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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 of the professional bar and the general public. The first ten volumes of opinions published covered the years 1977 through 1986; the present volume covers 1987. The opinions included in Volume 11 include some that have previously been released to the public, additional opinions as to which the addressee has agreed to publication, and opinions to Department of Justice officials that the Office of Legal Counsel has determined may be released. A substantial number of Office of Legal Counsel opinions issued during 1987 are not included.

The authority of the Office of Legal Counsel to render legal opinions is derived from the authority of the Attorney General. Under the Judiciary Act of 1789 the Attorney General was authorized to render opinions on questions of law when requested by the President and the heads of executive departments. This authority is now codified at 28 U.S.C. §§ 511-513. Pursuant to 28 U.S.C. § 510 the Attorney General has delegated to the Office of Legal Counsel responsibility for preparing the formal opinions of the Attorney General, rendering opinions to the various federal agencies, assisting the Attorney General in the performance of his function as legal adviser to the President, and rendering opinions to the Attorney General and the heads of the various organizational units of the Department of Justice. 28 C.F.R. § 0.25.

Opinions of the Office of Legal Counsel in Volume 11

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Provisions of the Special Foreign Assistance Act of 1986 Relative to the Assets of Jean Claude Duvalier

Section 204 of the Special Foreign Assistance Act of 1986 requires the President to freeze or otherwise prevent the dissipation of assets, allegedly stolen by the former president of Haiti, that are the subject of litigation to determine their ownership. The President is not required to freeze assets that are not the subject of litigation by the government of Haiti.

January 2, 1987

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

I. Introduction and Summary

This memorandum is in response to your request of November 26, 1986, for the opinion of this Office regarding the obligations imposed upon the President by § 204 of the Special Foreign Assistance Act of 1986, Pub. L. No. 99–529 (Act), a provision that mandates that the President provide assistance to the government of Haiti in its efforts to obtain assets allegedly stolen by Jean Claude Duvalier and his associates. We understand that the need for this opinion is prompted by interagency deliberations to determine the substance of the Executive Order required to implement the Act.

In the course of these interagency deliberations, this Office has learned that the Government of Haiti has litigation pending in both Florida and New York which seeks to recover assets allegedly stolen by Jean Claude Duvalier or his associates.[1] In both cases the Haitian government may be required to post bond to secure attachment orders on or otherwise preserve the Duvalier assets pending resolution of the litigation to determine title to the assets.[2] Counsel for the Haitian government has represented to the Department of Justice that Haiti has insufficient funds to post bond. Haiti's counsel has contended that § 204 of the Special Foreign Assistance Act requires that the President expeditiously freeze all Duvalier assets within the jurisdiction of the United States. The Department of the Treasury, however, has taken the position that the President is not required to freeze or otherwise prevent the dissipation of Duvalier assets even if these assets are subject to pending litigation in which Haiti is unable to

[1] In this memorandum we shall denominate assets held in the name of Jean Claude Duvalier or his associates that are under the jurisdiction of the United States as "Duvalier assets," without prejudging the issue of who actually has title to these assets.

[2] We understand that, at present, the Government of Haiti has obtained temporary orders restraining the assets until decisions on the posting of bonds and other preliminary matters are rendered.

post bond. Treasury concedes that § 204 requires the President to take some action to assist Haiti in its efforts to recover Duvalier assets, but believes that the statutory requirement to provide assistance may be satisfied if the United States undertakes an investigation to discover Duvalier assets within the United States which are not presently the subject of litigation.

We have concluded that § 204 of the Special Foreign Assistance Act requires the President to freeze or otherwise prevent the dissipation of Duvalier assets which are the subject of litigation by Haiti if such action is necessary to preserve these assets during the pendency of litigation to determine their proper ownership.[3] A fair reading of § 204 makes clear that Congress specifically recognized that Haiti was unable to secure the assets without outside assistance and that the purpose of the section was to mandate that the President provide that assistance. Moreover, the legislative history confirms that Congress intended the President to take action that would permit Haiti to have its claims considered on their merits and specifically contemplated that he freeze Duvalier assets in order to accomplish this result. Finally, the President's signing statement recognizes that his discretion under § 204 must be exercised in a manner that reflects § 204's purpose. The clear purpose of the legislation is to preserve the *res* during the pendency of Haiti's legal proceedings.

We also conclude, however, that the President's obligations under § 204 are limited to assisting Haiti with respect to Duvalier assets that are now the subject or that subsequently become the subject of litigation by the government of Haiti. Although the President has discretion under § 204 to take action with respect to any Duvalier assets under the jurisdiction of the United States, the legislation does not require a general freeze of these assets.

II. Analysis

Section 204(b) of the Special Foreign Assistance Act of 1986 orders the President to exercise authorities referenced by § 203 of the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1702, to assist Haiti in its efforts to recover through legal proceedings the assets of Jean Claude Duvalier and his associates. This section provides in full:

> The President shall exercise the authorities granted by section 203 of the International Emergency Economic Powers Act (50 U.S.C. § 1702) *to assist the Government of Haiti in its efforts to recover, through legal proceedings, assets* which the Government of Haiti alleges were stolen by former president-for-life Jean Claude Duvalier and other individuals associated with the Duvalier regime. This subsection shall be deemed to satisfy the requirements of section 202 of that Act.

[3] In defining the actions required by § 204, we do not, of course, imply that the President must personally undertake any action. Pursuant to 3 U.S.C. § 301, the President may delegate 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 . . . any function which is vested in the President by law."

(Emphasis added.) The authorities referenced in § 203 of IEEPA are extremely broad and include the authority to freeze assets within the jurisdiction of the United States in which a foreign government or foreign national has an interest.[4] Under IEEPA a predicate to the exercise of these authorities is the declaration under § 202 of that Act that a national emergency exists. In light of Congress' statement that § 204(b) of the Special Foreign Assistance Act is deemed to satisfy this requirement, no declaration of emergency is required.[5]

Section 204(b) thus requires that the President exercise authority embodied in IEEPA to assist the government of Haiti to recover Duvalier assets through legal proceedings. A fair reading of § 204 as a whole, however, suggests that Congress has not left the nature of this assistance to unfettered Presidential discretion, because in § 204(a) Congress made findings which indicate its purpose in passing this legislation.[6] The findings in § 204(a) are as follows:

> (1) the Government of Haiti believes that former president-for-life Jean Claude Duvalier and other individuals associated with the Duvalier regime illegally diverted to their own use substantial amounts of the assets of the Government of Haiti;
>
> (2) *the Government of Haiti is attempting to locate and recover those assets through legal means*;
>
> (3) *virtually every relevant jurisdiction, both in the United States and abroad, requires the posting of some form of security to*

[4] Section 203 provides the following authorities:

(a) (1) At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise —

(A) investigate, regulate, or prohibit —

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities; and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States

The President has recently exercised these authorities to freeze certain assets owned by the Libyan government or its instrumentalities. Executive Order No. 12544, 51 Fed Reg. 1235 (1986).

