 Ct. Cl. 397 (1955), stands for the proposition that the President need not actually sign removal papers, but that he may leave to the Attorney General the implementation of an oral Presidential decision to remove a U.S. Attorney appointed with the advice and consent of the Senate; indeed, that the President may authorize the Attorney General to do what he feels is warranted and then orally approve the action taken by the Attorney General. *Carey* at 401-403.[4] But we do not recommend this course of action in the situation at hand, since the incumbent U.S. Attorney apparently has the backing of the district court. That court might react unfavorably to any action that does not carefully comport with the letter of the statute.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

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[3]We note that in your view this matter has a serious potential effect upon the Attorney General's ability to manage the Department's business.

[4]*See also*, *Newman* v. *United States*, 382 F. (2d) 979, 982 (D.C. Cir. 1967), suggesting that the President can delegate certain of his supervisory and disciplinary powers—including the power of summary dismissal—to deal with misconduct of his subordinates.

December 7, 1979

79-84 MEMORANDUM OPINION FOR THE SPECIAL COUNSEL, MERIT SYSTEMS PROTECTION BOARD

Merit Systems Protection Board—Special Counsel—Employment of Temporary or Intermittent Attorneys and Investigators (31 U.S.C. § 686)

Assistant Attorney General Harmon has asked me to respond to your request for our view whether your desire to employ temporary or intermittent investigators and attorneys to investigate and assist in the processing of your cases is consistent with relevant law and ethical considerations.[1]

It is our understanding that you want to appoint both employees detailed from other Federal agencies and individuals from the private sector. They will serve under your supervision on a part-time basis not to exceed 6 months. These employees will be appointed when you have a backlog of work and will perform the same functions as permanent employees of your Office; in particular, they will screen cases and interview witnesses.

I.

Temporary or intermittent experts and consultants may be regained by agencies when authorized by an appropriation or other statute. 5 U.S.C. § 3109. Although your recent appropriation act authorizes you to employ experts and consultants, Act of Sept. 29, 1979, Pub. L. No. 96-74, 93 Stat. 572, in our view this appropriation may not be used to hire employees to perform the same functions as are performed by regular employees in your Office. Subchapter 1-2 of *The Federal Personnel Manual,* Chapter 304, provides a definition of "consultant" and "expert." A consultant who is excepted from the competitive service is "a

[1]We understand from your staff that you are no longer interested in employing such persons to train your permanent staff or to assist in the development of a computer-based information retrieval system.

person who serves as an advisor to an officer or instrumentality of the Government, as distinguished from an officer or employee who carries out the agency's duties and responsibilities." A consultant position is defined as "a position requiring the performance of purely advisory or consultant services, not including performance of operating functions." The definition of expert is somewhat broader but, in our view, does not provide a basis for the plan you contemplate. *The Federal Personnel Manual* describes an expert as "a person with excellent qualifications and a high degree of attainment in a professional * * * field. His knowledge and mastery of the principles, practices, problems, methods, and techniques of his field of activity, or of a specialized area in a field, are clearly superior to those usually possessed by ordinarily competent persons in that activity." An expert position is one that "for satisfactory performance, requires the services of an expert in the particular field * * * and with duties that cannot be performed satisfactorily by someone not an expert in that field." This, although your appropriation for temporary experts could most likely be used to hire particularly qualified attorneys or investigators to work on unusually difficult matters, we do not understand this to be your current plan, and we do not believe that short-term employees hired to perform work exactly like that of your regular staff can properly be considered experts.

II.

Because we believe that the temporary agency and private-sector employees you want to appoint cannot be considered experts or consultants, the question arises whether there is any other statutory authorization for hiring them.

Employees from Other Federal Agencies

Section 686(a) of title 31, United States Code, authorizes purchase of services by one Federal Government entity from another Federal Government entity. This statute states:

> Any executive department or independent establishment of the Government, or any bureau or office thereof, if funds are available therefore and if it is determined by the head of such executive department, establishment, bureau, or office to be in the interest of the Government so to do, may place orders with any other such department, establishment, bureau, or office for * * * services, of any kind that such requisitioned Federal agency may be in a position to supply or equipped to render, and shall pay promptly by check to such Federal agency as may be requisitioned, * * * all or part of the estimated or actual cost thereof * * * .

We read § 686(a) as allowing you to request the services of attorneys and investigators employed in another Federal Government entity that has authority to conduct activities similar to those the employees will be pursuing for you. Two prerequisites to your use of funds to reimburse the

transferor agency are that the funds were appropriated for the type of work you will have the detailed attorneys and investigators perform,[2] and that you provide an adequate rationale why the work cannot be satisfactorily performed by your own staff or by using the funds to increase your agency's staff. This second requirement would be met if you can make a showing that Government efficiency is best served by bringing into your agency on a temporary basis employees who have gained experience in the kind of work to be performed while working for other agencies rather than hiring new employees and having to train them for a job that will last at most 6 months.

Employees from the Private Sector

You also propose to accept the gratuitous services of attorneys and investigators from the private sector.[3] The acceptance of voluntary services is prohibited by 31 U.S.C. 665(b), which states that:

> No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law * * * .

This has been interpreted by the Attorney General to prohibit a contract for services for which no payment is required, but the prohibition on acceptance of voluntary services was not intended to cover services rendered gratuitously in an official capacity under a regular appointment to a position otherwise permitted by law to be nonsalaried. 30 Op. Att'y. Gen. 51 (1913). *See also* subchapter 1–4.d of *The Federal Personnel Manual,* Chapter 311.

Subchapter 1–4 of Chapter 311 defines gratuitous service as that offered and accepted without pay under an appointment to perform duties the pay for which has not been established by law. If Congress has fixed a minimum salary for a position, an individual cannot waive that salary. *Glavey* v. *United States,* 182 U.S. 595 (1901). *Cf., MacMath* v. *United States,* 248 U.S. 151 (1918). You are in a better position than we to determine as a factual matter whether the attorneys and investigators you hope to hire from the private sector will be filling jobs for which a minimum salary has been fixed by law. Even if there is such a minimum salary set, this element of the definition of gratuitous service could be interpreted to mean that if the Government is to pay anything more than a nominal sum, the minimum salary established by law must be paid, but that "a position for which no minimum salary is set by law" includes all those positions for which no salary or a nominal salary is paid. Section 5102(c)(13) of title 5,

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[2]Funds appropriated for the hiring of attorneys and investigators to perform the tasks you intend to have the detailed employees perform may be used only for the purposes for which they are appropriated, 31 U.S.C. 628, but they are available to pay either employees of your own or those detailed from another agency.

[3]We leave aside for the moment the question of whether you can pay each private sector employee a nominal sum, not to exceed $100, for all services rendered by the participant during the 6 months of the program.

U.S. Code, states that chapter 51 of title 5 providing for the classification of pay and allowances does not apply to employees who serve without pay or at nominal rates of pay.

We conclude, therefore, that you can appoint attorneys and investigators from the private sector and that you can pay a nominal sum such as you propose to those providing the gratuitous service. We do not think, as stated above, that your appropriation for hiring temporary consultants or experts can be used to provide these funds and thus you will have to be able to justify the appointment and expenditure under 5 U.S.C. 1206(j), authorizing you to appoint the legal, administrative and support personnel necessary to perform the functions of your Office, and as an expense necessary thereto under your recent appropriation act.

III.

Finally, we consider whether the plan you propose is consistent with relevant conflict of interest laws. This advice is necessarily general and does not preclude the need for careful consideration of particular factual circumstances.

The employees whose services you obtain from other Federal agencies will continue to be subject to the conflict of interest restrictions for regular Government employees. Your proposed plan raises no unusual questions as to those employees and therefore we see no need to discuss the requirements in detail.

Those appointed from the private sector will be subject to the same requirements as regular Government employees, but they may be made subject to the less stringent conflict of interest requirements for special Government employees if you decide in advance to appoint them to serve less than 130 days in any 365-day period. 18 U.S.C. 202(a) defines "special government employee" as "an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States * * * who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis * * * ." In estimating in advance of appointment the number of days an employee may serve, an agency must in good faith find that the special Government employee will serve no more than 130 days; a part of a day must be counted as a full day, and a Saturday, Sunday, or holiday on which duties are to be performed must be counted equally with a regular work day. *Federal Personnel Manual,* Chapter 735, Appendix C. If an employee does, however, serve for more than the 130 days, he or she will nevertheless continue to be regarded as a special Government employee so long as the original estimate was made in good faith. *Id.* Once an employee is appointed as a special Government employee, the restrictions imposed by the conflict of interest laws apply even on days the employee does not serve the Government. *Id.*

Compensation

Sections 203 and 209 of title 18 limit the compensation employees may receive in addition to their Government salary. The restrictions of § 209 on the receipt of "salary, or any contribution to or supplementation of salary" as compensation for services as an employee of the United States from any source other than the Government of the United States is expressly not applicable to special Government employees. § 209(c). The restrictions found in § 203(a) on receipt of outside compensation when one is serving as an officer or employee of the United States in relation to any matter in which the United States is a party or has a direct and substantial interest before any department, agency, or commission, applies to special Government employees only in relation to a particular matter involving a specific party or parties in which the employee has at any time participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, or which is pending in the department or agency of the Government in which he or she is serving.[4] Furthermore, § 203 applies to matters pending in the department only when a special Government employee has served in the agency for no more than 60 days during the immediately preceding 365 days. § 203(c).

If you do not hire private employees as special Government employees, they will be subject, as are the regular Government employees whose services you might utilize, to the restrictions of § 203. But even if the private employees were special Government employees, if they serve without compensation, they nevertheless will not be subject to § 209. *See* § 209(c).

If the employees from the private sector are regular employees and are paid by the Government, § 209 requires that their private-sector compensation be reviewed to ensure that it does not include payment for Government work and to reflect their more limited participation in the private firm's business. To satisfy § 203, these employees' salaries will have to be reviewed further, if necessary, to ensure that they do not share fees for representational services performed by another as outlined above.[5]

Representation Restrictions

Regular Government employees must refrain from acting as agents or attorneys for anyone before any department, agency, court, court-martial, officer, or any civil, military, or naval commission, in connection with any particular matter in which the United States is a party or has a direct and

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[4]Section 203 applies as well to receipt of compensation by an employee for services rendered by another, such as a law partner.

[5]The restrictions of § 209 do not prohibit continued participation by employees in bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plans maintained by a private employer. *See* § 209(b).

substantial interest. 18 U.S.C. § 205. This section restricts special Government employees in more limited fashion; such an employee may not act as attorney or agent in relation to any particular matter involving a specific party or parties in which that employee has at any time participated in the course of his or her Government service, or, if the employee has served at least 61 days, any matter that is pending in the department in which he or she is serving. A special Government employee is not otherwise barred from acting as an attorney in court proceedings or in proceedings before other agencies.

Section 208 of title 18 requires an officer or employee (including a special Government employee) to disqualify himself or herself from participating in decisions with regard to particular matters where he or she, a spouse, minor child, partner, organization in which the employee is serving as officer, director, trustee, partner, or employee, or any person or organization with whom he or she is negotiating or has any arrangement concerning prospective employment, has a financial interest. A waiver is available under certain conditions, § 208(b), and, as with the applicability of all of the conflict of interest sections discussed in this opinion, a careful examination of the particular facts would have to be made in each individual case.

Post-employment Restrictions

Section 207 of title 18 was amended by the Ethics in Government Act of 1978 to require that regular employees and special Government employees be permanently barred from acting as attorney or agent or otherwise representing any person other than the United States in making any communication, with intent to influence, or in making any informal or formal appearance before any department, agency, commission, or court in relation to any particular matter in which the United States or the District of Columbia is a party or has a direct and substantial interest and in which the employee participated personally and substantially, Pub. L. No. 95-521, Title V, T 501(a), as amended by Pub. L. No. 96-28 (92 Stat. 1864, 93 Stat. 76).[6] The employee will also be prohibited for 2 years from acting as agent or attorney in similar circumstances with regard to matters under his or her official responsibility, but in all likelihood the realm of official responsibility of the employees you would have would be no broader than the matters in which they participated personally and substantially.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

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[6]We assume that the employees you are considering hiring will not be among those designated for more stringent coverage under § 207(d).

December 10, 1979

79-85 MEMORANDUM OPINION FOR THE ACTING COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE

Immigration and Nationality Act (8 U.S.C. § 1182)—Immigration and Naturalization Service—Public Health Service—Homosexuality as Grounds for Exclusion

This responds to your inquiry concerning the legal authority of the Surgeon General to direct the Public Health Service (PHS) medical officers[1] not to certify arriving homosexual aliens as possessing a "mental defect or disease" solely because of their homosexuality.

Under § 212(a)(4) of the Immigration and Nationality Act of 1952, as amended ("the Act"), 8 U.S.C. § 1182(a)(4), Congress requires the exclusion of homosexual aliens from the United States. Enforcement of the Act's exclusionary provision is a joint responsibility of the Immigration and Naturalization Service (INS) and the PHS.[2] The INS performs examinations of all arriving aliens other than mental or physical examinations, 8 U.S.C. § 1225, and it administratively adjudicates the admissibility *vel non* of aliens in doubtful cases, 8 U.S.C. § 1226. Upon referrals from INS officers, the PHS then conducts physical and mental examinations of arriving aliens, and certifies "for the information of [INS officers], any physical or mental defect or disease observed" in aliens so examined. Since 1952, the exclusion of homosexual aliens has been enforced both

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[1]Physical and mental examinations of arriving aliens may be performed by medical officers of the Public Health Service or civil surgeons qualified as specified in 8 U.S.C. § 1224. References in this memorandum to medical officers of the Public Health Service are intended to include both groups of examining physicians.

[2]Except when referring to specific documents, our understanding of the facts and of the agencies' positions is based on an October 18, 1979 meeting between you, members of your staff, the General Counsel of the Department of Health, Education and Welfare, and members of this Office.

unilaterally by the INS, *e.g.*, relying on an alien's admission of homosexuality and jointly, subsequent to a certification by the PHS that particular aliens are afflicted with a "mental defect or disease," *i.e.*, homosexuality. You indicate, however, that in the past several years, the number of referrals to the PHS has increased significantly.

On August 2, 1979, the Surgeon General and Assistant Secretary for Health of the Department of Health, Education and Welfare (HEW), issued a memorandum declaring that "homosexuality *per se* will no longer be considered [by the PHS] a 'mental disease or defect,'" and that "the determination of homosexuality is not made through a medical diagnostic procedure;" he indicated that INS officers would be advised to stop referring aliens to the PHS for mental examinations solely on the ground of suspected homosexuality.

You have questioned the Surgeon General's authority to make these determinations and have inquired concerning the impact of his memorandum on the enforceability of the Act. For reasons stated below, we conclude: Congress clearly intended that homosexuality be included in the statutory phrase "mental defect or disease," and the Surgeon General has no authority to determine that homosexuality is not a "mental defect or disease" for purposes of applying the Act; if the Surgeon General has determined, as a matter of fact, that it is impossible for the PHS medically to diagnose homosexuality, the referral of aliens to the PHS for certification of homosexuality would be unhelpful; and the INS is statutorily required to enforce the exclusion of homosexual aliens, even though the Surgeon General has directed the PHS no longer to assist in this enforcement.

I. Homosexuality as a "Mental Defect or Disease"

The first policy promulgated by the Surgeon General's memorandum is: "[H]omosexuality per se will no longer be considered [by the PHS] a 'mental disease or defect.'" The asserted consequence of this finding is that PHS medical officers will no longer certify that any alien referred to them for physical and mental examination possesses a "mental defect or disease," within the meaning of 8 U.S.C. § 1224, solely on the ground of homosexuality. For the reasons that follow, we conclude that the Surgeon General has no authority to exclude homosexuality from the coverage of the phrase "mental defect or disease" as used in the Act.