[5] We emphasize that in any event the President's exercise of authority under § 204 will not constitute an exercise of authorities under the IEEPA itself but an exercise of powers under the Special Foreign Assistance Act of 1986 that are defined by reference to IEEPA. Therefore the President's action under § 204 will not create any precedent with respect to actions that may be taken under IEEPA.

[6] To interpret § 204(b) without reference to § 204(a) would be to ignore the cardinal rule of statutory interpretation that all parts of a statute are to be given effect *See American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490, 513 (1981). Moreover, the findings are the best evidence of the purpose of the statute. They show that Congress specifically considered and reached a judgment regarding the problem at hand. *See* R. Keeton, *Venturing to Do Justice* 94–95 (1969) (arguing that courts must pay special attention to congressional purpose when Congress has considered and prescribed for the specific problem which the legislation addresses).

secure the issuance of orders of attachment or other judicial seizures of property;

(4) *the Government of Haiti is unable, without outside assistance, to post the necessary security because of its lack of assets*;

(5) Haiti's economic situation could be significantly improved, and the need for external resources reduced, if the Government of Haiti is able to pursue its legal remedies against those who are in large part responsible for the economic crisis in Haiti; and

(6) the United States has a substantial foreign policy interest in helping the Government of Haiti recover any assets which were illegally diverted by those associated with the Duvalier regime.

(Emphasis added.)

The requirement that the President assist Haiti must therefore be read in light of Congress' findings in § 204(a) concerning the nature of the problem Haiti faces and the nature of the assistance Haiti requires. Through these findings, Congress has made clear that (1) Haiti is unable as a practical matter to pursue the assets through legal proceedings, because it is unable to post the necessary bond to secure these assets; and (2) Haiti needs "outside assistance" to preserve the *res* pending litigation. In the event that Haiti, as the findings specifically contemplate, is unable to post bond, the direct inference to be drawn is that the President's assistance to Haiti should be of a kind that will secure the assets until a judgment determining title to the assets may be rendered. Among the authorities Congress has referenced in § 204(b) for this purpose are those that may be used to prohibit the transfer of assets *pendente lite*.[7] Thus, § 204 read as a whole strongly suggests that, in the event Haiti is unable to post bond to secure Duvalier assets, the President must employ the authority delegated by Congress in a manner that will preserve the *res* pending entry of judgment.

The legislative history of § 204 removes any possible doubt that Congress intended that the President freeze Duvalier assets if such action is necessary to prevent the assets from being dissipated before the conclusion of litigation. Representative Dixon introduced § 204 as a floor amendment to the Special

[7] Under the authorities referenced by IEEPA the President may preserve the *res* in a variety of ways. He may simply prohibit any transfer of the *res pendente lite*. He may also condition any transfer on the receipt of a license which would be issued only upon certification that the defendant had deposited an amount equivalent to the fair market value of the *res* with the court in which the litigation was being conducted. As the President's signing statement makes clear, § 204 "does not directly specify which of the many executive powers referenced by the International Emergency Economic Powers Act should be employed," and the President therefore "retains the discretion to select those powers that are appropriate to carry out the legislation's purposes." Presidential Signing Statement, Special Foreign Assistance Act, 22 Weekly Comp. Pres. Doc. 1453 (Oct. 27, 1986).

For convenience, in the rest of the opinion we will denominate Presidential action to preserve Duvalier assets *pendente lite* as an "asset freeze." We emphasize, however, that "freeze" is an umbrella term encompassing a variety of actions that the President may take under the authorities referenced by IEEPA in order to preserve the Duvalier assets.

Foreign Assistance Act of 1986. His speech is the only legislative history explaining this section. Representative Dixon's speech in pertinent part is as follows:

> When the Duvaliers fled Haiti in February, they not only left the country in millions of dollars of debt, but with less than $1 million in foreign reserves.
>
> Without foreign exchange reserves to buy even the bare necessities, including food and fuel, the Government urgently must recover the money the Duvaliers siphoned off.
>
> The Government of Haiti is attempting to locate and recover those assets through legal means.
>
> But virtually every relevant jurisdiction, both in the United States and abroad, requires the posting of some form of bond to secure the issuance of orders of attachment or judicial seizures of property.
>
> The Government of Haiti is unable, without assistance, to post the necessary security bond because of its lack of assets.
>
> My amendment is simple and straightforward: *To assist the new Government of Haiti to have its day in court in its attempt to reclaim wealth which was allegedly stolen by Haiti's former President and his associates.*
>
> *The amendment would require the President to use authorities in the International Economic Powers Act to freeze assets of Duvalier and his associates so that these assets cannot be removed during the period which Haiti's claims are considered through regular legal processes.*

132 Cong. Rec. 19717–18 (1986) (emphasis added).[8]

[8] Representative Dixon's speech continued as follows.

> I can understand that some do not like to see the emergency powers applied in a case such as this where the emergency is not one facing the United States but instead confronts a friend. If we can develop another way to be helpful in a timely manner, I would welcome it But if we wait, some of the wealth that belongs to the Haitian people may be irretrievable [sic] lost. I would hope that the Foreign Affairs Committee will look for a permanent way of providing authority to the President to help countries in Haiti's position in the future but for Haiti the time is now.
>
> We do not know whether any of the funds skimmed off through years of corruption came from the U.S. Treasury. We should act to help assure that the moneys in the United States are given to their rightful owners and not lost forever because Haiti is too poor to press its claims effectively.
>
> I believe that the interim Government of Haiti, under the Lieutenant General Namphy (Namphee), is seriously committed to a transition from a military council to a democratically elected civilian government
>
> A law firm — Stroock, Stroock, & Lavan — has been retained by the Government of Haiti to assist in recovering these assets.
>
> I hope you will support my amendment and help the Government of Haiti in recovering the funds.

132 Cong. Rec. at 19718.

Given the text of the statute and its legislative history, we therefore cannot agree with Treasury's position that the President could (1) refuse to freeze the Duvalier assets subject to legal proceedings even if such action were necessary to prevent these assets from being transferred or dissipated before the conclusion of the litigation; and (2) simply choose to investigate in an attempt to identify other Duvalier assets within the jurisdiction of the United States in order to satisfy the statutory requirement that the President exercise authorities referenced by IEEPA. If Duvalier assets subject to litigation would be dissipated without an asset freeze, it would not be sufficient, in our view, for the President to limit his action to investigating whether Duvalier has other assets in the United States not at present subject to litigation. Since Haiti lacks the funds to preserve the *res pendente lite*, Haiti would face, according to the congressional findings, the same difficulties with respect to any such newly discovered assets as it now faces with respect to the assets that are in litigation. Congress could not have intended that the assistance rendered by the President leave Haiti in the same situation that the legislation was designed to ameliorate.[9]

We do not agree, however, with counsel for the Government of Haiti that the statute requires the President to freeze all the Duvalier assets that are within the

[9] We have also concluded that Congress' direction that the President take action to preserve a *res* held in the name of a foreigner pending judgment determining title to the *res* is within Congress' constitutional powers. First, it is clear that freezing Duvalier assets *pendente lite* does not constitute a Bill of Attainder. In *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), the Supreme Court determined that legislation depriving former President Nixon of the custody of his records was not a Bill of Attainder, because the legislation did not represent a deprivation traditionally forbidden by the Bill of Attainder Clause nor the functional equivalent of such a deprivation. The Court held that the deprivation was not a forbidden functional equivalent because the legislation had a legitimate nonpunitive purpose and the legislative record did not reflect a punitive legislative motive. *Id.* at 475–84. Under the *Nixon* test, freezing Duvalier assets does not violate the Bill of Attainder Clause. Such an action is not one, like the confiscation of property, that is traditionally forbidden by the Bill of Attainder Clause Nor is the action a functional equivalent, because the legislation has the legitimate nonpunitive purpose of aiding a foreign country and the legislative record displays no punitive motive. It should also be noted that the legislation leaves the ultimate issue of the title to these assets to the determination of courts under applicable state laws.

Second, the congressional action is not an improper usurpation of judicial power In *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), the Supreme Court held that under the authority delegated to him by IEEPA, the President could nullify attachments that various plaintiffs had obtained on Iranian property in both state and federal courts. Although the Court did not address the precise issue of whether this action usurped judicial powers because of its interference with pending litigation, the Court, in upholding the constitutionality of the nullification, implicitly held that the action was not a usurpation. *A fortiori*, freezing assets pending litigation — an action which permits an ultimate judicial determination on the merits — is not an unconstitutional usurpation of judicial power. Moreover, the Supreme Court has specifically upheld against separation of powers challenge a federal statute that assured plaintiffs that they would receive consideration of the merits of their claim despite a judicial decision *specifically* holding that the claim was barred by res judicata. *United States* v. *Sioux Nations*, 448 U.S. 371 (1980) (upholding statute that provided for review on the merits of an Indian Claims Commission finding, despite Court of Claims decision refusing to reach merits on the basis of res judicata).

Nor does Congress' direction to the President unconstitutionally interfere with his foreign policy prerogatives. Congress' authority to order a freeze of foreign assets, like its power to delegate such authority to the President under IEEPA, derives from the Foreign Commerce Clause. To be sure, Congress' direction in this case may have some incidental effect on the President's ability to conduct foreign policy. Other congressional action under the Foreign Commerce Clause, however, like the legislation restraining investment in a particular country or the imposition of tariffs, has a far more direct effect on the President's ability to conduct foreign policy. Yet to our knowledge no court has ever suggested that such legislation is unconstitutional for this reason.

jurisdiction of the United States. Through its findings in § 204(a), Congress defined Haiti's problem as that of being unable to secure assets in legal proceedings. Moreover, the mandate in § 204(a) refers specifically to assisting the efforts of Haiti to recover the Duvalier assets through legal proceedings. The legislative history also tends to confirm that the President's obligations are triggered by the existence of legal proceedings. As Representative Dixon stated in his remarks quoted above, § 204 "would require the President to use authorities . . . to freeze assets of Duvalier and his associates so that these assets cannot be removed during the period which Haiti's claims are considered through regular legal processes." 132 Cong. Rec. at 19717.

We therefore agree with Treasury that if the United States could somehow participate in the litigation over Duvalier assets to persuade the courts to preserve the assets, without bond, pending the conclusion of litigation, an assets freeze under § 204 would not be necessary because the problem Congress sought to address would no longer exist.[10] We note, however, that the Civil Division has considered the possibility of such participation but has concluded that such efforts would be unlikely to succeed.[11]

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[10] In this event, § 204's mandate could be satisfied by investigating the existence of Duvalier assets other than those subject to pending litigation.

[11] We do not think that the United States may avoid an assets freeze under § 204 by requiring that the Haitian government take action in litigation that it does not believe is in its best interests. For instance, counsel for the Haitian government has stated that Haiti will not file a RICO action against Duvalier in order to obtain federal court jurisdiction. Section 204 does not contemplate that the President will condition his assistance to Haiti on its filing a new suit or in taking some other action, but rather contemplates unilateral action by the President under the authorities referenced by IEEPA.

For similar reasons, we do not believe the United States may require Haiti to accept a grant of foreign assistance given under the condition that Haiti use the grant to post bond in pending litigation against Duvalier assets. Section 2346(a) of Title 22 authorizes the provision of Economic Support Funds as follows:

> The Congress recognizes that, under special economic, political, or security conditions, the national interests of the United States may require economic support for countries in amounts which could not be justified solely under part I of subchapter I of this chapter. In such cases, the President is authorized *to furnish assistance to countries and organizations, on such terms and conditions as he may determine*, in order to promote economic or political stability . . . .

(Emphasis added.)

The State Department argues that assistance, as the term is used in § 2346, refers only to funds which are provided under an arrangement with the beneficiary country. *See* Memorandum from Kenneth J. Vandevelde, Office of the Legal Advisor, Department of State to John O. McGinnis, Office of Legal Counsel, Department of Justice (Dec. 16, 1986). Therefore a unilateral decision by the United States to pay funds to a federal or state court or a bonding company for the benefit of Haiti would not constitute assistance as that term is used in § 2346. We agree with the Department of State's conclusion, because § 2346 clearly contemplates providing funds to countries rather than disbursing funds on behalf of countries without their consent. Therefore, in order to have foreign assistance funds used to post bond, the United States would have to give a conditional grant or loan to Haiti for this purpose. Haiti would be at liberty to refuse any funds provided under this condition and the United States would continue to be obligated to take action under § 204 of the Foreign Assistance Act.

We also note that the Department of State believes that the Special Foreign Assistance Act of 1986 would, in any event, preclude the provision of funds to Haiti to pay bonds, because Congress chose another means to satisfy the bond by granting the President the authorities referenced by IEEPA We would only need to reach this argument if Haiti demonstrated a willingness to accept a grant on the condition that it be used to post bond

Conclusion

We believe that § 204 of the Special Foreign Assistance Act of 1986 requires the President to prevent Duvalier assets that are subject or become subject to litigation from being dissipated until a final judgment on the ownership of the assets has been rendered. The President's obligations, however, are limited to actions necessary to prevent the removal of Duvalier assets which are subject to litigation. The statute thus does not require the President to freeze all Duvalier assets. Finally, if the United States government is able to preserve Duvalier assets *pendente lite* by means other than an assets freeze, such as by filing amicus briefs which persuade state courts to suspend their bond requirement, the President would not be required to exercise his authority under § 204.