Under 8 U.S.C. § 1224, PHS medical officers conduct mental and physical examinations of arriving aliens "under such administrative regulations as the Attorney General may prescribe, and under medical regulations prepared by the Surgeon General of the United States Public Health Service." Under this provision, the Surgeon General is empowered reasonably to regulate the PHS's medical functions. To whatever extent intended by Congress, this authority would appear on its face to include discretion to promulgate policies regarding the description and diagnosis of disease. *See, e.g.*, 42 CFR § 34.2(b), 34.4 (1978).

However, it is elementary that the Surgeon General may not redefine terms in a statute that have rationally been given certain and specific meaning by Congress:

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. [*Manhattan General Equip. Co.* v. *Commissioner of Internal Revenue,* 297 U.S. 129, 134 (1936). *See also, United States* v. *Larionoff,* 431 U.S. 864, 873, and note 12 (1977), and cases cited therein.]

Where Congress has classified homosexuality as a disease and requires on that ground the exclusion of homosexual aliens, the Surgeon General has no authority to disregard or to change the statute administratively.

Neither the INS nor the PHS questions that Congress intended, under 8 U.S.C. § 1182(a)(4), to exclude homosexual aliens from the United States. That section provides:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * * * *
>
> (4) Aliens afflicted with psychopathic personality, sexual deviation, or a mental defect; * * *

Although the "(a)(4) exclusions" do not expressly refer to homosexuals, the legislative history of the 1952 enactment and its 1965 amendment, as well as the interpretation of the 1952 provisions by the Supreme Court in 1967, conclusively establish that Congress intended to include homosexuals within their terms. *Boutilier* v. *INS*, 387 U.S. 118 (1967).[1]

There is no doubt that Congress intended homosexuality to be a "mental defect or disease" as those words are used in the Act. It included homosexuals within medical categories, *i.e.,* "psychopathic personality, sexual deviation, and mental defect." Its determination to exclude homosexual aliens from admission was based on the recommendations concerning medical exclusions made by the Senate Judiciary Committee in 1950:

> The subcommittee believes, however, that the purpose of the provision [of the Immigration Act of 1917] against "persons with constitutional psychopathic inferiority" will be more adequately served by changing that term to "persons afflicted with

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[1]On the relevant history of the original enactment, *see* Letter from Acting Surgeon General J. Masur to Representative Francis E. Walter (May 15, 1951), reprinted at H. Rept. 1365, 82d Cong., 2d sess. 45 (1952), and the discussion in S. Rept. 1137, Pt. 1, 82d Cong., 2d sess. 9 (1952). On the 1965 amendment, in which Congress, in response to the court's holding in *Fleuti* v. *Rosenberg,* 302 F.(2d) 652 (9th Cir. 1962), added the term "sexual deviation" to 8 U.S.C. § 1182(a)(4), *see* H. Rept. 745, 89th Cong., 1st sess. 16 (1965), and S. Rept. 748, 89th Cong., 1st sess. 19 (1965).

> psychopathic personality," and that the classes of mentally [sic] defectives should be enlarged to include homosexuals and other sex perverts. [S. Rept. 1515, 81st Cong., 2d sess. 345 (1950).]

The House Judiciary Committee, describing the original (a)(4) provisions as enacted in 1952, referred to them as "medical grounds for exclusion." H. Rept. 1365, 82d Cong., 2d sess. 45 (1952).

Finally, 8 U.S.C. § 1224, providing that PHS medical officers shall certify "any physical and mental defect or disease" observed in the arriving aliens they examine, also requires that these officers be provided with "suitable facilities for the detention and examination of all arriving aliens who it is suspected may be excludable under paragraphs (1) to (4) or (5) of section 1182(a) [of title 8]." It would not be logical for Congress to have provided facilities suitable for the physical and mental examination of aliens suspected of being excludable under § 1182(a)(4), unless Congress assumed that the persons excludable under that paragraph are afflicted with diagnosable diseases. Congress considered homosexuality a disease. Not a word in the statute or its history suggests congressional intent that the Surgeon General be empowered in the future to eliminate homosexuality as a ground for exclusion by declaring his disagreement with Congress' determination that homosexuality is a "mental defect or disease."[4]

II. Amenability of Homosexuality to Diagnosis

In addition to promulgating a new policy regarding the medical status of homosexuality, the Surgeon General asserts in his memorandum: "the determination of homosexuality is not made through a medical diagnostic

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[4]We reject as a general proposition the suggestion in an October 16, 1979 letter to you from 18 Members of Congress that the INS, or any other agency, "may make policy changes in light of changing facts and societal values without regard to court decision or legislative history." That position is flatly irreconcilable with the duty of the President, and of the executive branch he directs, to "take Care that the Laws be faithfully executed." Constitution of the United States, Art. II, § 3, cl. 4.

This would be a different situation had Congress not given any specific content to its general medical categories or otherwise indicated its intent that the Surgeon General define the Act's provisions in light of changing medical opinion. For example, both the Members' letter and a memorandum by the National Gay Task Force, forwarded on July 11, 1979 by its Co-Executive Directors to former Associate Attorney General Michael J. Egan, note that the INS, under the Immigration Act of 1917, excluded at least one alien for contemplated adultery, *U.S. ex rel. Tourny* v. *Reimer,* 8 F. Supp. 91 (S.D.N.Y. 1934), and deported at least one for criminal "lewdness," *Lane ex rel. Cronin* v. *Tillinghast,* 38 F.(2d) 231 (1st Cir. 1930). Both letters assert that the INS has since changed its policies in these areas, either under the 1917 Act or under the analogous provisions of the 1952 Act. However, the provisions involved—exclusion for intended acts of "immoral purpose" and deportation for crimes of "moral turpitude"—were left wholly undefined by the 1917 Act and by its legislative history. *See* S. Rept. 352, 64th Cong., 1st sess. (1916). (The terms are also not explained in the legislative history of H.R. 6060, 63d Cong., 3d sess. (1916), in which the deportation category first appeared, or in the legislative history of the Act of February 20, 1907, 34 Stat. 898, 899, in which the exclusionary provision originated.) In these cases, INS could reasonably infer Congress' intent that it promulgate definitions and implement policies that reflect contemporary assessments of "immoral purpose" and "moral turpitude." No such intended discretion appears from the history of § 1182(a)(4).

procedure." The meaning of this statement is ambiguous. If it is asserted that the ascertainment of homosexuality is not possible through medical diagnosis on the tautological ground that homosexuality is not a medical or pathological condition, this finding is merely a reassertion of the Surgeon General's first determination that homosexuality is not included in the statutory definition of "mental defect or disease." As stated above, this is a determination that the Surgeon General is not authorized to make. If the Surgeon General, however, has stated a fact of medical practice—namely, that doctors do not have available any procedure helpful in determining homosexuality—that fact, it appears, would not be subject to legislative alteration.[5] If this latter assertion is in fact the Surgeon General's determination, then it obviously would be unhelpful for the INS to refer suspected homosexuals to the PHS for mental examination. The accuracy of this position cannot be determined by this Office.

III. Administrative Consequences

In light of the foregoing, it is necessary to determine the administrative consequences of the Surgeon General's memorandum for the enforcement of the Act. His memorandum states:

> The Immigration and Naturalization officials * * * will be advised * * * that in accord with this change they should no longer refer aliens suspected only of being homosexual to the PHS for certification of a mental disease or defect under 8 USC 1224.

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[5]We are in no position to assess and we express no view on this possibility. We note, however, that Congress was already aware in 1951 of the limited helpfulness of medical diagnosis in ascertaining homosexuality. In a memorandum accompanying the May 15, 1951 letter from Acting Surgeon General J. Masur to Representative Francis E. Walter, the PHS explained:

> *Sexual perverts*—The language of the bill lists sexual perverts or homosexual persons as among those aliens to be excluded from admission to the United States. In some instances considerable difficulty may be encountered in substantiating a diagnosis of homosexuality or sexual perversion. In other instances where the action and behavior of the person is [sic] more obvious, as might be noted in the manner of dress (so-called transvestism or fetishism), the condition may be more easily substantiated. Ordinarily, a history of homosexuality must be obtained from the individual, which he may successfully cover up. Some psychological tests may be helpful in uncovering homosexuality of which the individual, himself, may be unaware. At the present time there are no reliable laboratory tests which would be helpful in making a diagnosis. The detection of persons with more obvious sexual perversion is relatively simple. Considerably more difficulty may be encountered in uncovering the homosexual person. Ordinarily, persons suffering from disturbances in sexuality are included within the classification of "psychopathic personality with pathologic sexuality." This classification will specify such types of pathologic behavior as homosexuality or sexual perversion which includes sexual sadism, fetishism, transvestism, pedophilia, etc. In those instances where the disturbance in sexuality may be difficult to uncover, a more obvious disturbance in personality may be encountered which would warrant a classification of psychopathic personality or mental defect.

Reprinted in, H. Rept. 1365, 82d Cong., 2d sess. 47 (1952). The Surgeon General, in his August 2, 1979 memorandum, does not explain how the facts of diagnostic procedure have changed since 1951.

We also note that, to enforce the (a)(4) exclusions, INS will presumably be required to promulgate some policy defining homosexuality and prescribing the appropriate investigation to be undertaken by INS officers. Such investigations—like medical diagnoses—will likely have to rely primarily, if not entirely, on the representations of the arriving aliens.

To the extent that the Surgeon General's statement purports to authorize PHS medical officers to decline referrals from INS officers, his memorandum is without authority. Section 1224 of title 8 provides that physical and mental examinations of arriving aliens are to be conducted "under such *administrative* regulations as the Attorney General may prescribe, and under *medical* regulations prepared by the Surgeon General of the United States Public Health Service." [Emphasis added.] The question whether INS may properly refer particular categories of aliens to the PHS for examination is an administrative, not a medical question. Viewed as a question of law, the issue must be decided by the Attorney General, whose "determination and ruling" with respect to "all questions of law [relating to immigration and naturalization] shall be controlling." 8 U.S.C. § 1103(a). On the other hand, if the Surgeon General's advice is based on the asserted fact that the PHS has no procedures that would be helpful to the INS in these cases, that advice raises the same issue of medical fact discussed above.

The legal issue posed is whether the INS is legally required to enforce the exclusion of homosexual aliens if PHS would no longer provide examinations and certifications to assist the INS in verifying this ground for exclusion. We think that the INS is required to do so.

The sole indication that Congress intended that all suspected "(a)(4)" aliens be examined by the PHS prior to exclusion arises by implication from the requirement of 8 U.S.C. § 1224:

> [M]edical officers shall be provided with suitable facilities for the detention and examination of all arriving aliens who it is suspected may be excludable under paragraphs (1) to (4) or (5) of section 1182(a) of [title 8].

A requirement of suitable facilities for the examination of all suspected "(a)(4)" aliens arguably implies Congress' intent that all such aliens receive physical and mental examinations.

The structure of the Act, however, as well as its legislative history, and contemporaneous administrative interpretation, support the conclusion that examinations are not required in all cases, and that the requirement of suitable facilities for the examination of all aliens in the specified categories refers only to those aliens who may be referred to the PHS and by the INS. First, it must be noted that the statute does not impose any express obligation on the INS to refer potentially excludable aliens to the PHS for examination. On the contrary, the only express referral obligation imposed on examining immigration officers with respect to aliens "who may not appear * * * to be clearly and beyond a doubt entitled to land," 8 U.S.C. § 1225(b), is that the officers detain such aliens "for further inquiry to be conducted by a special inquiry officer." *Id.* The conclusion that PHS referrals were intended to be subject to the reasonable discretion of immigration officers is buttressed by 8 U.S.C. § 1224, which provides that the PHS shall render its medical certifications "for the information of the immigration officers and the special inquiry officers."

Further, the exclusion provisions do not require a PHS certification as a basis for an (a)(4) exclusion. Examining immigration officers may require evidence seemingly ample to make a reasonable (a)(4) determination: sworn statements by aliens; the production of books, papers, and documents; and the testimony, under subpoena, of additional witnesses. 8 U.S.C. § 1225. Upon a referral by examining INS officers, a special inquiry officer must make a determination concerning the admissibility based on any evidence produced at the inquiry. 8 U.S.C. § 1226(a). The Act provides that a PHS certification that an alien is afflicted with a mental defect as specified in § 1182(a)(4) will be conclusive of that fact at any hearing before a special inquiry officer, 8 U.S.C. § 1226(d), but nowhere implies that the absence of such a certification has any necessary effect whatsoever.

In sum, we conclude that, although referrals to the PHS, in light of the Surgeon General's directive, currently appear to be unhelpful with respect to the determination whether particular aliens are excludable as homosexuals, the INS is required nonetheless to enforce the Act's exclusionary provisions.

The unavailability of the PHS in the enforcement process does pose obvious practical problems. The term "homosexuality" is highly imprecise, and Congress may not have intended the exclusion of every individual who could arguably be included under any definition of homosexuality. It may reasonably be inferred that Congress intended homosexuality to be defined in light of current knowledge and social mores.

Because immigration officers are not expert in analyzing the personalities of arriving aliens, we believe it would serve the interests of rational law enforcement for the INS to promulgate a uniform policy for investigating the suspected homosexuality of arriving aliens. Such a policy might indicate the extent to which examining officers are to rely on the representations of the aliens themselves and the particular questions, if any, that officers may ask concerning specific conduct.

Finally, in view of the Surgeon General's memorandum and the consequent law enforcement problems posed for the INS, we recommend that the memorandum, its consequences for the INS, and any resulting enforcement policy be brought to the attention of Congress.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

December 14, 1979

79-86 MEMORANDUM OPINION FOR THE GENERAL COUNSEL, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE

Fishery Conservation and Management Act (16 U.S.C. § 1801 *et seq.*)—Boundaries between Adjoining Regional Fishery Management Councils

This responds to your request for our opinion whether the Secretary of Commerce is required by the Fishery Conservation and Management Act of 1976 (Act), 90 Stat. 331, 16 U.S.C.A. § 1801 *et seq.* (1979 Supp.) to establish boundaries between adjoining regional fishery management councils on a geographical basis rather than on the basis of considerations other than geography.[1]

There are eight regional fishery councils, each covering certain designated States and having jurisdiction over fisheries in areas seaward of those States. The question of boundaries is most controversial—and has arisen in this case—in the context of those adjoining fishery councils that include the same State, in this instance Florida. In such a situation, one cannot begin with an established State boundary and derive a "seaward" line from it. Theoretically, the Secretary could establish a boundary between two adjoining councils at any point along the Florida coastline, even though it does not rest only on a geographical standard, as long as it does conform to a rational division between fisheries in areas seaward of the shore. The question you have asked is essentially whether such discretion has been delegated, or whether it is barred, by the Act.

For the reasons discussed below, we conclude that discretion is barred. The Act contemplates that boundaries between adjoining regional fishery management councils are to be established solely on the basis of geographical factors.

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[1]The second question raised by you concerning the litigation authority of regional fishery councils will be addressed in a separate, forthcoming memorandum.

All references in this memorandum to title 16 of the United States Code Annotated are to the 1979 Supplement.

I. Background

The issue presented derives from a long-standing controversy between the South Atlantic Fishery Management Council (SAFMC) and the Gulf of Mexico Fishery Management Council (GMFMC). The SAFMC consists of the States of North Carolina, South Carolina, Georgia, and Florida, and it "shall have authority over the fisheries in the Atlantic Ocean seaward of such States." § 302(a)(3) of the Act, 16 U.S.C.A. § 1852(a)(3). The GMFMC consists of the States of Texas, Louisiana, Mississippi, Alabama, and Florida, and it "shall have authority over the fisheries in the Gulf of Mexico seaward of such States." § 302(a)(5) of the Act, 16 U.S.C.A. § 1852(a)(5).