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Release of Information Collected Under the Agricultural Marketing Agreement Act of 1937

A provision in the appropriations act for the Department of Agriculture relating to the release of information collected under the Agricultural Marketing Agreement Act of 1937 does not restrict the use of such information in the Department's rulemaking proceedings, in its prosecution of enforcement proceedings, or in its defense of regulatory actions under the 1937 Act. The restriction was intended solely to limit the Department's discretionary release of information to members of the public in response to Freedom of Information Act or other requests.

January 15, 1987

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF AGRICULTURE

This responds to your request for our opinion on the effect of a provision in the current appropriations act for the Department of Agriculture (USDA). The provision in question relates to the release of information collected under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§ 601 *et seq.* (1937 Act), and reads as follows:

> None of the funds provided in this Act may be expended to release information acquired from any handler under the Agricultural Marketing Agreement Act of 1937, as amended: *Provided*, That this provision shall not prohibit the release of information to other Federal agencies for enforcement purposes: *Provided further*, That this provision shall not prohibit the release of aggregate statistical data used in formulating regulations pursuant to the Agricultural Marketing Agreement Act of 1937, as amended: *Provided further*, That this provision shall not prohibit the release of information submitted by milk handlers.

Pub. L. Nos. 99–500, title VI, § 631, 100 Stat. 1783, 1783–30 (1986) and 99–591, title VI, § 631, 100 Stat. 3341, 3341–30 (1986) (collectively, § 631).

You wish to know whether and how § 631 affects USDA's ability to use information collected by it under the 1937 Act in connection with enforcement and rulemaking proceedings initiated by it under the 1937 Act, as well as in judicial or administrative challenges to USDA actions initiated by private

parties. The particular examples with respect to which you seek our guidance all involve situations in which the information in question might be introduced by USDA as evidence in connection with its own rulemaking activities, its prosecution of enforcement proceedings, and its defense of regulatory actions taken under the marketing order program established by the 1937 Act.

For reasons set forth in greater detail below, we believe that § 631 does not restrict USDA's ability to release information acquired from handlers under the 1937 Act in the course of its administration and enforcement of that Act, regardless of whether the information is relevant in an administrative or a judicial context, and regardless of whether USDA is in the position of a plaintiff or a defendant. Rather, § 631 was intended solely to limit USDA's discretionary release of information to members of the public, outside of the enforcement context, in response to requests under the Freedom of Information Act or otherwise.

In interpreting a statute, we look first to its text. Though couched in terms of a limitation on the expenditure of appropriated funds, as a practical matter § 631 functions as a direct restriction on USDA's release of information acquired from handlers under the 1937 Act. On the other hand, precisely because § 631 is a USDA appropriations limitation, it would seem to have no effect on other agencies' ability to use or disseminate the information in question.

There are three provisos to § 631's restriction on the release of information, only one of which is relevant here: the section explicitly does not prohibit release of information to "other Federal agencies for enforcement purposes."[1] We believe that it would be anomalous to suppose that Congress intended to allow other federal agencies freely to use information collected by USDA for their own enforcement purposes, while at the same time denying a similar freedom to USDA itself. Accordingly, we think that the ambiguously worded "enforcement" exception in § 631 must be read to reflect and incorporate Congress' expectation that the section would not restrict USDA's ability to use any information collected by it under the 1937 Act to carry out its own authorized enforcement functions.

Yet another feature of the statutory language supports this narrow reading of § 631's intended scope. This is the provision's use of the term "release" to describe what USDA may not do with information collected by it, as opposed to a broader term such as "disclose." The use of the term "release" suggests a concern with USDA's discretionary dissemination of information to the public, rather than an intent to inhibit authorized law enforcement activities. Where Congress has imposed restrictions on a federal agency's use of information in its possession, it has generally enacted laws prohibiting "disclosure" of such

[1] The wording of this proviso is somewhat ambiguous, because it is not clear whether another agency's "enforcement purposes" — as distinct from USDA's own enforcement purposes — *will justify* USDA's release of information. In any event, because § 631 restricts only USDA's ability to release information, this provision would not inhibit another agency to which the information was released by USDA under the proviso from in turn releasing it to nongovernmental parties in the course of its own authorized activities

information.[2] Moreover, although Congress has on occasion imposed restrictions on an agency's ability to disclose information in its possession to other agencies, we would not, in the absence of a very clear indication in the statutory language or legislative history, infer an intent to restrict an agency's ability itself to use information properly obtained by it to administer and enforce a statute for which it is responsible.

The legislative history of § 631 contains no such indication. To the contrary, it confirms that this section was not intended to restrict USDA's use of information in the enforcement context. The impetus for imposing a legislative limitation on USDA's discretionary release of information collected under the Act to private parties seems to have come in the first instance from the district court's decision in *Ivanhoe Citrus Ass'n* v. *Handley*, 612 F. Supp. 1560 (D.D.C. 1985). *Handley* was a "reverse" FOIA case in which California orange growers sought to prevent USDA from releasing certain lists of grower names and addresses collected by USDA under the Act. The court ruled against the growers, holding that the grower lists in question were not exempt from disclosure under FOIA, and that USDA had not abused its discretion in releasing the lists pursuant to a FOIA request.

In *Handley*, the court held, *inter alia*, that lists of names and addresses were not covered by a provision in the 1937 Act requiring that certain information collected under that Act be kept confidential. *See* 7 U.S.C. § 608d(2). Presumably, had this confidentiality provision in the 1937 Act applied to the lists in question, FOIA would have provided no basis for releasing them to a private party. *See* 5 U.S.C. § 552(b)(3). On the other hand, the confidentiality provision of the 1937 Act would have posed no bar to USDA's use of protected information for its own enforcement purposes under the Act, because it provides that protected information may be disclosed "in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired." 7 U.S.C. § 208d(2).

In July 1985, only a few days after the *Handley* decision was announced, the House Agriculture Committee reported out an amendment to the confidentiality provision of the 1937 Act. According to the Committee's report, the amendment was intended to extend the coverage of the confidentiality provision to the kind of information at issue in *Handley*. *See* H.R. Rep. No. 271, 99th Cong., 1st Sess., pt. 1, at 197 (1985) ("The amendment would overturn the legal basis used by the [*Handley*] court and the Administration to justify release of growers['] names and addresses. . . ."). Notwithstanding this apparent intention, however, the amendment reported by the House Agriculture Committee and ulti-

[2] *See, e.g.*, 18 U.S.C. § 1905 (generally prohibiting agency "disclosure" of confidential information and trade secrets); 15 U.S.C. § 2055(b)(1) (prohibiting "disclosure" by the Consumer Product Safety Commission); 5 U.S.C. § 1401 (permitting "disclosure" of confidential information and trade secrets received by the National Highway Traffic Safety Administration under the National Traffic and Motor Vehicle Safety of Act only "when relevant in any proceeding under this title"). *See also* Office of Legal Policy, U.S. Department of Justice, *Freedom of Information Act Case List* 317–23 (1986) (discussion of "Exemption 3" statutes).

mately enacted by Congress in December 1985 was worded so as to bring within the ambit of the confidentiality provision only "trade secrets and commercial or financial information." Pub. L. No. 99–198, § 663, 99 Stat. 1631 (1985).

Almost immediately, questions were raised as to whether grower lists would be considered "trade secrets and commercial or financial information." (Indeed, the *Handley* decision had explicitly held that they were not, at least for purposes of the FOIA's (b)(4) exemption. 612 F. Supp. at 1566.) It thus appeared that the 1985 amendment to the 1937 Act had not accomplished the Agriculture Committee's stated objective of protecting the grower lists at issue in *Handley* from FOIA disclosure, and that further legislative steps would be necessary.

When viewed against this background, § 631 appears to represent a second attempt to effect the desired limitation on USDA's discretion to release information collected from handlers under the 1937 Act in response to FOIA requests. That this new restriction on USDA was imposed through an appropriations act provision rather than by a second amendment to the confidentiality provision of the 1937 Act itself is probably best explained as a phenomenon of the modern legislative process: in recent years Congress has proven itself increasingly willing to use the relatively expeditious appropriations process to enact substantive law, rather than go through the arduous, time-consuming and often dangerous process of amending the United States Code.

As is often the case in such situations, the current USDA appropriations act has no formal legislative history that would confirm or refute our hypothesis about the connection between § 631 and the confidentiality provision of the 1937 Act. Nonetheless, we believe that this hypothesis offers the most plausible explanation of Congress' intent in enacting § 631. Accordingly, we believe § 631 should be interpreted in light of the 1937 Act's express intention to allow USDA to use information collected under the Act "in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party." 7 U.S.C. § 608d(2).

In sum, we believe that § 631 does not limit USDA's ability to release information in the context of exercising its enforcement and administrative responsibilities under the 1937 Act. Accordingly, it would appear that § 631 poses no bar to USDA's release of information to governmental or nongovernmental parties in any of the specific situations described in your letter.

As a final point, we note that because the restriction contained in § 631 was enacted as part of an appropriations act, there is a presumption that Congress intended it to be effective only for the fiscal period covered by that act. None of the generally accepted countervailing indications of permanence are present in either the text or nature of the provision. *See* General Accounting Office, *Principles of Federal Accounting Law* 2–34 to 2–37 (1982).[3] Accordingly, it is

[3] A provision in an appropriations act will be regarded as permanent if the language used or the nature of the provision makes it clear that such was of the intention of Congress. *Principles*, *supra*, at 2–34. Section 631 contains no language making clear Congress' intention to extend the provision's life beyond that of the

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our opinion that the restriction contained in § 631 will have no effect beyond the end of the fiscal period covered by the current USDA appropriations act, unless it is reenacted by Congress.

SAMUEL A. ALITO, JR.
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Office of Legal Counsel

[3] (. . . continued)
appropriations act in which it appears, and the nature of the restriction imposed does not necessarily imply intended permanence. The phrasing of a provision as an affirmative authorization rather than a restriction on the use of funds is generally regarded as an indication that Congress intended it to be permanent. *Id.* at 2–37. But § 631 is couched in terms of a limitation on USDA's use of funds rather than as a direct restriction on the release of information. Finally, the inclusion of a provision in the United States Code, another common indication of intended permanence, *id.* at 2–36, is missing here.

Application of Establishment Clause to School "Voucher" Program

A draft bill proposing issuance of compensatory education certificates to parents of eligible school children would not on its face violate the Establishment Clause even if the certificates would be redeemable at religious private schools.

February 2, 1987

MEMORANDUM OPINION FOR ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY

This memorandum records our comments on the draft Education Consolidation and Improvement Act of 1987. We focus on the Establishment Clause concerns raised by the "compensatory education certificates" program which would be created under § 106 of the bill. For the reasons set forth below, we believe that the program is facially constitutional. We caution, however, that the bill, as drafted, may be vulnerable to "as-applied" challenges under certain circumstances.

I

Section 106 of the bill would amend Chapter 1 of the Education Consolidation and Improvement Act of 1981 (the Act) by adding a new § 560. That section would authorize a local educational agency ("LEA") receiving Chapter 1 assistance to provide "compensatory education certificates" directly to the parents of eligible children,[1] in either of two circumstances. First, the LEA could provide such certificates if it determined that to do so "would be more *effective* . . . than direct service provided by the agency in meeting the needs of [eligible] children." Section 560(a)(1) (emphasis added). Second, the LEA could issue such certificates if it determined that they were "needed to provide *equitable* services to either public or private school children." Section 560(a)(2).[2] Section 560(b) provides that an LEA shall make such determinations about the need for certificates "with respect to individual children, grades, schools,

[1] Section 560(h) defines "eligible child" as "an educationally deprived child selected to participate in a local educational agency's Chapter 1 program" in accordance with §§ 556(b)(1),(2) and 557 of the Act (codified at 20 U.S.C. §§ 3805(b)(1), (2), 3806).

[2] These two criteria, effective and equitable administration, are already required of Chapter 1 programs. *See* 20 U.S.C. §§ 3805(b)(4), (5), 3806

attendance areas, or any combination thereof, or may make such certificates available on a district-wide basis." Section 560(b) further requires an LEA to "apply the same criteria to public and private school children in determining the extent to which it will provide . . . certificates."

Section 560(d)(1) states that certificates may be redeemed by parents only for "purchase [of] compensatory education services that meet the identified educational needs of [an] eligible child."[3] Subsection (d)(2) provides that these services may be purchased "from any public or private school, wherever located, that the local education agency determines is able to provide appropriate and effective compensatory educational services to the child."[4]

In sum, when an LEA, applying established and neutral criteria, determines that its Chapter 1 program is functioning ineffectively and/or inequitably with respect to any individual child or any group of eligible children, the LEA may provide compensatory education certificates directly to the parents of such children. The parents may then redeem the certificates for compensatory services at the public or private school of their choice.

II

The term "private school," as used in the draft bill, clearly encompasses both religious and non-religious private schools. Thus, it must be measured against the Supreme Court's Establishment Clause precedents dealing with aid to religious schools. This is an extraordinarily tangled area of the law, and many of the Court's decisions, when read together, are all but unintelligible. Nevertheless, the draft bill is sufficiently close to the programs upheld in *Witters* v. *Washington Department of Services for the Blind*, 474 U.S. 481 (1986), and *Mueller* v. *Allen*, 463 U.S. 388 (1983), that we believe that it survives facial constitutional scrutiny.