In 1977, the National Oceanic and Atmospheric Administration (NOAA) published interim regulations, *see* 42 F.R. 36980, proposing that the boundary between the two Councils be located at the point of intersection of Dade County and Monroe County in Florida, and seaward of that point. That boundary was not based on geographical factors.[2] It is located, we are told, some 200 miles north of the southernmost part of the Florida Keys. Accordingly, it would give the GMFMC jurisdiction over the water areas seaward of the Florida Keys, and would confine the jurisdiction of the SAFMC to an area north of a line running seaward of the Dade County-Monroe County border. The SAFMC has objected to this boundary on the ground that it gives the GMFMC jurisdiction over part of the Atlantic Ocean.

For an extended period of time, negotiations were carried on between the councils, and between them and the regional and national authorities of NOAA. Memoranda of law were submitted by both sides to NOAA. In a decision published on April 20, 1979, NOAA reaffirmed the earlier boundary ruling. *See* 44 F.R. 23528–29.

The legal reasoning underlying NOAA's determination rests significantly on § 304(f)(2) of the Act, 16 U.S.C.A. § 1854(f)(2). It identifies as one of the Secretary's miscellaneous duties that he "shall establish the boundaries between the geographical areas of authority of adjacent Councils." Although NOAA notes that this grant of authority was added to the original bill without explanation, it maintains that, on its face, the statute delegates to the Secretary a broad discretion to establish boundaries between adjacent councils. Moreover, it urges that if § 302(a) of the Act (which stipulates that the SAFMC and the GMFMC shall have authority over fisheries in the Atlantic Ocean and the Gulf of Mexico, respectively) is read to limit the Secretary's discretion to the identification of a geographical line between the Atlantic and the Gulf, then, in effect,

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[2] In the interim regulations, 50 CFR § 601.12(c)(2) (1978), the explanation is as follows: The boundary between the South Atlantic and Gulf of Mexico Councils continues the agreed county boundary between Dade and Monroe Counties to minimize potential difficulties for fishermen, the affected councils, and outward bordering countries.

§ 302(a) would contradict § 304(f)(2)'s grant of broad discretion to the Secretary. To avoid such inconsistency, NOAA argues, it is necessary to read § 302(a) in an expansive manner[3] so as to permit the establishment of boundaries on the basis of several factors including, but not confined to, geographical considerations.

Apart from statutory language, NOAA believes that a broad reading is necessitated by the underlying purpose of § 304(f)(2) to promote the conservation and management of fisheries. Because fish do not respect geographical boundaries established by cartographers and geographers, NOAA reasons, it would not be consistent with the statute's aim to insist that boundaries between adjoining councils must have only a geographical foundation.[4] Furthermore, NOAA argues that a strictly geographical reading of the statutory provision dealing with the council's boundaries is inconsistent with the intent of Congress indicated in passages in the legislative history dealing with the membership of certain western States on regional councils. In particular, NOAA relies on indications in the legislative history that certain States were included on more than one council because, apart from purely geographical considerations, their residents have interests in the management of the area's fisheries.

II. Discussion

We start our analysis with the statutory language. The Act announces that the SAFMC "shall have authority over the fisheries in the Atlantic Ocean seaward" of its constituent States, including Florida, and that the GMFMC "shall have authority over the fisheries in the Gulf of Mexico seaward" of its constituent States, also including Florida. §§ 302(a)(3), (5), 16 U.S.C.A. § 1852(a)(3), (5).

These provisions distinguish the areas of jurisdiction of the SAFMC and GMFMC with reference to two different water areas—the Atlantic Ocean and the Gulf of Mexico. This is clarified by comparing the SAFMC's jurisdiction, which has authority over "the fisheries in the Atlantic Ocean seaward" of its States, with that of the Mid-Atlantic Fishery Management Council, which has authority over "the fisheries in the Atlantic Ocean seaward of such States." The characteristic distinguishing the jurisdictions of the SAFMC and the Mid-Atlantic Fishery Management Council is the fact that their members are representatives of different States; both have jurisdiction over different parts of the same ocean. In contrast, the distinguishing characteristic between the jurisdiction of the SAFMC and that of

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[3]In a supporting memorandum of law, NOAA describes its broad reading of § 302(a) as a "functional" approach, as opposed to what it calls the SAFMC's "literal" interpretation.

[4]This argument is said to be strengthened by the Act's definition of a fishery; it speaks of stocks of fish identified "on the basis of geographical, scientific, technical, recreational, and economic characteristics * * * ." 16 U.S.C.A. § 1802(7)(A). Because the definition is not confined to geographical factors, it is said to buttress the view that the Act's drafters were not attempting to limit the Secretary's discretion in establishing boundaries between adjoining councils to the consideration of geographical matters.

the GMFMC is that the former has authority over fisheries in the Atlantic Ocean, as distinct from the Gulf of Mexico. This suggests that Congress intended that the boundary identification between the latter two councils should ultimately rest on this geographical criterion.

That interpretation is strengthened by § 302(a)'s last sentence. It provides that "[e]ach Council shall reflect the expertise and interest of the several constituent States *in the ocean area* over which such Council is granted authority." [Emphasis added.] This pronouncement reaffirms the straightforward reading of the statute to the effect that Congress intended the councils' jurisdictions to be defined geographically in terms of ocean areas, not in terms of nongeographical factors. We next will discuss whether this reading is consistent with (1) other provisions of the Act, (2) its underlying purposes, and (3) its legislative history.

A. Consistency with Other Provisions of the Act

We find no inconsistency between, on the one hand, saying that § 302(a) limits the Secretary's authority in establishing boundaries by positing certain geographical criteria as guideposts and, on the other hand, saying that § 304(f)(2) grants the Secretary authority to establish the boundaries. One provision simply limits the authority granted by the other provision. Pursuant to § 304(f)(2), the Secretary would still have a significant function to perform, namely, identifying with precision the boundaries between adjoining councils.

This interpretation is borne out by § 304(f)(2), which does not purport to grant the Secretary unlimited discretion in establishing boundaries, but rather provides that the Secretary "* * * shall establish the boundaries between *the geographical areas of authority* of adjacent Councils." [Emphasis added.] The use of the modifier "geographical" reaffirms the view that geographical considerations define the council's areas of authority.[5]

Moreover, the contrary view appears to be inconsistent with other provisions of the Act. As we have noted, the major feature distinguishing the areas of authority of two councils such as, for example, the Mid-Atlantic and the South Atlantic Councils, is geographical—namely, the boundary between different States on each council. Absent an affirmative basis for doing so, which does not appear in the statute, it would be anomalous to distinguish the areas of authority of some councils, but not of others, on geographical grounds.

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[5]It may be suggested that the use of the word "geographical" in the phrase "geographical areas of authority" does not mean that the areas of authority are to be based on geographical considerations but rather, once established, that they have a geographical dimension. No other dimension is identified in the cited statutory language. In conjunction with the language of § 302(a) and the legislative history, this indicates that Congress intended to ground the councils' areas of authority on geographical factors alone.

B. Consistency with the Act's Purposes

The vindication of the Act's aim—the conservation and management of fishery resources off the coasts of the United States, *see* 16 U.S.C. §§ 1801(b)(1)-(6)—would not be undermined by a decision that the Secretary is bound to establish boundaries between adjoining councils on a geographical basis. We believe that the statute provides sufficient flexibility for particularized treatment of fisheries that overlap the boundaries of adjoining councils.

When a fishery extends on both sides of a boundary, the Secretary is empowered to direct either one of the adjoining councils to prepare the management plan for the fishery. Alternatively, the councils could be directed to prepare jointly a plan to be approved by a majority of each council. *See* § 304(f)(1), 16 U.S.C.A. § 1854(f)(1). The fact that a geographically defined boundary divides two adjoining councils would not prevent effective management of a fishery the location of which does not conform to the boundary.[6]

C. Consistency with the Legislative History

The scant legislative history on the issue confirms the interpretation we have sketched. The forerunner of the crucial language of what became § 302(a) first appeared in the bill reported by the Senate Committee on Commerce,[7] which stated in its report that national standards for fishery management and conservation:

> * * * are to be applied by * * * newly-created Regional Fishery Management Councils (*one for each major ocean area*) in the development of management plans for each fishery determined to be in need of management and conservation * * * .[8] [Emphasis added.]

The language in italics reaffirms that regional councils are to be distinguished geographically on the basis of different ocean areas, not on the basis of nongeographical factors.

Nor is this view weakened by passages in the legislative history indicating that certain western States should be represented on more than one council because, apart from solely geographical factors, their residents have an

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[6]We do not consider the Act's definition of a "fishery" to support the view that boundaries between adjoining councils should be defined in terms of all the factors that define a fishery. A fishery and an area of authority of fishery councils are analytically distinct. The former may be quite broadly defined while the latter may be more precisely defined. The key statutory provisions of concern here relate to the councils' areas of authority, not the definition of a fishery.

[7]S. Rept. 416, 94th Cong., 1st sess. 52 (1975).

[8]*Id.* at 3.

interest in the management of the area's fisheries.[9] Such passages show only that Congress relied on more than strictly geographical justifications for including representatives of a single State on more than one council. Once a council's membership is settled, the boundaries between adjoining councils are to be based on geographical grounds. Council membership and its boundary are simply two different subjects.

We are constrained to conclude that the Act requires boundaries between adjoining regional fishery management councils to be based on geographical factors alone.[10]

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

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[9]For example, the report of the House Committee on Merchant Marine and Fisheries noted that California and Oregon were to be represented on both the Pacific and Alaska Councils (as they were called in the House bill) "because of the migratory habits and movements of anadromous species, many of which spawn in their waters and migrate to areas off the coast of Alaska, and because of the participation of their fishermen in this fishery off the coasts of Alaska * * *." H. Rept. 445, 94th Cong., 1st sess. 62 (1975). Similarly, the Senate Commerce Committee report called for the inclusion of Washington on both the Pacific and North Pacific Councils (as the Senate bill termed them):

> The Pacific Council would be concerned with the fisheries in the Pacific Ocean, seaward of California, Oregon, and Washington * * *. The North Pacific Fishery Council would be concerned with the fisheries in the northern Pacific Ocean off the State of Alaska. For the most part, fishermen in this area reside in Alaska, however, a fairly large number of residents from the State of Washington also fish in this area. [S. Rept. 416, 94th Cong., 1st sess. 32 (1975).]

[10]We do not address the question where, in particular, the geographical line between the Atlantic Ocean and the Gulf of Mexico should be located in the absence of the views of your agency.

December 21, 1979

79-87 MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

Federal Aviation Act—Foreign Air Transportation—Scope of Presidential Authority on Review of Civil Aeronautic Board's Approval of Airline Mergers (49 U.S.C. § 1461)

This is in response to a request for an opinion on the President's authority under § 801 of the Federal Aviation Act, as amended by the Airline Deregulation Act, 49 U.S.C. § 1461, to review the order of the Civil Aeronautics Board (the Board) in the *Pan American-Acquisition of Control of, and Merger with, National Case* (Docket 33283). The Board approved a merger between Pan American World Airways ("Pan Am") and National Airlines ("National"), as well as the transfer to Pan Am of National's certificates, including National's certificates to engage in foreign air transportation. The only foreign route excepted from the approval was National's Miami-to-London route. You have asked us what the President's legal options are in reviewing the Board's order and more specifically whether the President has the authority to award the Miami-to-London route to Pan Am.

Several conclusions emerge from our consideration of this matter. First, the President does not have the authority under the statute to order the Board affirmatively to award the Miami-to-London route to Pan Am. Second, because the Board's deletion of the Miami-to-London route appears to be inextricably related to its approval of the merger and of the transfer of National's certificates, the President cannot reinstate the route by disapproving only the deletion of the route. Moreover, even if the President could reinstate the Miami-to-London route in the certificates transferred to Pan Am by disapproving the deletion, it is possible that the Board may have the authority thereafter to reconsider its order and deny Pan Am's merger application as well as the transfer of National's certificates to Pan Am. Third, we have also concluded that the Department of State has articulated a foreign relations concern on which the President

may rely to justify a disapproval of the deletion of the Miami-to-London route under § 801, should he decide to rely upon it. We have pointed out, however, that the President can satisfy the Department of State's articulated foreign relations concern if he takes no action on the Board's merger order and reviews instead the Board's forthcoming selection of a carrier to service that route in the *Miami-London Case,* which is now pending before the Board.

I.

Under § 801 of the Federal Aviation Act, as amended by the Airline Deregulation Act of 1978, 49 U.S.C. § 1461,[1] the Board's issuance, denial, transfer, amendment, cancellation, suspension, or revocation of a certificate to engage in foreign air transportation and the terms, conditions and limitations contained in such certificates must be presented to the President for review. The President has the right to disapprove any such Board action "solely upon the basis of foreign relations or national defense considerations which are within the President's jurisdiction, but not upon the basis of economic or carrier selection considerations," 49 U.S.C. § 1461(a).[2] The President's disapproval renders the Board's action null and void.

At the outset, it is necessary to identify the Board's actions in this case which are subject to Presidential review under § 801. In its order, the Board approved[3] the application of Pan American World Airways, Inc., for acquisition of control of and merger with National Airlines, Inc., and the transfer to Pan American of the certificate of public convenience and necessity issued to National for its international routes with the exception

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[1]The provision of § 801, as codified, reads as follows:

> (a) The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in any certificate authorizing an air carrier to engage in foreign air transportation, or any permit issuable to any foreign air carrier under 1372 of this title, shall be presented to the President for review. The President shall have the right to disapprove any such Board action concerning such certificates or permits solely upon the basis of foreign relations or national defense considerations which are within the President's jurisdiction, but not upon the basis of economic or carrier selection considerations. Any such disapproval shall be issued in a public document, setting forth the reasons for the disapproval to the extent national security permits, within sixty days after submission of the Board's action to the President. Any such Board action so disapproved shall be null and void. Any such Board action not disapproved within the foregoing time limits shall take effect as action of the Board, not the President, and as such shall be subject to judicial review as provided in section 1486 of this title.

[2]The question whether the President has grounds to disapprove the Board's order is discussed in the next section of this opinion.

[3]The Board approved the merger and transfer subject to the conditions that Pan Am accept certain labor-protective conditions and agree to operate the Miami-to-London route until another carrier is selected by the Board. On October 1, 1979, the Board instituted proceedings to hear applications for the Miami-to-London route. *Miami-London Case* (Docket 36764).

of National's Miami-to-London authority. Because National's certificates authorize it to engage in foreign air transportation, the transfer of those certificates is clearly subject to Presidential review. Under the case law, the merger approval, because it is inextricably linked to the transfer of certificates, has also been viewed as subject to Presidential review under § 801(a). *Trans World Airlines* v. *Civil Aeronautics Board,* 184 F. (2d) 66, 71 (2d Cir. 1950). It could also be reasonably argued that the deletion of the Miami-to-London route from the certificate for Route 168 may be viewed as an "amendment" to the transferred certificate and, as such, also subject to Presidential review as a separate Board action.[4] However, the Board's deletion of the route appears to be inextricably related to its approval of the merger and of the transfer of the certificates.[5] For that reason, we believe that the Board's actions should be viewed as a single Board action under § 801, which the President may either disapprove or approve by expressing no disapproval.

If the President were to adopt the view that the Board's actions are reviewable separately under § 801, it is unlikely that the President could effectively reinstate the deleted route by disapproving the "amendment" and expressing no disapproval of the transfer and the merger. From the order, it is apparent that the Board regarded its approval of the merger and transfer as conditioned on the deletion of the Miami-to-London route.[6] The Board may argue that without the fulfillment of that conditon there is no Board approval of the transfer and merger and therefore no reviewable Board actions concerning the transfer and merger.

Alternatively, the Board could maintain that under § 801(a) the transfer and merger not disapproved by the President are not actions of the President but rather Board actions and as such may be reconsidered by the Board either *sua sponte*[7] or upon petition for reconsideration by a party to

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[4]The Board states in its opinion that it is deleting the Miami-to-London route. As a footnote to that statement, it mentions that the certificate for Route 168 had been amended several times before. Majority Opinion at 52, n. 135.

[5]The Board also apparently viewed its deletion of the Miami-to-London route from National's certificates and its approval of the merger and of the transfer of National's certificates as inextricably related. In its order in the *Miami-London Case* (Docket 36764), the Board states:

> Absent the condition that Miami-London authority not be transferred, we would not approve the Pan American-National merger. [Order at 1.]

Our conclusion that the Board's order constitutes a single inseverable Board action for the purpose of Presidential review under § 801 is based on the interrelationship among the merger, transfer, and amendment decisions and not on the basis that all three decisions were included in one order. We do not foreclose the possibility that there may be instances in which the Board may include in one order actions that could be considered severable and thus separately subject to Presidential disapproval.

[6]The Board mentions twice in its opinion that its approval of the transfer is conditioned on the deletion of the Miami-to-London route. Majority Opinion 7, 64. *See also* its order in the *Miami-London Case* at 1. (Docket 36764.)

[7]Except as otherwise provided in this chapter the Secretary of Transportation or the Board is empowered to suspect or modify their orders upon such notice and in such manner as they shall deem proper. [49 U.S.C. § 1485(d).]

the proceeding.[8] As support for such an argument, the Board could point to § 801(a)'s provision that "[a]ny such Board action not disapproved within the foregoing time limits shall take effect as action of the Board, not the President, and as such shall be subject to judicial review as provided in section 1006 of this Act." If § 801(a) was intended to treat Board actions not disapproved by the President as actions of the Board for all purposes, an argument that the transfer and merger actions may be reconsidered would have some merit. From the face of the statute,[9] however, it is apparent that the purpose of treating actions not disapproved by the President as Board actions was to overcome the reluctance of the courts to review Presidential decisions under the former § 801(a).[10] Thus, it could be argued that Board actions reviewed and not disapproved by the President are treated as Board actions under § 801(a) only for the purpose of ensuring judicial review and that § 801(a) does not permit the Board under the guise of reconsideration to review Presidential decisions.[11] Given these uncertainties and the Board's threat to disapprove the merger if the President attempts to reinstate the Miami-to-London route, we doubt that, even if the Board's actions were viewed separately, the President would succeed in reinstating the Miami-to-London route.

Nor do we believe that the President could reinstate the route by ordering the Board to do so. The argument suggesting this course of action relies upon case law construing § 801(a) prior to its amendment by the Airline Deregulation Act. For this reason, the argument has no merit. Section 801(a) prior to amendment[12] required that the transfer of certificates

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[8]Any party to a proceeding, unless an order or rule of the Board specifically provides otherwise, may file a petition for reconsideration, rehearing or reargument of (1) final orders issued by the Board. [14 CFR § 302.37.]

[9]The legislative history of the Airline Deregulation Act does not discuss the purpose of treating action not disapproved by the President as Board action.

[10]*Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948) (absent clear congressional intention, judicial review should be unavailable).

[11]If the Board were permitted to reconsider the decision to transfer and it disapproved the transfer, its disapproval would have to be submitted to the President under § 801(a) for review. *Trans World Airlines* v. *Civil Aeronautics Board*, 184 F. (2d) 666, 70-71 (2d Cir. 1950). The President could then disapprove the Board's disapproval, and the Board's disapproval would under § 801(a) become null and void. It is not clear what would be the status at that point of Pan Am's application for merger and transfer, but, since the Board's action would be a nullity, Pan Am's application would probably be considered as pending before the Board and the whole process would begin again.

[12]Section 801(a), prior to amendment by the Airline Deregulation Act, provided:

> The issuance, denial, transfer, amendment, cancellation, suspension, revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 1372 of this title, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before application thereof. (72 Stat. 782 (1958).)

to engage in foreign air transportation be subject to the approval of the President. In *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948), the Supreme Court interpreted this power of review very broadly:

> *Nor is the President's control of the ultimate decision a mere right of veto.* It is not alone issuance of such authorizations that are subject to his approval, but denial, transfer, amendment, cancellation, or suspension as well. And likewise subject to his approval are the terms, conditions and limitations of the order. 49 U.S.C. § 601. *Thus, Presidential control is not limited to a negative but is a positive detailed control over the Board's decisions unparalleled in the history of American administrative bodies.* [*Id.* at 109. (Emphasis added.)]

Relying on this interpretation of former § 801, Presidents have ordered the Board to rewrite its orders to select carriers and otherwise to revise its orders to make them acceptable to the President.[13]

Section 801(a), as amended by the Airline Deregulation Act, still requires that the issuance, denial, transfer, amendment, cancellation or suspension be presented to the President for his review. That review, however, has now been circumscribed. The statute makes clear that the President is limited to disapproving Board actions and, therefore, unlike the former § 801(a), he is given a "mere right of veto." *Id.* at 109. This limitation does not preclude the President from exercising his veto in such a way that he indirectly retains some control over the Board's decision. For instance, the President may disapprove the Board's entire action in this case and make it clear that he will continue to disapprove a merger between Pan Am and National unless the Miami-to-London route is transferred to Pan Am. *Cf., Trans Alaska Pipeline Rate Cases,* 436 U.S. 631, 652-54 (1978).[14] Of course, the Board then has the option of disapproving the merger and transfer entirely, but it should be remembered that the Board's disapproval is subject to Presidential review, and may be disapproved. To break the stalemate, the Board may choose to submit an order acceptable to the President, rather than submit another disapproval of the merger to the President for his review.

II.

As mentioned above, the President may disapprove a Board action under § 801(a) "solely upon the basis of foreign relations or national defense considerations which are within the President's jurisdiction, but not upon the basis of economic or carrier selection grounds." 49 U.S.C.

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[13] *See, e.g.*, President Carter's action in the *Transatlantic Route Proceeding* (Docket 25908).

[14] In *Trans Alaska,* the Supreme Court held that the Interstate Commerce Commission, although it had no express power to prescribe interim rates, could, in suspending a rate, indicate the maximum interim tariff which it would not suspend.

§ 1461(a). If read narrowly, § 801(a) would permit the President to disapprove on foreign relations or national defense grounds only when those grounds did not include economic or carrier selection considerations. Under this interpretation, the President would be precluded from disapproving the Board's selection of a particular carrier even if such selection would have a significant adverse effect on foreign relations. We believe that such an interpretation is not consistent with the purpose of the statute. In explaining the purpose of the amendments to § 801, the House Report states:

> Section 801 of the Federal Aviation Act does not impose any specific standards for the President to follow in reviewing decisions of the CAB on international air routes. *From time to time questions have arisen as to whether this section permits the President to substitute his judgment for that of the CAB as to which routes will best serve the interests of the traveling public. The committee believes that this type of judgment should be made by the CAB which is an arm of Congress and that the President should only disapprove CAB decisions when the decision would create difficulties in our foreign relations or national security.* Accordingly, H.R. 12611 provides that the President may disapprove CAB international route decisions only on the basis of foreign relations or national defense considerations and that the President may not disapprove CAB decisions on economic grounds or carrier selection grounds. [H. Rept. 95-1211, 95th Cong., 2d sess. at 19 (1978). (Emphasis added.)]

From the foregoing passage, it is apparent that Congress limited the grounds upon which the President could disapprove Board actions in order to preclude the President from second-guessing the Board's decision as to what action would best serve the interests of the traveling public. The legislative history reveals no intention to confine the scope of the President's authority to disapprove Board action on foreign relation or national security grounds to situations in which these considerations did not encompass economic or carrier selection issues. To infer such an intention would run counter to the established principle that when the President acts under a legislative grant in the area of foreign relations or national security, his powers should be construed broadly. *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 318-22 (1936). It is apparent that a requirement that the President's power to act arise only where his foreign affairs concerns have no economic or carrier selection aspects would significantly restrict the President's prerogative to act. Those knowledgeable about the issues that ordinarily arise in the review of these types of CAB decisions would agree that most sensitive international air transportation decisions have aspects both of foreign relations and economic or carrier selection considerations. In the absence of a clear expression from Congress that it intended to restrict the President in this way, we see no basis for so limiting his authority.

The Department of State, although noting it had no objection to the Board's order, has indicated in its letter to the Office of Management and Budget that withholding the Miami-to-London route from Pan Am may create difficulties with Great Britian. According to the Department of State, Great Britain has indicated that it will not permit any American carriers not presently serving Heathrow Airport to start service at Heathrow and that such carriers must fly into Gatwick Airport. The Department of State believes that because Pan Am presently serves Heathrow, Great Britain would permit Pan Am to fly from Miami into Heathrow Airport. If a replacement carrier is selected, the British may deny such carrier the facilities at Heathrow and insist that it fly into Gatwick instead. A dispute may then arise between the United States and Great Britain as to the rights of American carriers under Bermuda II. The Department of State believes that "the issue could become extremely abrasive, with possible adverse consequences for our efforts to gain broad liberalization of the present U.S.-UK Civil Aviation agreement." Letter dated November 19, 1979, from Julian L. Katz, Assistant Secretary for Economic and Business Affairs, Department of State, to James T. McIntyre, Jr., Director, Office of Management and Budget.

The concern that a dispute may arise between Great Britain and the United States if a replacement carrier for the Miami-to-London route cannot fly into Heathrow Airport appears on its face to provide a basis for an assertion by the President that withholding that route from Pan Am will create difficulties in foreign relations. Because of the deference the courts have traditionally accorded to the President when he acts as the Nation's organ of foreign policy, his determination would most likely be accepted on its face by the courts. *United States* v. *Curtiss-Wright Corp.*, 299 U.S. at 319–21; *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. at 111.

Nevertheless, we believe that, in the light of § 801(a)'s requirement that the President state in a public document the reasons for disapproving a Board action, the President should be aware of a weakness we perceive in this foreign relations argument. To our knowledge Pan Am is not the only American carrier that presently serves Heathrow. Even if the British insist that no new carriers may serve Heathrow, a dispute may not arise if the replacement carrier selected by the Board also presently serves Heathrow. Thus, whether a foreign relation problem may arise will be known only after the Board has selected a carrier for that route.[15] If the Board selects a carrier that does not presently serve Heathrow, the President may disapprove that Board action on the ground that he does not want to create a

[15]The Board has commenced proceedings to select a replacement carrier for the Miami-to-London route. *Miami-London Case* (Docket 36764). The Board's order approving the merger between Pan Am and National requires Pan Am to operate the route until a carrier is finally selected.

conflict with the British by demanding that the replacement carrier be permitted to fly into Heathrow. His reasons would give a signal to the Board to select a carrier that presently serves Heathrow and the President's articulated foreign relations concerns could, presumably, ultimately be satisfied.

Conclusion

In our view, the President does not have the power under § 801(a) to reinstate the Miami-to-London route or to order the Board to do so. Because the Board's merger, transfer, and amendment decisions are inextricably related, the President may not disapprove only the amendment. The President does have the power to disapprove the entire Board action and may justify disapproval on the ground that withholding the Miami-to-London route from Pan Am will create difficulties in our relations with Great Britain.[16]

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[16]Your Office asked us also to comment briefly on some other proposed reasons for disapproving the Board's action. The first suggestion is that the Board's concern that Pan Am's operation of the Miami-to-London route would be anticompetitive will be groundless when Bermuda II is liberalized to permit more American carriers to fly into Great Britain. In our opinion, this reason merely criticizes the Board's economic analysis and does not provide a ground for asserting that the deletion of the route will create difficulties in foreign relations or national security. Another suggested ground for disapproval is that the President has a foreign policy of maintaining a strong national carrier and that awarding the Miami-to-London route to Pan Am will accomplish that policy. Again we do not perceive the nexus between maintaining Pan Am as a strong carrier and § 801's standard for disapproval—whether the Board's action will create difficulties in foreign relations or national security. Finally, it has been suggested as a national defense consideration that Pan Am must be maintained as a financially viable carrier so that it is available to airlift American citizens out of troubled areas. We are not sufficiently knowledgeable about the state of the international air travel industry, or about the practical need to preserve Pan Am as a "viable" entity, to comment on this argument.

December 21, 1979

79-88 MEMORANDUM OPINION FOR THE DIRECTOR, UNITED STATES WATER RESOURCES COUNCIL

Department of Transportation Act of 1966 (49 U.S.C. § 1656(a))—Water Resources Council—Calculation of Primary Direct Navigation Benefits of a Water Resources Project (§ 7(a) of the Act)

This responds to your request for our opinion whether the factors set forth in the formula for determining the primary direct navigation benefits of a water resource project, second paragraph of § 7(a) of the Department of Transportation Act of 1966, 49 U.S.C. § 1656(a) (1976), are exclusive. Your question, as we understand it, is whether the Water Resources Council (Council) may provide in its standards and criteria for economic evaluation of water resource projects that factors in addition to those specifically set forth in the formula may be considered in the determination of primary direct navigation benefits. With the caveats that the formula does not address costs or benefits other than primary direct navigation benefits, we believe that its factors are exclusive. Therefore, the Council may not adopt standards and criteria directing such benefits to be calculated in a manner different from that dictated by the formula.

Section 7(a) provides, in relevant part:

> The standards and criteria for economic evaluation of water resource projects shall be developed by the Water Resources Council established by Public Law 89-80. For the purpose of such standards and criteria, the primary direct navigation benefits of a water resource project are defined as the product of the savings to shippers using the waterway and the estimated traffic that would use the waterway; where the savings to shippers shall be construed to mean the difference between (a) the freight rates or charges prevailing at the time of the study for the movement by the alternative means and (b) those which would be charged on the proposed waterway; and where the estimate of traffic that would use the waterway will be based on such freight rates, taking into account projections of the economic growth of the area.

The language concerning primary direct navigation benefits is clear. The benefits "are defined as" and the definition that follows is set out in a formula precise enough to be reduced to a mathematical statement. Thus, "Primary Direct Navigation Benefit = Traffic (Prevailing Nonwater Rates minus Projected Water Rates)."[1] We do not know of any principle of statutory construction permitting the Council to vary so unambiguous a definition by adding to it, unless its legislative history were to show unequivocally a contrary intent on the part of Congress. The legislative history shows the opposite.

The definition of primary direct navigation benefits was added to S. 3010, 89th Cong., 2d sess. (1966) by amendment of the Senate Committee on Government Operations, after its hearings on that bill. As introduced, S. 3010 and the corresponding House bill H.R. 13200, 89th Cong., 2d sess. (1966), would have allowed the Secretary of Transportation, after consultation with the Water Resources Council, to establish the standards and criteria for economic evaluation of the transportation aspects of water resource projects.[2] The proposal, placing such authority in the Secretary rather than the Council, and permitting the executive rather than the Congress to establish the standards and criteria for economic evaluation of navigational benefits, encountered a hostile reception at both the House and Senate hearings from interested witnesses and communicants and also

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[1]The term "estimated traffic" is not precisely defined by the statute. It is an estimate that must take into account both the water rates and the projected economic growth in the area to be served by the water project. In addition, it must apparently also include the projected useful life for the transportation facilities of the project. During the Senate hearings some dissatisfaction was expressed concerning a then-recent decision of the Corps of Engineers to reduce from 100 years to 50 years the life expectancy of transportation-related water resource projects for the purpose of calculating cost-benefit ratios. *Hearings on S. 3010 before the Senate Committee on Government Operations* (Part 4), 89th Cong., 2d sess. 654 (1966) (Statement of Senator Mundt). However, section 7(a) itself does not establish a lifespan for water transportation facilities.