In *Witters*, the Court held that the Establishment Clause did not require a state to deny vocational assistance to a blind student merely because the student chose to apply the aid to religious training at a Bible college. Justice Marshall, writing for the Court, found that "any aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." 474 U.S. at 488 (footnote omitted). Consequently, the Court found that the aid program did not have the primary effect of advancing or inhibiting religion, and thus passed the second prong of the three-part test announced in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612–613 (1971). The

[3] The draft bill would establish some safeguards on the redemption of the certificates. Section 560(c)(1) would require that the amount for which such certificates may be redeemed must be one "that is equitable to all children selected to participate" in the LEA's overall Chapter 1 program. Subsection (c)(2) would further provide that the amount that an individual parent may receive by redeeming his or her certificate "shall not exceed the cost of compensatory services incurred by the parent." Section 560(g)(3) would require LEAs applying for Chapter 1 funds to provide assurances that it will exercise due diligence to ensure that payments made to parents are used only for authorized purposes, and to recover any misused funds.

[4] Under § 560(e), an LEA would be permitted to use Chapter 1 funds to provide transportation to children whose parents choose to purchase compensatory services from schools outside the children's attendance area. That section would define such transportation expense to be "an administrative cost."

Court noted that the parties had conceded the first prong of the test, a secular purpose. 474 U.S. at 485–86. It declined to apply the entanglement prong until after the lower court had an opportunity to do so itself on remand. *Id.* at 753 n.5.[5]

In *Mueller*, the Court voted 5–4 to uphold a state tax deduction for educational expenses, despite the fact that over 90 percent of the tax benefits under the statute flowed to religious school students. The Court readily found that the statute had a secular purpose: "a State's decision to defray the cost of educational expenses incurred by parents — regardless of the type of schools their children attend — evidences a purpose that is both secular and understandable." 463 U.S. at 395. Turning to the effects prong of the test, the Court again emphasized the facial neutrality of the statute, together with the fact that "public funds become available [to religious schools] only as a result of numerous private choices of individual parents of school-age children." 463 U.S. at 399.[6] The Court found no excessive entanglement, despite the fact that state officials were charged with disallowing deductions for materials used in teaching religion. The Court stated simply that that type of decision did not differ substantially from other types of decisions previously upheld, such as those involved in textbook loan programs. 463 U.S. at 403.

Like the programs upheld in *Witters* and *Mueller*, the draft bill has a clear secular purpose. Moreover, it would dispense aid directly to parents pursuant to a facially-neutral standard. As a consequence, whatever aid might flow to religious schools (and, as a practical matter, it may resemble the proportions present in *Mueller*) would do so only as a result of the individual choices of parents. Thus, under *Witters* and *Mueller*, it would not have the impermissible "primary effect" of advancing religion. Finally, whatever "entanglement" might result from an LEA's duty to approve programs and monitor funds would approximate that sanctioned in *Mueller*. In sum, we think that the program proposed in the draft bill would fit within the holdings of *Witters* and *Mueller*, and hence be facially constitutional.

However, neither *Witters* nor *Mueller* involved a state officer in the determination of eligibility. Therefore, we wish to caution that if an LEA distributes certificates predominantly to religious school students — and especially if it

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[5] Justice Marshall's opinion also referred to the fact that only a small portion of the state aid would in fact end up in the hands of religious schools. *See* 474 U.S. at 488. However, this portion of his analysis was effectively disavowed by five Justices writing separately. Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, stated that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon* . . . test, because any aid to religion results from the private choices of individual beneficiaries." *Id.* at 491 (Powell, J., concurring) (footnote omitted). This was true, he said, regardless of the percentage of "private choices" which ultimately benefited religious institutions. *See id.* at 491 n.3. Justice O'Connor also did not join the relevant portion of Justice Marshall's opinion. *See id.* at 493 (O'Connor, J., concurring in the judgment and concurring in part). Finally, Justice White reiterated his long-standing view that the "the Court's decisions finding constitutional violations where a state provides aid to private schools or their students misconstrue the Establishment Clause and disserve the public interest." *Id.* at 490 (White, J., concurring). *See also Mueller* v. *Allen*, 463 U.S. 388, 401 (1983) ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.").

[6] The Court also cited several "characteristics" of the program, most notably the fact that the benefit was available for all parents. *See* 463 U.S. at 396–399.

does so on a school-wide basis, then it risks an as-applied challenge. Justice Powell's opinion in *Witters* emphasized that, in his view, a program must be "*wholly* neutral." 474 U.S. at 490–91 (Powell, J., concurring) (emphasis added). Likewise, in her separate opinion, Justice O'Connor stressed her own "reasonable person" version of the *Lemon* test: "no reasonable observer is likely to draw from the facts before us an inference that the state itself is endorsing a religious practice or belief." *Id.* at 493 (O'Connor, J., concurring in the judgment and concurring in part); *cf. Lynch* v. *Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). As a practical matter, a facially neutral program like this one that nevertheless accords substantial discretion to state officials to determine the availability of certificates (and which may then result in certificates being issued predominantly to religious school students by virtue of such state rather than private decisions) might be insufficiently neutral in application and run afoul of the considerations outlined by Justices Powell or O'Connor, or both.

The chances of an as-applied challenge would diminish considerably, in our judgment, if the discretion of the LEA was more limited, thereby lessening the involvement of the state in the determination of the availability of certificates. In this regard, § 560 could provide that once the LEA determined that when a given percentage of eligible students were not being effectively or equitably served, certificates would be available on an area-wide or district-wide bases. This change would preclude any argument that an LEA administrator had favored religious schools by a determination under the effectiveness and equitability standards that predominantly resulted in the parents of children enrolled in religious schools being eligible for certificates.

DOUGLAS W. KMIEC
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Legal Effect of Joint Resolution Disapproving the President's Pay Recommendations

A joint resolution of Congress disapproving the President's pay recommendations under the Federal Salary Act of 1967 has no legal force when the joint resolution was passed by one house after the expiration of the statutorily prescribed 30–day period for Congress to disapprove the recommendations. The recommended pay raises are therefore effective. Congress remains free, however, to repeal those pay raises through legislation for that purpose.

February 9, 1987

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This responds to your request for our opinion whether § 3 of H.R.J. Res. 102 effectively "disapproved" the recent pay recommendations made by the President pursuant to the Federal Salary Act of 1967, 2 U.S.C. §§ 351 *et seq.* We believe § 3 has no legal force, because H.R.J. Res. 102 was passed by the House after expiration of the statutorily prescribed 30–day period for a joint resolution of disapproval. Therefore, the salary increases become effective in accordance with 2 U.S.C. § 359.