[2]As originally presented, S. 3010, an Administration bill, provided in its § 7(a), *inter alia*, that:

> The standards and criteria for economic evaluation of the transportation features of multipurpose water resource projects shall be developed by the Secretary after consultation with the Water Resources Council, and shall be compatible with the standards and criteria for economic evaluation applicable to nontransportation features of such projects. [Senate Hearings, *supra* (Part 1) at 21.]

The House version, as introduced as H.R. 13200, 89th Cong., 2d sess. (1966), contained identical language. Creating a Department of Transportation: Hearings on H.R. 13200 before the House Committee on Government Operations (Part 1), 89th Cong., 2d sess. 20 (1966). The bill H.R. 15963, as reported out by the House committee, contained no mention of standards and criteria for economic evaluation of multipurpose water resource projects, except to exempt such projects from the jurisdiction of the Secretary of Transportation for such purposes. Among the stated reasons for striking the language, was that "[t]he committee has been informed that the Committee on Public Works of the House of Representatives is now considering whether to hold hearings dealing with the evaluation of benefits in connection with inland waterway projects." H. Rept. 1701, 89th Cong., 2d sess. 18 (1966) (House Report).

from a number of Members of Congress. Hearing on S. 3010 before the Senate Committee on Government Operations, 89th Cong., 2d sess. *passim* (1966) (Senate Hearings); Creating a Department of Transportation: Hearings on H.R. 13200 before the House Committee on Government Operations, 89th Cong., 2d sess. *passim* (1966) (House Hearings). The Senate Committee took cognizance of these objections.

At the Senate hearings a number of witnesses and several Senators pointed out that on November 20, 1964, the Corps of Engineers, at the direction of the Bureau of the Budget, had modified the existing formula for computing primary direct navigation benefits. Previously, the Corps of Engineers determined savings to shippers by comparing the anticipated water rate to the prevailing rates charged on other modes of transportation at the time of the determination. The new method involved comparing the water rate to projected rates which the competing modes of transportation could be expected to adopt to meet the competition from the water project. It was pointed out to the Senate committee, and noted, *e.g.*, 112 CONGRESSIONAL RECORD 24375 (1966) (remarks of Senator McClellan), that no proposed water project had met the test of the new formula since its issuance in 1964. Although the committee was informed, during the pendency of the hearings (*see* Senate Hearings (Part 3) at 474 (remarks of Senator Harris)), that the Bureau of the Budget had reconsidered and reinstated the pre-1964 formula, it decided, in the words of its report, to "establish a definition of primary direct navigation benefits of water resource projects, thus restoring the criteria followed by the Corps of Engineers prior to November 1964, when the Bureau issued new criteria for the evaluation of such projects." S. Rept. 1659, 89th Cong., 2d sess. 13 (1966) (Senate Report). The committee "deemed" such a definition "necessary in order to insure that future projects will be evaluated on the same basis as those which have resulted in the development of this Nation's outstanding system of inland navigation which has served so well in peace and war." Senate Report at 14. The intent of the committee and the Senate is best summed up by a statement made during the floor debate by Senator Jackson, a member of the Senate Committee on Government Operations and a supporter of the committee amendment:

> We have not only negated the 1964 directive of the Bureau of the Budget but *we have, by statute, also written into section 7 what the criteria are, should be, and must be,* in connection with water navigation projects. Much of that, in the past, has been of a policy nature. We have now, by statute, made clear that we insist the policy be that of the executive branch prior to the directive of the Bureau of the Budget of 1964. [112 CONGRESSIONAL RECORD 24380 (emphasis added).]

Nothing else in the legislative history of the definition indicates that the Senate intended it to be interpreted differently. Rather, the hearings, the debate, and the Senate report all confirm that Senator Jackson's interpretation of the Congressional intent underlying the definition is the correct one.

The version of the Transportation Act that passed the House did not contain a definition of primary direct navigation benefits.[3] The conference committee, however, adopted the Senate definition without modification. H. Conf. Rept. 2236, 89th Cong., 2d sess. 27 (1966). Nothing further in the conference report, or in the House debate, indicates that the House interpreted the definition any differently than the Senate.

In sum, the legislative history demonstrates that Congress intended to establish by statute the pre-1964 method for computing primary direct navigation benefits so that the executive could not vary it. Congress believed that the formula set forth in § 7(a) specified this method. Thus, any attempt to vary that formula by adding extraneous factors would violate not only the text of § 7(a), but also its intent—that of freezing the definition of primary direct navigation benefits as it existed (in Congress' interpretation) prior to November 1964.

The definition speaks only to primary direct navigation benefits and it is silent concerning the method for determining other benefits of multipurpose water resource projects and for determining costs. It is clear from the legislative history that Congress realized that primary direct navigation benefits were not the only benefits associated with most water resources projects.[4] Thus, the definition in the second paragraph of § 7(a) does not prevent the Council from considering, in establishing its overall standards and criteria for economic evaluation of water resource projects, other benefits in addition to primary direct navigation benefits.[5]

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[3] *See* n. 2, *supra.*

[4] We have reviewed the legal memorandum prepared by the National Wildlife Federation in 1977 which you made available. We believe that the cited evidence does not support an opposite conclusion but only establishes that Congress recognized other types of benefits.

[5] For examples of recognized benefits of water resource projects that are not classified as primary direct navigation benefits, *see* S. Doc. 97, 87th Cong., 2d sess. 8-10 (1962), a document entitled "Policies, Standards, and Procedures in the Formulation, Evaluation, and Review of Plans for Use and Development of Water and Related Land Resources." This document, prepared by the President's Water Resources Council, was mentioned frequently during both the House and Senate hearings and is alluded to in the House Report.

December 27, 1979

79-89 MEMORANDUM OPINION FOR THE DEPUTY ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION

Naval Petroleum Reserves (10 U.S.C. § 7426)—Settlement of *United States* v. *Standard Oil Co. of California* (9th Cir. No. 78-1565)

This responds to your request for our opinion whether 10 U.S.C. § 7426 precludes a settlement of the above-captioned case, in which Standard Oil Co. of California (Standard) would be guaranteed current receipt of more than its percentage share of oil from Naval Petroleum Reserve No. 1 at Elk Hills, Kern County, California, (the Elk Hills reserve), during the present period of maximum production. We concluded in an earlier memorandum that the statute would bar such a settlement. We now confirm our earlier conclusions.

I. Background

Your inquiry arises in the context of settlement negotiations between the United States and Standard over the terms for including within the Elk Hills reserve certain land adjoining the reserve. That land had been developed independently by Standard before the United States sought, and was granted, an injunction against independent production pending determination of the terms and conditions for including the land within the reserve. The Secretary of the Navy concluded that Standard should receive an amount of oil as compensation for including the land in the reserve, but that this amount should not be received until the expiration of the present period of maximum production of the reserve (authorized for 6 years by Title II of the Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94-258, 90 Stat. 303, 307, 10 U.S.C. § 7422(c)(1)(B)). The U.S. district court, on November 4, 1977, ruled that Navy's determination that the land should be included within the reserve was binding on Standard and that the proposed terms and conditions were fair and equitable. Standard appealed that decision, and oral argument before the U.S. Court of Appeals for the Ninth Circuit was held in September, 1979.

The present issue concerns the legality of settlement terms under consideration that would, *inter alia,* guarantee to Standard receipt currently of an amount of oil that would exceed the share of oil to which it is entitled on the basis of its ownership interest in the reserve. After inclusion in the reserve of the land of concern here, the United States would own some 80 percent of the oil in the producing zone, and Standard would own some 20 percent. The question presented is thus whether § 7426 bars Standard, in circumstances of maximum production, from receiving currently more than 20 percent of the zone's production and, therefore, bars any settlement that would surpass the 20 percent figure.

II. Discussion

The Act of June 17, 1944, 58 Stat. 280, authorized the United States and Standard to enter into a unit plan contract for the development of naval petroleum reserves, including the one at Elk Hills. To protect the interests of the United States, Congress provided that any unit plan contract must require that the United States be assured of receipt currently of its share of the total production. The pertinent provision is as follows:

> *Any contract* entered into pursuant to the authority granted in the preceding paragraph for joint, unit, or other cooperative plan of exploration, prospecting, conservation, development, use, or operation *shall require that the United States be assured of receipt currently of its share of the total production from each of the various commercially productive zones underlying all lands covered by the contract* as determined from time to time on the basis of estimates of its original share of the quantities of recoverable oil, gas, natural gasoline and associated hydrocarbons in such zones underlying such lands on the date fixed in such contract: *Provided, however, That any party to such a contract,* other than the United States *may,* pursuant to the authority hereinabove granted to use and operate the reserves for their protection, conservation, maintenance and testing, *be permitted under the terms of such contract to have produced and to receive and shall have charged to its share in the total production from any zone or zones such quantities of petroleum as are necessary to compensate it—*
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> (a) *for its share of the current expenses* of protecting, conserving, testing and maintaining in good oil-field condition such lands and the wells and improvements thereon, *and its real and personal taxes* levied or assessed thereon; *and*
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> (b) *for surrendering control of the rate of production from its lands*: *Provided,* That if the Secretary of the Navy is not then causing petroleum to be produced pursuant to a joint resolution as referred to in the preceding paragraph, the quantity of petroleum determined to be produced under this subparagraph (b) may, in the absolute discretion of the Secretary, be terminated or reduced at any time on reasonable notice.

> Such quantities permitted to be produced pursuant to the foregoing subparagraphs (a) and (b) shall in no event, however, exceed one-third of its share of the estimated recoverable petroleum on such date fixed in such contract shall be entered into without prior consultation in regard to all its details with the Naval Affairs Committees of the Congress.[1] [Emphasis added.]

The statutory requirement that the United States shall "be assured of receipt currently of its share of the total production from each of the various commercially productive zones underlying all lands covered by the contract" on its face would preclude a settlement in a period of maximum production that would permit Standard to receive currently more than its share of total production in the zone. For if Standard were guaranteed such receipt, then the United States could not be assured of receipt currently of its full share of the total maximum production.

In response, Standard argues that the current receipt principle does not govern absolutely because the statute includes the proviso that any party other than the United States may be permitted to receive oil as necessary to compensate it for its share of current expenses and taxes, and for surrendering control of the rate of production. Standard contends that the proviso carves out two broad exceptions to the current receipt principle. Thus, if, in a hypothetical case, 100 barrels per day are produced from zone X in a period of maximum production, and if 10 barrels would compensate Standard for current expenses and taxes and 10 additional barrels would compensate Standard for surrendering control over the rate of production, then, Standard contends, only 80 barrels must be divided currently between Standard and the United States in accordance with their respective ownership shares.

The first problem with this interpretation is that the current receipt principle is stated in unambiguous language providing that each contract must guarantee "that the United States be assured of receipt currently of its share *of the total production* from each of the various commercially productive zones underlying all lands covered by the contract * * * ." [Emphasis added.] Standard seeks to add a gloss to the statute that in effect would nullify Congress' use of the word "total."

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[1] 58 Stat. 280, 281. This provision was codified in 1956 at 10 U.S.C. § 7426(b), (c) and (d). The legislative history of the 1956 codification makes it plain that no substantive change in the 1944 statute was intended. *See* Report of the House Judiciary Committee on the revision of title 10, U.S. Code, Armed Forces, and title 32, U.S. Code, National Guard, H. Rept. 970, 84th Cong., 2d sess. 19, reprinted at 1956 *U.S. Code Cong. & Admin. News* 4613, 4620 ("[t]he object of the new titles has been to restate existing law, not to make new law. Consistently with the general plan of the United States Code, the pertinent provisions of law have been freely reworded and rearranged, subject to every precaution against disturbing existing rights, privileges, duties, or functions"); *see also* the Senate Judiciary Committee Report, S. Rept. 2484, 84th Cong., 2d sess., reprinted at *id.* 4632, 4640. *See generally, Muniz* v. *Hoffman,* 422 U.S. 454 472-74 (1975); *Tidewater Oil Co.* v. *United States,* 409 U.S. 151, 162 (1972); *Fourco Glass Co.* v. *Transmirra Products Corp.,* 353 U.S. 222, 227 (1957).

Also, in a period of maximum production, to allow Standard to receive currently, in addition to its percentage share amounts of oil, both for costs and taxes and for surrendering control over the rate of production would be most unusual. Ordinarily, it is expected that an oil producer will meet its operating expenses by selling what it owns, and that it will not receive an increment in addition to what it owns in order to pay such expenses. Standard implicitly suggests that Congress did not accept that normal understanding. In view of the statute's plain language, we are necessarily reluctant to reach such a result.

Standard relies primarily on a passage in the report of the House Committee on Naval Affairs, H. Rept. 1529, 78th Cong., 2d sess. 11-12 (1944), which speaks of "two permissible exceptions" to the current receipt principle in the following terms:

> The basic principles sought to be embodied in the foregoing new second paragraph are that any joint, unit, or cooperative contract with respect to reserve No. 1 must provide, first, that the question of drainage be solved by means of the ultimate receipt by the United States of its proper share of the oil underlying the lands covered by the contract on the date fixed in the contract, and, second, that the United States receive currently its proper share of the oil as it is produced from the lands covered by the contract. To this second principle, however, *there are two permissible exceptions:* One is that a private party to the contract may produce, receive, and have charged to its share in the total oil in the field sufficient oil to reimburse it for its share of the field-maintenance expenses and the real and personal property taxes levied against it in respect of its lands and the improvements thereon; the other is that a private party to the contract may have a right to have produced and to receive and have charged to its share in the total oil in the field an agreed amount of oil representing one of the considerations moving to it for its agreement under the contract to surrender to Navy control over the rate of production from its lands.
>
> It is to be particularly noted that *the oil which the contract may call for to be produced and allotted in accordance with the two exceptions is expressly referred to in the new second paragraph as produced under the authority,* contained in the first paragraph and discussed above, *for the use and operation of the reserves for their protection, conservation, maintenance, and testing.* The theory behind this approach is that the contract is entered into for the main purpose of securing protection by the elimination of drainage and the enhancement of conservation by the acquisition of control over the time and rate of production from the private lands. Accordingly, the production provided for under paragraphs (d) and (f) of section 5 of the proposed unit plan contract with Standard does not depend upon any finding

of need for national defense purposes nor any joint resolution of the Congress. Rather, *it is produced under the authority of the protecting power and represents an allowance of a part of Standard's share of the oil to Standard within the terms of the exceptions denominated (a) and (b) in the new second paragraph of the act.* [Emphasis added.]

To understand the foregoing passage, it must be recognized that the statute contemplated two different situations concerning production of the Reserves: "shut-in" periods during which only enough oil to maintain the Reserves would be produced, and "open-up" periods during which fuller production would be required to meet needs of national defense[2] In the former situation, there would be a need to protect the interests of an entity in Standard's position by guaranteeing it sufficient production to meet its current expenses and taxes and compensate it for surrendering control over the rate of production. As noted in the foregoing passage from the House Committee report, oil produced "in accordance with the two exceptions is * * * produced under the authority * * * for the use and operation of the reserves for their protection, conservation, maintenance, and testing"—that is under the authority of a shut-in period. The fact that the current receipt principle has "two permissible exceptions" in such a period does not determine the result in the present case, for the reserve is in a period of "open-up," or maximum, production.