The Federal Salary Act was intended to provide a systematic method of adjustment in the rates of pay for the Vice President, members of Congress, members of the federal judiciary, and most positions in the Executive Branch covered by the Executive Schedule. The Act creates a Commission on Executive, Legislative, and Judicial Salaries, to be established every four years, with a mandate to review and recommend to the President appropriate salary levels for the specified officials. *Id.* §§ 351, 356. Not later than December 15 of the fiscal year in which the review is conducted, the Commission is required to submit to the President a report of the results of its review and its recommendations as to appropriate salary levels. *Id.* § 357. The President, in turn, must "include, in the budget next transmitted . . . by him to the Congress . . . his recommendations with respect to the exact rates of pay which he deems advisable, for those offices and positions." *Id.* § 358. These recommendations become effective in accordance with § 359(2)[1] "unless any such recommendation is disapproved by a joint resolution agreed to by the Congress not later than the last day of the 30–day period which begins on the date . . . such recommendations are transmitted to the Congress." *Id.* § 359(1).

[1] Section 359(2) provides that the "effective date" of the recommended rates of pay "shall be the first day of the first pay period which begins for such office or position after the end of the 30–day period [for congressional review]."

Pursuant to this statutory scheme, in January the President submitted, with the budget, recommended pay increases for the covered positions. The 30–day period provided by § 359(1) for passage of a joint resolution of disapproval expired at midnight, February 3, 1987. On January 29, 1987, well before expiration of the period, the Senate passed H.R.J. Res. 102. As passed by the Senate, § 3 of H.R.J. Res. 102 provides that:

> The recommendations of the President relating to rates of pay for offices and positions within the purview of section 225(f) of the Federal Salary Act of 1967 [2 U.S.C. § 356], as included (pursuant to section 225(h) of such Act [2 U.S.C. § 358]) in the budget transmitted to the Congress for fiscal year 1988, are disapproved.

The House, however, did not take final action on H.R.J. Res. 102 until February 4, 1987, the day after expiration of the 30–day period prescribed by § 359(1). Although the resolution passed by both Houses of Congress is identical and therefore will become law if signed by the President, we believe that the delay in House action beyond the statutory 30–day period rendered ineffective Congress' action disapproving the raise.

To our knowledge the issue raised is one of first impression. We start from the well-founded premise that Congress could pass legislation at any time to set specific rates of pay for the covered positions, consistent with constitutional limitations.[2] Clearly, Congress cannot bind itself legislatively from enacting future legislation. Congress could, for example, pass a bill directing that the rates of pay for the covered positions be no more than the rates payable as of a given date, or actually setting specific salary levels. Such legislation, if signed by the President, would supersede the effectiveness of the raises recommended by the President under the Salary Act.[3] Although it can be argued that the difference between such legislation and the resolution of disapproval contained in H.R.J. Res. 102 is only formalistic and that Congress' inclusion of § 3 in the resolution must therefore be given effect, we believe the sounder view is that Congress did not intend in this instance for the disapproval to have any legal force and effect.

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[2] The Compensation Clause of the Constitution, art. III, § 1, provides that federal judges shall receive "a Compensation, which shall not be diminished during their Continuance in Office." Under *United States* v. *Will*, 449 U.S. 200 (1980), a judge's salary increase "'vests' for purposes of the Compensation Clause *only when it takes effect* as part of the compensation due and payable to Article III judges." *Id.* at 229 (emphasis added). Because § 359(2) of the Salary Act provides that the recommended pay increases become effective on the first day of the first pay period after expiration of the 30 days provided for congressional review, we read *United States* v. *Will* to mean that legislation to deny the recommended raises to members of the judiciary would have to be passed by Congress and signed by the President before the beginning of the next applicable pay period, which we understand is March 1, 1987.

[3] Congress has, in fact, frequently used the appropriations process to set specific salary levels for federal employees that are different from those set pursuant to existing statutory schemes (such as the Salary Act and 5 U.S.C. § 5305). The most recent example is § 144 of last year's Continuing Resolution, Pub. L. Nos. 99–500 and 99–591, in which Congress mandated an across-the-board three-percent pay increase for federal employees.

It is clear, both from the language of § 3 which specifically references the procedures of the Salary Act as well as the debates on H.R.J. Res. 102, that both Houses of Congress understood they were acting pursuant to the statutory scheme set up by the Federal Salary Act, including the 30–day time limit provided in § 359(1). *See, e.g.*, 133 Cong. Rec. 2273 (1987) (remarks of Sen. Glenn); 133 Cong. Rec. 2687–88 (1987) (remarks of Rep. Ford). There was also considerable doubt voiced in both Houses that failure to act within the statutory deadline would render any vote on the proposed resolution of disapproval moot. For example, Representative Ford, Chairman of the House Post Office and Civil Service Committee, which had jurisdiction over the recommended pay raises, stated that:

> Under the explicit terms of section 225 of the Federal Salary Act of 1967, it is clear that the deadline for congressional disapproval of the President's pay recommendations expired at midnight last night, February 3. Since the House did not act by that deadline, what we do today is meaningless.

133 Cong. Rec. 2687 (1987). Similar views were voiced by other members of the House and Senate. *See, e.g.*, 133 Cong. Rec. 2282 (1987) (remarks of Sen. Humphrey); *id.* at 2288 (remarks of Sen. Wilson); *id.* at 2278 (remarks of Sen. Grassley); 133 Cong. Rec. 2688 (1987) (remarks of Rep. Smith). We have found no contrary statements in the debates to suggest Congress wished to ignore the 30–day limitation imposed by § 359(1). Therefore, while the Senate certainly intended to disapprove the proposed increases, its intent was to do so within the 30–day period, consistent with the statutory scheme; passage of H.R.J. Res. 102 by the Senate does not necessarily imply any intent or authorization once that 30–day period expires. Because of the failure of the House to act within the 30–day period, its intent obviously was not to disapprove the recommended increase within the required 30–day period. Indeed, in light of the floor statements indicating that the House believed action on the bill after the 30th day to be meaningless, we cannot say that the House intended to disapprove the President's recommendations at all.[4] Looking at the intent of both Houses, we conclude that there was no clear mutual intent to disapprove the recommended pay raises.

In any event, we believe that Congress is correct in its interpretation of the effect of the 30–day deadline in § 359(1). Although Congress obviously could achieve the same result, *i.e.*, continuance of executive, legislative, and judicial salaries at their current levels through other types of legislation, it chose to use the mechanism provided in § 359(1). Because Congress chose to limit its expression of disapproval within the terms of the Federal Salary Act, including the requirement of a joint resolution of disapproval passed within 30 days following the President's transmittal of his recommendations, its actions must

[4] In a sense, as of 12:01 a.m. on February 4, 1987, there were no "recommendations" of the President to be approved; by operation of statute, those recommendations became actual pay increases, automatically effective as of the first day of the next pay period.

be interpreted accordingly. Had Congress either successfully stated its disapproval within the requisite 30 days, or, before or after that period, expressly indicated a willingness to disregard the existing statutory scheme, for example, by amending § 359 or by expressly setting specific salary levels by legislation, Congress could have easily and effectively disapproved the pay raises. Congress, however, expressly acted within the confines of the Federal Salary Act, and we believe the time limit imposed by that Act is therefore controlling.