In our view, the "two permissible exceptions" language in the House Committee report merely confirms that, in a shut-in period in which production otherwise would likely be so low as to make it impossible to compensate Standard for current costs and taxes and for surrendering control over the rate of production, Standard is protected by an authorization of

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[2]As stated in the Report of the House Committee on Naval Affairs, H. Rept. 1529, 78th Cong., 2d sess. 6–7 (1944):

> It is to be noted that the clause as so amended contemplates two separate situations when oil may be produced from the reserves. The first is for a protective purpose, the existing power being continued but with the clarifying words 'conservation, maintenance, and testing' added in order to make it clear that this power to produce includes production which will contribute to over-all conservation in the ground and also production for proper field maintenance * * * . It is the intention of the bill that the Secretary in his discretion and without the necessity of further congressional authorization than is provided by this provision of the act itself, may produce oil or cause oil to be produced—
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> for the protection, conservation, maintenance, and testing of the aforesaid reserves * * * .
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> The second situation in which oil may be produced under the amended clause is—
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> whenever and to the extent the Secretary, with the approval of the President, finds required for the national defense * * * .
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> In this case, however, the bill provides that there shall be no production pursuant to such a finding unless and until the Congress shall first have authorized it by joint resolution.

production sufficient for those needs.[3] As Chairman Vinson, the Act's principal draftsman, stated:

> When the war needs cease to exist, then the fields will be shut down, except for the protection of the field and to enable Standard to produce enough to earn its taxes out of the reserve, and to pay for giving up control over all of its lands.[4]

However, a different situation is presented when the reserve is in a period of maximum production. In such a circumstance, the legislative history confirms the conclusion, based on the statute's language, that Congress expected that the United States would receive currently its percentage share of oil from the reserve. Assistant Secretary of the Navy Bard testified to this effect before the Senate Committee on Naval Affairs shortly before the Congress passed the 1944 Act:

> I think I can explain so that you get the whole picture perhaps. The Navy will produce oil for war purposes, it never will produce except for an emergency. It wants to keep its oil in the ground. *When it is producing for war purposes, the scheme is to divide the oil between Navy and Standard in the ratios of their interests in the oil in the ground,* that is, 64 percent and 36 percent. When it is not producing for war purposes, the Navy produces nothing. All production then is to cover the costs of Standard and their taxes plus a certain amount of oil, subject to the discretion of the Secretary, to compensate them for turning over all control of their property to the Navy.[5] [Emphasis added.]

Accordingly, Congress understood that, in an open-up situation, the current receipt principle governs. However, in a shut-in period, Standard could receive more oil than the United States on a current basis for expenses, taxes, and surrendering control over the rate of production; the United States would simply conserve its current share in the ground.[6]

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[3]There are two statutory qualifications on Standard's receipt of oil for costs and taxes and for compensation in a shut-in situation. First, in order to protect the Government's interest of preserving oil in the ground, the Secretary was provided ultimate discretion in such a period to reduce or even to terminate the flow of oil to Standard as compensation for surrendering control over the rate of production. Second, Standard could not receive over time more than one-third of its total recoverable oil in a zone for current costs and taxes and for compensation in order that the bulk of Standard's oil and Navy's oil would be preserved in the ground.

[4]Naval Petroleum Reserves, Hearing before the Committee on Naval Affairs, United States Senate, on S. 1773, 78th Cong., 2d sess. 13 (1944); *see also* S. Rept. 948, 78th Cong., 2d sess. 4 (1944).

[5]Naval Petroleum Reserves, Hearing before the Committee on Naval Affairs, United States Senate, on S. 1773, 78th Cong., 2d sess. 19 (1944).

[6]The United States would still be assured of receiving currently its percentage share should that become necessary.

In sum, on the basis of the statute's plain language and its legislative history, we cannot accept Standard's interpretation. Section 7426 does bar a settlement under which, in a period of maximum production, Standard would be guaranteed receipt of more than its percentage share of oil from Naval Petroleum Reserve No. 1.[7]

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[7]In response to Standard's suggestion that it is unfair to limit it to its percentage share of oil in the present open-up period, we note that such a contention is undermined by the district court's finding in this case that "the terms offered by the Navy were 'fair and equitable.' " Memorandum Opinion of November 4, 1977, 4.

December 28, 1979

79-90 MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

Constitutional Law—Fourth Amendment Exclusionary Rule—Legislative Proposal

This responds to your request that we consider whether Congress may constitutionally limit the scope of the Fourth Amendment exclusionary rule in Federal criminal proceedings. Specifically, you have asked us to consider whether Congress may constitutionally enact legislation limiting the application of the exclusionary rule along the lines of the bill drafted by Senator Kennedy's staff, and establishing alternative remedies similar to those provided in the current draft of the Administration's amendments to the Federal Torts Claim Act (FTCA). This legislation would permit evidence seized in violation of the Fourth Amendment to be admitted in Federal criminal proceedings, if otherwise admissible, if the agent conducting the search or seizure reasonably believed that his conduct was lawful; permit victims of illegal searches and seizures to sue the United States and receive liquidated damages and special damages upon proof of a constitutional violation; deny the United States a good faith defense in such suits; and establish disciplinary procedures whereby either the appropriate Federal agency or the victim of an illegal search or seizure could bring charges against the offending Federal agent.

It is our conclusion, based on relevant Supreme Court decisions, that, absent other equally effective remedies to deter Federal officers from violating the Fourth Amendment, the exclusionary rule is required by the Constitution to protect that Amendment's guarantee against unlawful searches and seizures. Congress may enact alternative remedies, but the ultimate responsibility for evaluating the efficacy of those alternative remedies lies with the courts. We believe that the proposed statute would be held constitutional, even though it purports to limit the scope of the exclusionary rule, because it provides an alternative that the courts are likely to find adequate.

I. History of the Exclusionary Rule

The exclusionary rule has been shaped more by experience than by logic. Imposed by the Supreme Court in *Weeks* v. *United States,* 232 U.S. 383 (1914), the exclusionary rule was initially justified on considerations of fair play and on the judgment that notions of judicial integrity should prevent Federal court involvement in illegal searches and seizures:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions * * * should find no sanction in the judgment of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. [*Id.* at 392.]

Equally important, the exclusionary rule was necessary to protect Fourth Amendment rights:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.[1] [*Id.* at 393.]

The Court several years later read *Weeks* quite broadly, holding that a person could not be compelled to produce books and documents before a grand jury where the materials had been illegally seized by the Government and then returned. *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1920). Justice Holmes, writing for the Court, rejected the arguments that the Government may properly subpoena materials of which it knows only because of an illegal search: "The essence of a provision forbidding the acquisition of evidence in a certain way is that

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[1] *Weeks* relied in large part on *Boyd* v. *United States,* 116 U.S. 616 (1886), where the Court had held that a district court order requiring production of invoices in a forfeiture proceeding under the customs laws violated the defendant's Fourth and Fifth Amendment rights. The Court noted the interrelation of the protections of the two Amendments: seizure of private papers is tantamount to compelling a person to testify against himself; and the Fifth Amendment prohibition "throws light on" the reasonableness of the search. *Id.* at 633. In language that has been much quoted, the Court stated:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offenses * * * . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard, the Fourth and Fifth Amendments ran almost into each other. [*Id.* 630.]

not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[2] Acceptance of the contrary position, Justice Holmes wrote, would reduce the Fourth Amendment to "a form of words." *Id.* at 392.

The exclusionary rule fashioned in *Weeks* applied only to evidence illegally obtained by Federal officers for use in Federal trials. In 1949, the Court held that the basis of the Fourth Amendment—"[t]he security of one's privacy against arbitrary intrusion by the police"—is implicit in "the concept of ordered liberty" and thus enforceable against the States through the Fourteenth Amendment's due process clause. *Wolf* v. *Colorado,* 338 U.S. 25, 27-28 (1949). However, the Court refused to find that due process demanded application of the exclusionary rule to start criminal proceedings. Although the Court acknowledged that the exclusionary rule might be an effective way to deter unreasonable searches, it was not prepared to hold that "a State's reliance upon other methods * * * if consistently enforced," could not equally ensure that State police conduct would comport with due process dictates. *Id.* at 31.

In *Mapp* v. *Ohio,* 367 U.S. 643 (1961), the Court reversed *Wolf* and declared the exclusionary rule applicable to all State criminal proceedings. The Court stressed that the rule, as developed in *Weeks* and *Silverthorne,* is "a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to 'a form of words.'" *Id.* at 648. Although "not basically relevant" to the Court's constitutional holding, it surveyed the years since *Wolf* and found other State remedies for protection of the Fourth Amendment inadequate. *Id.* at 651-53. The Court cited with approval language in *Elkins* v. *United States,* 364 U.S. 206, 217 (1960), that the exclusionary rule is necessary "to compel respect for the constitutional guaranty in the only effective available way."[3]

II. Deterrence and Judicial Integrity

From the exclusionary rule's inception two principles that have informed the development of the doctrine have been recognized: (1) exclusion of illegally obtained evidence is necessary to protect the guarantees of the Fourth Amendment, and (2) courts should not sanction illegal activities of Government agents by permitting the fruits of such activities to be received into evidence. It is now "commonplace" to refer to those

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[2]This statement has been characterized by the present Court as a "broad dictum" that has been "substantially undermined by later cases." *United States* v. *Calandra,* 414 U.S. 338, 352 n. 8 (1974).

[3]Illegally seized evidence was barred in other situations: *Elkins* v. *United States,* 364 U.S. 206 (1960) (prohibiting Federal use of evidence illegally obtained by State officials); *Rea* v. *United States,* 350 U.S. 214 (1956) (Federal officer may be enjoined from providing to State authorities evidence seized pursuant to an invalid search warrant); *Lee* v. *Florida,* 393 U.S. 378 (1968) (Federal Communications Act provisions prohibit use of wiretap conversations in State proceeding).

sources and goals of the exclusionary rule as considerations of "deterrence" and "judicial integrity."[4] *Brown* v. *Illinois,* 422 U.S. 590, 599 (1975). *See, e.g., Stone* v. *Powell,* 428 U.S. 465, 484–86 (1976); *Terry* v. *Ohio,* 392 U.S. 1, 12–13 (1968); *Elkins* v. *United States,* 364 U.S. at 217–23.

The relative importance ascribed by the Court to deterrence and judicial integrity in the development of the exclusionary rule has varied. Where the Court has expanded the scope of the doctrine, it has emphasized the judicial integrity rationale. *See, e.g., Lee* v. *Florida,* 392 U.S. 378, 385–86 (1968) (evidence seized in violation of Federal Communications Act not admissible in State trials); *Mapp* v. *Ohio,* 367 U.S. at 659–60; *Elkins* v. *United States,* 364 U.S. at 222 (overruling "silver platter" doctrine). Where the Court has sought to limit the reach of the exclusionary rule, it has relied largely on the deterrence principle and has found that application of the exclusionary rule to the facts of the case would not significantly aid in deterring illegal police conduct. *See, e.g., Michigan* v. *DeFillippo,* 99 S. Ct. 2627, 2633 n. 3 (1979); *Stone* v. *Powell,* 428 at 482–95; *United States* v. *Janis,* 428 U.S. 433, 457–60 (1976).

Over the past decade or so, it has become clear that the deterrence rationale now bears the laboring oar in exclusionary rule analysis. Recent Supreme Court cases teach that the doctrine of judicial integrity is not to be

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[4]The phrase "the imperative of judicial integrity" was coined by Justice Stewart in *Elkins* v. *United States,* 364 U.S. at 222, which held that evidence seized illegally by State officials could not be admitted in Federal trials. The "judicial integrity" rationale is usually traced to the dissenting opinions of Justices Holmes and Brandeis in *Olmstead* v. *United States,* 277 U.S. 438, 469, 471 (1928):

> I think it is a less evil that some criminal should escape than that Government should play an ignoble part. [*Id.* at 470 (Holmes, J., dissenting).]
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> * * * * * * *
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> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against the pernicious doctrine this Court should resolutely set its face. [*Id.* at 485 (Brandeis, J. dissenting).]

The dissenters adopted an unfragmented view of the Government as punisher of criminals: "no distinction can be taken between the Government as prosecutor and the Government as judge." *Id.* at 470 (Holmes, J., dissenting). The Court in later cases has tended to disaggregate "the Government." *See generally* Shrock & Welsh, "Up from Calandra: The Exclusionary Rule as a Constitutional Requirement," 59 Minn. L. Rev. 251, 254–60 (1974).

While there is a tendency to "constitutionalize" the words of Justices Holmes and Brandeis, their opinions make clear that the obligation of Federal courts to exclude illegally seized evidence arises "apart from the Constitution." 277 U.S. at 469 (Holmes, J., dissenting); *id.* at 479–85 (Brandeis, J., dissenting). It should be noted, however, that the question whether the Federal courts have any power to exclude evidence beyond that arising from the Constitution and Federal statutes, *i.e.,* whether they have a reservoir of "supervisory power," is presently before the Supreme Court. *See, United States* v. *Payner,* No. 78-1729, Oct. Term 1979.

treated as determinative; indeed, the cases appear to strip it of any weight.[5] The basis for a critique of the doctrine is that it proves too much: if judicial integrity is offended by any use of illegally seized evidence, then the doctrine would effectively establish a right not to be convicted upon illegally seized evidence. However, the standing cases, *e.g., Rakas* v. *Illinois,* 439 U.S. 128 (1978), and impeachment cases, *e.g., Walder* v. *United States,* 347 U.S. 62 (1954), make it clear that "the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings against all persons." *United States* v. *Calandra,* 414 U.S. 338, 348 (1974). *See, Stone* v. *Powell,* 428 U.S. at 485; *United States* v. *Janis,* 428 U.S. at 458 n. 35.[6]

The saliency of deterrence became clear in *Linkletter* v. *Walker,* 381 U.S. 618 (1965), where the Court refused to give retroactive effect to *Mapp*. *See* Miles, "Decline of the Fourth Amendment: Time to Overrule *Mapp* v. *Ohio?*" 27 Cath. L. Rev. 9, 69 (1977). Faced with perhaps thousands of prisoners convicted between *Wolf* and *Mapp*, the Court found refuge in stressing deterrence:

> *Mapp* had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action * * * . We cannot say that this purpose would be advanced by making the rule retrospective. This misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved * * * . Finally, the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late. [*Id.* at 636–37.][7]

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[5]The commentators have generally recognized the decline and fall of "the imperative of judicial integrity." *See, e.g.,* Sanders & Robbins, "Judicial Integrity, The Appearance of Justice, and the Great Writ of Habeas Corpus: How to Kill Two Thirds (or More) with One Stone," 15 Am. Crim. L. Rev. 63, 76–78 (1977); Schrock & Welsh, *supra,* note 4, at 263–69. They have also noted the inherent difficulties in the concept. *See, e.g.,* McGowan, "Rule-Making and the Police," 70 Mich. L. Rev. 659, 692 (1972); Monaghan, "The Supreme Court, 1974 Term—Forward; Constitutional Common Law," 89 Harv. L. Rev. 1, 5–6 (1975); Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. Chi. L. Rev. 665, 668–69 (1970).

[6]A broad application of the judicial integrity principle is also difficult to reconcile with the refusal of the Supreme Court to void convictions in cases in which the defendant has been brought before the court by illegal police methods. *E.g., Frisbie* v. *Collins,* 342 U.S. 519 (1952); *Ker* v. *Illinois,* 119 U.S. 436 (1886).

[7]Justice Black, who had concurred in *Mapp* on the ground that the Fourth and Fifth Amendments taken together demand exclusion of illegally obtained evidence in state trials, dissented in *Linkletter.* He wrote:

> [T]he undoubted implication of today's opinion that the rule is not a safeguard for defendants but is a mere punishing rod to be applied to law enforcement officers is a rather startling departure from many past opinions, and even from *Mapp* itself * * * I have read and reread the *Mapp* opinion but have been unable to find one word in it to indicate that the exclusionary search and seizure rule should be limited on the basis that it was intended to do nothing in the world except to deter officers of the law. [381 U.S. at 649.]

This logic has been consistently followed in subsequent cases refusing to give retroactive effect to new Fourth Amendment law. *See, e.g., Desist* v. *United States,* 394 U.S. 244 (1969) (denying retrospective application of *Katz* v. *United States,* 389 U.S. 347 (1967)).

The deterrence rationale has blossomed in several recent cases that have refused to extend the exclusionary rule to various proceedings outside the actual criminal trial or to apply new interpretations of the Fourth Amendment retrospectively. In *United States* v. *Calandra, supra,* the Court held that a witness testifying before a grand jury could not refuse to answer questions on the ground that the questions were based on illegally obtained evidence. The Court found that the burdens placed on the functioning of the grand jury were not outweighed by the deterrent value of the exclusionary rule. Justice Powell announced for the Court that the exclusionary rule's "prime purpose is to deter future unlawful police conduct." *Id.* at 348. The "imperative of judicial integrity" was relegated to a footnote responding to Justice Brennan's dissent. It stated simply "that 'illegal conduct' is hardly sanctioned * * * by declining to make an unprecedented extension of the exclusionary rule to grand jury proceedings where the rule's objectives would not be effectively served and where other important and historic values would be unduly prejudiced." *Id.* at 355 note 11.

In *United States* v. *Peltier,* 422 U.S. 531 (1975) (denying restrospective application of *Almeida-Sanchez* v. *United States,* 413 U.S. 226 (1973)), the Court again stressed the deterrent side of the exclusionary rule. Although Justice Rehnquist noted the "imperative of judicial integrity," he wrote for the Court that judicial integrity was not offended where the police reasonably believed in good faith that the evidence they seized was admissible at trial. *Id.* at 536–37. Thus, since the policeman could not know that his actions were illegal until announcement of the new rule, judicial integrity did not support retroactivity.

In *United States* v. *Janis, supra,* the Court in an opinion by Justice Blackmun held that the evidence seized by State officials in good faith, but unconstitutionally, need not be excluded in Federal civil tax proceedings. Applying the deterrence balance, it determined that the "exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion." *Id.* at 454. Justice Blackmun dealt with judicial integrity in a footnote, which if followed by the Court would effectively render the doctrine inconsequential:

> The primary meaning of "judicial integrity" in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the violation is complete by the time the evidence is presented to the Court * * * . The focus therefore must be on the question

whether the admission of the evidence encourages violations of Fourth Amendment rights. *As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose.* [*Id.* at 458 note 35. (Emphasis added.)]

Finally, in *Stone* v. *Powell, supra,* the Court held that Federal courts should not entertain State prisoner *habeas* petitions alleging Fourth Amendment violations unless the petitioner had not been afforded an opportunity for full and fair litigation of the claim in State court. The Court, through Justice Powell, determined that the deterrent value of the exclusionary rule was minimal in the *habeas* context. As to judicial integrity, the Court noted: "[w]hile courts, of course, must be ever concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence." *Id.* at 485.

The import of these cases is clear. The Court believes that the "prime purpose of the [exclusionary] rule, if not the sole one, 'is to deter future unlawful police conduct.' *United States* v. *Calandra,* 414 U.S. 338, 347 (1974)." *United States* v. *Janis,* 428 U.S. at 446. The rise of deterrence as the sole criterion for application of the exclusionary rule has two consequences important here.[8]

First, with the attention of the courts focused on deterring illegal police activity, the exclusionary rule need no longer be considered part and parcel of the Fourth Amendment and the due process clause of the Fourteenth Amendment. *Mapp* had characterized the exclusionary rule as a "clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard," 367 U.S. at 643, which is "an essential ingredient of the Fourth Amendment." *Id.* at 651. And Justice Black concurred in *Mapp*

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[8]The reliance upon deterrence appears to cut only one way: toward limiting applications of the exclusionary rule. To the extent that the exclusionary rule is divorced from the particular defendant, he or she becomes a private attorney general seeking to protect the rights of all against illegal police actions. Thus, under a strict deterrence analysis, the traditional standing doctrine should be discarded. However, the Court has very recently made clear that it will still only permit a defendant whose own Fourth Amendment rights have been violated to benefit from the exclusionary rule. *Rakes* v. *Illinois,* 439 U.S. 128 (1978). This holding is defended on the ground that "Fourth Amendment rights are personal rights" and thus a person against whom the evidence illegally seized from another is admitted "has not had any of his Fourth Amendment rights infringed." *Id.* at 133-34. This analysis seems in conflict with the Court's statement in *Calandra* that the exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." 414 U.S. at 348. This apparent conflict is resolved, however, when one focuses on language in *Calandra* that states that the Fourth Amendment does not require "adoption of every proposal that might deter police misconduct," 414 U.S. at 350–51, particularly where the deterrent benefits of expanding standing are outweighed by the costs of further encroachment upon law enforcement. *See generally* Burkoff, "The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine," 58 Ore. L. Rev. 151 (1979).

on the ground that from the Fourth and Fifth Amendments a "constitutional basis emerges which not only justified but actually requires the exclusionary rule." *Id.* at 622.[9]

The balancing analysis adopted by the Court in recent years, based on the costs and benefits of added deterrence, changes the constitutional grounding of the doctrine; as recast, the exclusionary rule need be invoked to protect Fourth Amendment rights only when it is deemed efficacious. *See, Stone* v. *Powell, supra; United States* v. *Calandra,* 414 U.S. at 348 ("In sum, the [exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.")

The emphasis on the functional analysis openly invites alternative remedies that may equally well deter violations of Fourth Amendment rights. Presumably, once such remedies are in place, the exclusionary rule may simply be abolished. *See, Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 414 (1971) (Burger, C.J., dissenting). All that is demanded by the Constitution, in the words of Professor Kaplan, is "something that works * * * . The content of the particular remedial or prophylactic rule is thus a pragmatic decision rather than a constitutional fiat." Kaplan, "The Limits of the Exclusionary Rule," 26 Stan. L. Rev. 1027, 1030 (1974). *See also, California* v. *Minjares,* 100 S. Ct. 9, 14–15 (1979) (Rehnquist, J., dissenting from denial of stay).

The second consequence of a focus on deterrence is limitation of the exclusionary rule to situations in which the law enforcement officer has acted unreasonably or in bad faith. If the exclusionary rule is nothing more than a deterrent to illegal police conduct, it makes little sense to apply it in situations where it can have no deterrent force, particularly given the high societal costs generated by the rule's frustration of law enforcement. *See, Stone* v. *Powell,* 428 U.S. at 489–95. Thus, in numerous recent cases several Justices have suggested that the exclusionary rule not be applied to situations in which the police have acted in good faith, such as where agents have relied upon a warrant or a statute later held to be unconstitutional. *See, United States* v. *Scott,* 436 U.S. 128, 135–36 (1978) (Justice Rehnquist, in dicta, writing for the Court: "In view of the deterrent purposes of the exclusionary rule consideration of official motives may play some part in determining whether application of the exclusionary rule is appropriate *after* a statutory or constitutional violation has

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[9]*See, United States* v. *Peltier,* 422 U.S. at 550–62 (Brennan, J., dissenting); *United States* v. *Calandra,* 414 U.S. at 356 (Brennan, J., dissenting):

> [Curtailment of police misconduct] if a consideration at all, was at best only a hoped-for effect of the exclusionary rule, not its ultimate objective. Indeed, there is no evidence that the possible deterrent effect of the rule was given any attention by the judges chiefly responsible for its formulation. Their concern as guardians of the Bill of Rights was to fashion an enforcement tool to give content and meaning to the Fourth Amendment's guarantees.

been established."); *Stone* v. *Powell,* 428 U.S. at 501–02 (Burger, C.J., concurring); *id.* at 538–42 (White, J., dissenting) (exclusionary rule should not apply where evidence was seized "by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief"); *Brown* v. *Illinois,* 422 U.S. at 611–12 (concurring opinion by Powell, J., joined by Rehnquist, J.); *Michigan* v. *Tucker,* 417 U.S. 433, 447 (1974) (Rehnquist, J., for five members of the Court) ("Where the official action was pursued in complete good faith * * * the deterrence rationale loses much of its force."). *Cf., United States* v. *Caceres,* 440 U.S. 741 (1979) (refusing to exclude evidence where the Internal Revenue Service violated departmental procedure in good faith and without violating constitutional rights of defendant); *Michigan* v. *DeFillippo,* 99 S. Ct. at 2633, note 2 (purpose of deterrence not served by excluding evidence seized during lawful arrest under statute later held unconstitutional).[10]

III. Congressional Power to Devise Alternatives

Although the exclusionary rule has been limited by the Court in this decade, it has remained a constitutional doctrine. *Mapp* was reaffirmed in *Stone* v. *Powell,* 428 U.S. at 481 (*see, id.* at 509–15 (Brennan, J., dissenting)); and *Mapp* is decidedly a constitutional decision. Indeed, for the exclusionary rule to apply to the States it must be a constitutional doctrine, for "no one * * * would suggest that [the] Court possesses any general supervisory power over the state courts." *Mapp* v. *Ohio,* 367 U.S. at 678 (Harlan, J., dissenting). *See, Murphy* v. *Florida,* 421 U.S. 794, 797–98 (1975); *id.* at 803–04 (Burger, C.J., concurring) (by implication); Cox, "The Role of Congress in Constitutional Determinations," 40 U. Cinn. L. Rev. 199, 251 (1971).[11]

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[10] *See also,* Comment, "Judicially Required Rulemaking as Fourth Amendment Policy: An Applied Analysis of the Supervisory Power of Federal Courts," 72 Nw. U.L. Rev. 595, 598–99 (1977); Note, Reason and the Fourth Amendment—The Burger Court and the Exclusionary Rule," 46 Ford. L. Rev. 139, 168–69 (1977); *cf.* Israel, "Criminal Procedure, The Burger Court, and the Legacy of the Warren Court," 75 Mich. L. Rev. 1319, 1409–15 (1977); Schrock & Welsh, "Reconsidering the Constitutional Common Law," 91 Harv. L. Rev. 1117, 1160–61 (1978).

Even if the "imperative of judicial integrity" were still deemed to carry weight in exclusionary rule analysis, the Court has stated that "if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the 'imperative of judicial integrity' is not offended" by admission of the evidence at trial. *United States* v. *Peltier,* 422 U.S. at 537, quoted in *Stone* v. *Powell,* 428 U.S. at 485 n. 23. *See also, Stone* v. *Powell,* 428 U.S. at 540 (White, J., dissenting).

[11] "Professor Monaghan has argued that the exclusionary rule, even though applied to the States, is something less than constitutional, and may be displaced by congressional remedies. *See* Monaghan, *supra* (note 5). His views, which are not easily reconciled with the words of *Mapp* and *Stone,* are thoughtfully and thoroughly criticized in Shrock & Welsh, "Reconsidering the Constitutional Common Law," *supra* (note 10). However, there are some indications in recent Supreme Court cases that lend support for the argument that the *Miranda* exclusionary rule is less than constitutional. *See, New Jersey* v. *Portash,* 440

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Yet the fact that the exclusionary rule has constitutional roots does not mean it is constitutionally mandated. The Chief Justice's dissent in *Bivens* first suggested that congressional provision of an alternative remedy that would deter official misconduct as well as the exclusionary rule would permit the Court to abolish the rule. 403 U.S. at 411–24. As discussed above, this conclusion flows logically from reliance on the deterrence rationale.[12] If the defendant has no personal right to exclusion of illegally seized evidence, then any remedy that adequately protects Fourth Amendment guarantees should meet the constitutional requirement that the Fourth Amendment not be rendered a "form of words."[13] This conclusion is supported by each of the scholars consulted by the Senate Judiciary Committee.

In other similar situations the Court has openly invited Congress to enact legislation that could supplement or supplant judicially created prophylactic rules. In declaring the *Miranda* rules to protect the Fifth Amendment rights of subjects of police interrogation, the Court wrote:

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other

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U.S. 450 (1979) (use of immunized grand jury testimony for impeachment is unconstitutional; distinguishing cases permitting impeachment use of evidence obtained in violation of *Miranda* on ground that in those cases no coercion was present); *North Carolina* v. *Butler*, 60 L. Ed. 2d 286, 294 (1979) (Blackmun, J., concurring) (suggesting that standard for waiver of lawyer after *Miranda* warnings is different than standard applied for waiver of "fundamental constitutional rights" as established by *Johnson* v. *Zerbst*, 304 U.S. 458 (1938)).

[12]Chief Justice Burger also believes that the existence of an effective alternative would satisfy the demands of judicial integrity: "Nor is it easy to understand how a court can be thought to endorse a violation of the Fourth Amendment by allowing illegally seized evidence to be introduced against a defendant if an effective remedy is provided against the government." 403 U.S. at 414.

[13]Justice Brennan continues to argue that the exclusionary rule is "part and parcel" of the Fourth Amendment. This argument, made in dissent, does not appear to reflect the views of the Court as presently constituted. *See, e.g., United States* v. *Calandra*, 414 U.S. at 355–67 (Brennan, J., dissenting); *see also, Wolf* v. *Colorado*, 338 U.S. at 48 (Rutledge, J., dissenting) ("I * * * reject any intimation that Congress could validly enact legislation permitting the introduction in federal courts of evidence seized in violation of the Fourth Amendment"). For an extensive argument that the exclusionary rule is constitutionally mandated, *see* Schrock & Welsh, "Up from Calandra," *supra* (note 4).

> procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed * * * .[14] [384 U.S. 436, 467 (1966). *See, id.* at 444, 478–79.]

Similarly, in the "line-up" cases, *United States* v. *Wade,* 388 U.S. 218, 239 (1967) and *Gilbert* v. *California,* 388 U.S. 263, 273 (1967), the Court noted that its prophylactic procedures were necessary in the absence of State or Federal rules that eliminated the risks of abuse attending line-up identifications.

In sum, given the emphasis on the exclusionary rule as a tool of deterrence and analogies to related areas where the Supreme Court has laid down protective rules while inviting prophylactic legislation, we believe the Supreme Court would hold that enactment by Congress on an alternative remedy that is as effective as the exclusionary rule in deterring violations of the Fourth Amendment would obviate the constitutional necessity for the exclusionary rule. This conclusion raises two additional questions: what alternative remedies are equally effective, and who is the judge of the effectiveness of the alternative.

Answering the second question first, we believe that it is the Supreme Court that must ultimately decide whether an alternative remedy adequately protects the Fourth Amendment from becoming a "form of words." *See, Bivens* v. *Six Unknown Named Agents,* 403 U.S. at 423 note 7 (Burger, C.J., dissenting) (by implication); Dellinger, "Of Rights and Remedies: The Constitution as a Sword," 85 Harv. L. Rev. 1532, 1548, 1552–53 (1972); Note "Excluding the Exclusionary Rule: Congressional Assault on *Mapp* v. *Ohio,*" 61 Geo. L. Rev. 1453, 1471 (1973). This is no more than recognition of the Court's traditional duty to measure congressional legislation against the Constitution. *Marbury* v. *Madison,* 1 Cr. 137 (1803). If the Constitution demands some remedy for effectuation of the Fourth Amendment, then it is the province of the Court to decide whether proffered alternatives meet constitutional requirements. The Court may find congressional factfinding persuasive, and it is likely to accord deference

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[14]Congress accepted the Court's invitation, but in a manner intended to limit the reach of *Miranda* rather than provide adequate alternative safeguards. 18 U.S.C. § 3501, Title II of the 1968 Omnibus Safe Streets and Crime Control Act. Although courts have avoided ruling on the issue, *see, e.g., United States* v. *Crook,* 502 F.(2d) 1378 (3d Cir. 1974), cert. denied, 419 U.S. 1123 (1975); *Ailsworth* v. *United States,* 448 F.(2d) 439 (9th Cir. 1971), the provision is of doubtful constitutionality. *See* Wright & Miller, *Federal, Practice and Criminal Procedure,* § 76, at 120–22 (1969); Gandara, "Admissibility of Confessions in Federal Prosecutions: Implementation of Section 3501 by Law Enforcement Officials and the Courts," 63 Geo. L.J. 305 (1974). Imaginative defenses for § 3501 have been constructed. It has been asserted that *Miranda* was based on factual assumptions about the coerciveness of custodial interrogations—assumptions that Congress has the power to reverse through its factfinding procedures. Alternatively, it has been argued that Congress has power under § 5 of the Fourteenth Amendment, as interpreted by *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966), to revise constitutional decisions of the Court. *See* S. Rept. 1097, 90th Cong., 2d sess. (1968). *See generally* Burt, "Miranda and Title II: A Morganatic Marriage," (1969) S. Ct. Rev. 81.

to the expressed judgment of Congress that the legislative alternatives are efficacious. But it remains up to the Court to render final judgment on what the Constitution demands. *See, Miranda* v. *Arizona,* 384 U.S. at 490.

Evaluating the likely effectiveness of alternatives to the exclusionary rule—such as police training and regulations, tort actions, criminal prosecutions, or contempt proceedings—is a difficult task. An initial problem is that it is unclear what yardstick of effectiveness should be used because the empirical evidence on the deterrent effect of the exclusionary rule is conflicting at best. *Compare, United States* v. *Janis,* 428 U.S. at 448–53, *with, Elkins* v. *United States,* 364 U.S. at 218; *compare, Oaks, supra* (note 5), *with* Critique, "On the Limitations of Empirical Evaluations of the Exclusionary Rule," 69 Nw. U.L. Rev. 740 (1974). The court has recently tended to express doubt about the rule's efficacy beyond its application at a criminal trial, and this view has been shared by many commentators. *See, e.g., United States* v. *Janis,* 428 U.S. at 448–53 and accompanying footnotes; *Oaks, supra*; Wilkey, 62 Judicature 215, 222–23 (1978).

However, the Court's growing disillusionment with the efficacy of the exclusionary rule is in tension with the earlier cases that held that the exclusionary rule was the only effective means of guaranteeing that the Fourth Amendment would not become a form of words. Indeed, *Mapp's* reversal of *Wolf's* holding (which had left State protection of the Fourth Amendment to other than exclusionary remedies) stated that applying the Fourth Amendment without the exclusionary rule "is to grant the right but in reality to withhold its privilege and enjoyment * * *. [T]he purpose of the exclusionary rule '[is] to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' *Elkins* v. *United States,* [364 U.S.] at 217." *Mapp* v. *Ohio,* 367 U.S. at 656.[15]

These statements could be viewed as hyperbole or makeweights for Justices who believed that the exclusionary rule was constitutionally mandated in any event. However, similar language has appeared in a recent case. In *Franks* v. *Delaware,* 438 U.S. 154 (1978), the Court held that a defendant could attack the veracity of affidavits supporting a search warrant, and that a court could exclude evidence obtained pursuant to the warrant if it determined that police officers had made deliberate misstatements in the affidavits and that the affidavits were necessary to a finding of probable cause. In describing the general considerations supporting a rule of exclusion, Justice Blackmun, writing for seven Justices, stated:

> [T]he alternative sanctions of a perjury prosecution, administrative discipline, contempt, or a civil suit are not likely to fill the gap. *Mapp* v. *Ohio* implicitly rejected the adequacy of

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[15] *See also, Terry* v. *Ohio,* 392 U.S. 1, 12 (1968) ("experience has taught that [the exclusionary rule] is the only effective deterrent to police misconduct"); *Lee* v. *Florida,* 392 U.S. 378, 386–87 (1968) ("nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law"); *Linkletter* v. *Walker,* 381 U.S. at 634; *Wolf* v. *Colorado,* 338 U.S. 25, 41 (1949) (Murphy, J., dissenting) ("[T]here is but one alternative to the rule of exclusion. That is no sanction at all").

these alternatives. Mr. Justice Douglas noted this in his concurrence in *Mapp,* 367 U.S., at 670, where he quoted from *Wolf* v. *Colorado,* 338 U.S. 25, 42 (1949): " 'Self-scrutiny is a lofty idea, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered.' " [*Id.* at 169.]

It is not easy to know what to make of these words. We believe that, at the very least, the Court may demand congressional factfinding concerning the efficacy of alternatives. We doubt that an adequate showing will be easy.[16] Alternatives that existed prior to *Mapp—e.g.,* a § 1983 action against State officers, a criminal prosecution, or prosecution under the civil rights laws, *see, Irvine* v. *California,* 347 U.S. 128, 137–38 (1954) (suggestion of Warren, C.J., and Jackson, J.)—should clearly be rejected as inadequate. *Cf., Wolf* v. *Colorado,* 338 U.S. at 41–47 (1949) (Murphy, J., dissenting); *People* v. *Cahan,* 44 Cal. 2d 434, 445–48 (1955). The efficacy of any remedies enacted since *Mapp* are essentially untested because the exclusionary rule was in place at the same time. Yet abandonment of the exclusionary rule in order to test new alternatives, such as those in the proposed amendments to the FTCA, is to risk rendering the Fourth Amendment a dead letter if the remedies fail. In short, the Court will be faced with little hard data on either side of the equation; it will have to measure the unknown deterrent value of the exclusionary rule against the untested deterrent value of the alternative.

This conclusion, however, does not necessarily mean that the Supreme Court would find a tort-disciplinary scheme an inadequate alternative. The problems associated with the exclusionary rule—such as permitting guilty defendants to go free, fostering police perjury, and not compensating victims of illegal searches who do not go to trial—measured against the better "fit" of the tort-discipline alternative may tip the Court toward accepting the alternative as at least as effective as the exclusionary rule, and therefore constitutional. This decision would be aided by the Court's traditional deferrence to legislative factfinding. *See, Oregon* v. *Mitchell,* 400 U.S. 112, 240, 246–49 (1970) (opinion of Brennan, White, and Marshall, J.J.); Burt, *supra* (note 14), at 112–14; Cox, *supra,* at 228–29; *cf., Regents of the Univ. of California* v. *Bakke,* 438 U.S. 265, 302 note 41 (1978) (opinion of Powell, J.).

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[16]Two recent studies, taken together, lend further support for the position that alternative remedies may be no more effective in deterring violations of the Fourth Amendment than the exclusionary rule. *Compare* Project, "Suing the Police in Federal Court," 88 Yale L.J. 781 (1979) (§ 1983 actions not effective deterrents of police misconduct) *with* Report by the Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions (C.A.O. April 19, 1979) (Federal prosecutors decline few prosecutions on the basis of Fourth Amendment problems; open to interpretation that compliance with Amendment's dictates is substantial given present reliance upon exclusionary rule).

IV. Conclusions

We have been asked to consider whether, assuming enactment of remedies similar to the proposed amendment to the FTCA, Congress may constitutionally limit or eliminate the exclusionary rule in Federal criminal proceedings. We believe that Congress may not, without more, "repeal" the exclusionary rule. The rule, in the absence of alternative remedies, is constitutionally mandated. However, Congress may provide the occasion for judicial repeal of the exclusionary rule by enacting alternative remedies. The Court, in its traditional exercise of judicial review, could then analyze whether the legislative alternatives adequately protect Fourth Amendment guarantees. Although two decades ago the Court might have deemed the exclusionary rule itself part and parcel of the Fourth Amendment and therefore not subject to legislative abolition, we believe that the Court's redefinition of the rule in terms of deterrence would constitutionally permit the rule's demise in the face of efficacious alternatives. We have identified some of the difficulties implicit in evaluating the deterrent potential of alternative remedies.

Applying these general conclusions to the draft Senate Judiciary Committee bill, we believe that it would be sustained as constitutional. The Court is likely to determine that the alternative remedy provided by the FTCA adequately protects Fourth Amendment rights, and therefore would sustain the abolition of the exclusionary rule. This conclusion is strengthened by the fact that the draft bill eliminates the exclusionary rule only for good faith violations of the Fourth Amendment. This is a limitation that the Court may well be willing to impose on its own even in the absence of alternative remedies.[17]

Our conclusion concerning the Court's likely reaction to the proposed legislation is descriptive, not normative. Although Congress and the Court may be willing to substitute amendments to the FTCA for the exclusionary rule, we are not convinced that the Department should support the constitutional minimum.

We believe that there are good reasons to question the adequacy of the proposed amendments to the FTCA. The substitution of the United States as the defendant will mean that any monetary recovery will be paid from the U.S. Treasury, and not by the Federal law enforcement officer involved. It has been asserted that ultimate taxpayer liability will generate public demands for law-abiding police, *see, e.g.,* Wilkey, 62 Judicature 215, 231 (1978); whatever force this has on the State level, we believe that it is tenuous at best when applied to the Federal fisc. This conclusion has empirical support. *See* Project, "Suing the Police in Federal Court," 88 Yale L.J. 781 (1979). Thus the only deterrent for the law enforcement

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[17]It should be noted that enactment of the proposed legislation will have the anomalous result of abolishing the exclusionary rule in the Federal courts but not the State courts. Of course, passage of the proposal may well spur the Court to reevaluate *Mapp* v. *Ohio, supra,* as recently urged by Justice Rehnquist. *California* v. *Minjares,* 100 S. Ct. 9 (1979) (Rehnquist, J., dissenting from a denial of a stay).

officer on the street is the disciplinary proceeding that may be convened. The proposal is silent as to the standards of responsibility that are to be applied in such a proceeding. Presumably, the police officer would be able to assert a good-faith defense since it would be unfair to subject him to administrative sanctions if he was carrying out his duties in a manner that a reasonable officer would believe was lawful. *Cf., Wood* v. *Strickland,* 420 U.S. 308 (1975); *United States* v. *Norton,* 581 F. (2d) 390, 393 and note 2 (4th Cir.) (citing cases), cert. denied, 439 U.S. 1003 (1978); *Bivens* v. *Six Unknown Named Agents,* 456 F. (2d) 1339, 1348 (2d Cir. 1972) (on remand). Yet the likelihood of a person (particularly a convicted defendant) overcoming a good-faith defense is notoriously low. *See, Bivens* v. *Six Unknown Named Agents,* 403 U.S. at 421 (Burger, C.J., dissenting). In short, the deterrent effect of the proposals on the police may be little or no more direct or effective than the exclusionary rule. Indeed, some have suggested that the likely effect of the proposed amendments is that the Government would be able to "buy" convictions by paying liquidated damages for Fourth Amendment violations. *See* Dellinger, *supra,* 85 Harv. L. Rev. at 1563. Such a remedy may well provide adequate compensation to a person who has been the subject of an illegal search or seizure; but it may do little to stop the Fourth Amendment from becoming a "form of words."

While we are deeply concerned about the ability of the tort remedy to deter violations of the Fourth Amendment, we also recognize that the amendments to the FTCA are important in that they extend remedies to persons who presently receive no relief after their Fourth Amendment rights are violated. Thus, we would suggest enactment of the FTCA amendments and continued adherence to the exclusionary rule. If, after an appropriate period of time, it becomes empirically apparent that the tort-discipline remedy provides adequate deterrence, then we believe that it would be time to reconsider the exclusionary rule. It may be sensible to amend the draft legislation to include a direction to the Department of Justice that it monitor over several years the effectiveness of the FTCA remedy and report to Congress. This proposal will supply an orderly process for abolition of the exclusionary rule, if abolition is empirically supportable. Of course, such a strategy could be frustrated if the Court on its own declared that existence of the new remedies obviated the need for the exclusionary rule. Congress could forestall the rule's untimely demise by making clear that its legislation was experimental and not to be deemed an alternative to the exclusionary rule. The legislation might expressly provide, for example, that Congress will consider the evidence and the wisdom of abolition of the exclusionary rule at some specific future date.

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December 28, 1979

79-91 MEMORANDUM OPINION FOR THE GENERAL COUNSEL, CENTRAL INTELLIGENCE AGENCY

Polygraph Tests—Central Intelligence Agency—Industrial Polygraph Program—Constitution—Supremacy Clause (Article VI, Clause 2)

A member of your staff has asked us for additional assistance with respect to the Central Intelligence Agency's (CIA's) Industrial Polygraph Program. Implementation of this program in Massachusetts has been delayed because of potential conflict with a Massachusetts statute penalizing an employer who requires employees to take polygraph tests. Mass. Gen. Laws, ch. 149, § 1913. In response to an earlier request, we presented our view, in a memorandum dated December 18, 1978, that a State law prohibiting the administration of polygraph tests to employees may not legitimately be applied to either the CIA or its contractors in a manner that precludes necessary security precautions. We reasoned that the Supremacy Clause would not allow a State law to disrupt Federal programs, even if the State law is applied only to a contractor and not to the Federal Government itself. We cautioned, however, that the validity of application of State law to Federal contractors is generally dependent on the facts and circumstances of a particular setting and that prelitigation predictions of success must be cautious.

By letter dated December 20, 1978, we expanded on these views. We repeated that the administration of polygraph tests to contractor employees who have access to, or are being considered for access to, sensitive compartmented information would meet the requirements of § 1-811 of Executive Order No. 12036, because, in the considered judgment of CIA officials, the tests are necessary to maintain appropriate standards of security. We did not suggest that administration of polygraph tests on a broader basis would be prohibited, but emphasized that the

limiting language of § 1-811 and the potential conflict with State law required that any such program not sweep more broadly than is deemed necessary by knowledgeable personnel in your agency.

We are now informed that the CIA wishes to proceed with the program in Massachusetts. At our request, your staff has provided further explanation of the CIA's need for the Industrial Polygraph Program. The explanation can be summarized as follows:

After the discovery of leaks of classified documents to foreign governments by a contractor's employee, the CIA Office of Security examined security standards governing access to sensitive compartmented information and determined that the standards were insufficient to protect such information. Although a contractor's personnel often have access to information not revealed even to CIA staff officers, the industry personnel are not subjected to the rigorous investigation required for staff positions. The Office of Security concluded that the personal history statement, background investigation, and personal interview were insufficient to identify at least three types of persons: (1) persons with vulnerabilities making them particularly susceptible to recruitment by hostile powers, (2) persons who have already been recruited by such powers but whose personal history statements are otherwise correct, and (3) persons who have developed false identities. Based on substantial experience with polygraphs, the Office of Security determined that the polygraph device would be an invaluable tool for improving security determinations. After successful completion of a pilot program, the Director of Central Intelligence ordered institution of the Industrial Polygraph Program.

The polygraph is not used as a substitute for less intrusive investigative measures. Instead, we have been informed that it is intended to enhance, upgrade, and extend those measures, and is, for these reasons, deemed a necessary adjunct. We have also been told that the examination is narrowed to the extent necessary to protect SCI information. To ensure that the tests will not be applied to employees indiscriminately, the CIA has identified the categories of persons who will be required to undergo a polygraph test.

As we set forth in our previous letters to you, courts reviewing State regulation of Federal contractors appear to apply the same standard as is applied to regulation of the Federal Government itself, that is, whether the State statute would defeat a legitimate Federal purpose or frustrate a Federal policy or function. *See, United States* v. *Georgia Public Service Comm'n*, 371 U.S. 285, 292-93 (1963); *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 186, 190 (1956); *Railway Mail Assoc.* v. *Corsi*, 325 U.S. 88, 93-96 (1945). The determinative question is whether the State's regulation of the contractor conflicts with Federal legislation or with any legitimate discernible Federal policy. *See, Penn Dairies, Inc.* v. *Milk Control Control Comm'n*, 318 U.S. 257,271 (1943).

Protection of sensitive intelligence information is required by statute and executive order, and clearly is a legitimate Federal function. *See* 50 U.S.C. §§ 403(d)(3), 403g; Executive Order No. 12065, 43 F.R. 28949 (1978). It appears to us that the CIA reasonably has determined that implementation of the Industrial Polygraph Program is necessary to protect adequately SCI information. If administration of the test to each included category of employees is reviewed carefully by CIA officials and determined necessary to protect sensitive information, it is our view that the State of Massachusetts may not interfere by enforcing its law against the Agency's contractors.

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