In sum, although the question is novel, we believe that § 3 of H.R.J. Res. 102 does not legally roll back the salary increases recommended by the President. Those increases must therefore be put into effect, subject to any subsequent congressional repeal of the pay raise as suggested above.

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Proposed Legislation Providing Authority for the Armed Forces to Recover Remains of Persons Deceased as a Result of Armed Forces Operations

Congress' authority to make rules for the United States armed forces under the Constitution, art. I, § 8, cl. 14, allows it to enact legislation governing the recover of the remains of members of the armed forces. Any grant to the armed forces of jurisdiction over the remains of non-military persons killed as a result of armed forces operational activities, however, may exceed Congress' constitutional authority.

February 20, 1987

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS

A proposed bill would give the armed forces "primary jurisdiction to recover and examine the remains of (1) any member of an armed forces; or (2) any other person, . . . whose death is believed to have been the result of any operational activity of the armed forces." According to the Department of Defense, at present:

> [J]urisdiction to recover the remains and investigate the death of any person generally rests with the government having jurisdiction over the location where the remains were found, regardless of the cause or suspected cause of death. In the United States, such jurisdiction generally rests with State or local governments, because Federal legislation has not preempted that right.

Consequently, "the armed forces are often denied, or are unable to obtain, the kind of information which could be obtained from full post-mortem examinations."

We see no constitutional impediment to a statute giving the armed forces primary jurisdiction over the remains of members of the armed forces. Such a statute would seem to fall squarely within Congress' power under Article I, § 8, cl. 14 of the Constitution "[t]o make Rules for the Government and Regulation of the land and naval Forces."

The proposed bill, however, goes further. It potentially would preempt most state authority over the remains of anyone who is believed to have been killed as a result of any military operations. Examples would include those killed as a result of a military jet crashing in a residential area or those killed as a result of poisonous gas leaked from a military transport truck. The power to make rules

for the armed forces does not extend this far. *See Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234 (1960). In that case, the Supreme Court rejected the claim that Congress has power to subject civilians to court martial jurisdiction under Article I, § 8, cl. 14, noting that power extends only to persons whose "*status* . . . can be regarded as falling within the term 'land and naval Forces.'" *Id.* at 241 (emphasis in original). The Court continued:

> Without contradiction, the materials furnished show that military jurisdiction has always been based on the "status" of the accused, rather than on the nature of the offense. To say that military jurisdiction "defies definition in terms of military 'status'" is to defy the unambiguous language of Art. I, § 8, cl. 14, as well as the historical background thereof and the precedents with reference thereto.

Id. at 243 (footnote omitted).

The Necessary and Proper Clause does not enhance Congress' power to enact the proposed bill.[1] That Clause empowers Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution [Congress' enumerated powers], and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Although the Necessary and Proper Clause affords Congress wide latitude in the choice of means to accomplish ends within the purview of its enumerated powers, *see McCulloch* v. *Maryland* 6, 17 U.S. (4 Wheat.) 316, 420 (1819), it confers no additional substantive authority. Thus, if Congress' power under Article I, § 8, cl. 14 extends only to members of the land and naval forces, then the Necessary and Proper Clause cannot be interpreted to give Congress the power to regulate civilians as a means of regulating the armed forces.[2] This was the conclusion of the Court in *Kinsella*, *supra*. Thus, after concluding that Article I, § 8, cl. 14 extends only to actual members of the armed forces, the Court rejected the contention that the Necessary and Proper Clause authorizes Congress to "include civilian dependents within the term 'land and naval forces' as a proper incident to [the Article I, § 8, cl. 14] power and necessary to its execution." *Id.* at 247–48.[3]

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[1] It may, however, be possible to read Congress' enumerated powers, in conjunction with the Necessary and Proper Clause, to authorize the application of certain military regulations to civilians who have voluntarily subjected themselves to such regulation, such as the civilian pilot of a chartered military flight. Unlike the regulation of civilians generally, regulation of such individuals may be necessary "[t]o raise and support Armies," and "[t]o provide and maintain a Navy."

[2] This is so even though as an administrative matter it may sometimes be difficult to distinguish between the remains of those who are, and those who are not, members of the armed forces. Although there may be an argument that a statute giving the military initial jurisdiction over remains in these more limited circumstances would be constitutional, the bill as drafted is not so limited.

[3] Nor can the statute be justified as a necessary and proper means of carrying into execution "the executive Power" or that attendant to the President's role as "Commander in Chief" or any of the other powers vested "in the Government of the United States, or in any Department or Officer thereof." The Department of Defense does not reveal how the States' primary jurisdiction over the remains of civilians killed as a result of military operations would affect the President's ability to exercise the executive power or to function as Commander in Chief.

To be upheld, the proposed bill must be a proper exercise of one of Congress' other enumerated powers. Although the Supreme Court has interpreted the Commerce Clause expansively, *see Perez* v. *United States*, 402 U.S. 146 (1971); *Daniel* v. *Paul*, 395 U.S. 298 (1969); *Wickard* v. *Filburn*, 317 U.S. 111 (1942), reliance on the commerce power in this instance presses even the extraordinary breadth of the commerce power found by the Supreme Court, and, in our view, disregards the enumerated power most relevant[4] and in so doing invades a core responsibility and prerogative of the States' reserved powers. Although we cannot say with confidence that the Court would refuse to uphold even this extraordinary measure as an appropriate exercise of the commerce power, *see Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), neither can we conclude that the bill would not exceed Congress' admittedly broad commerce power.

Under these circumstances, we do not believe it is appropriate for the administration to propose legislation that requires Congress to rely on a virtually unlimited view of the commerce power. Therefore, we suggest that the bill be redrafted to apply only to the remains of members of the armed forces.

DOUGLAS W. KMIEC
Deputy Assistant Attorney General
Office of Legal Counsel

[4] There is an additional consideration that is not without force. If, as we think, Congress is not empowered to preempt the States' jurisdiction over the remains of civilians under the enumerated power most closely related to the purpose of the bill — the power to make rules governing the armed forces — then the commerce power should not lightly be interpreted to circumvent the limitation inherent in the delegation of that power. For example, Article I, § 8, cl. 4 empowers Congress "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." This power does not authorize Congress to enact private bankruptcy laws. *See Railway Labor Executives' Ass'n* v. *Gibbons*, 455 U.S. 457 (1982). Thus, it would be legally questionable to interpret the Commerce Clause to authorize Congress to enact nonuniform bankruptcy laws.

Constitutionality of Proposed Legislation Requiring Renomination and Reconfirmation of Executive Branch Officers Upon the Expiration of a Presidential Term

A bill prohibiting the heads of Executive and Military Departments and certain other Executive officers from remaining in their positions during a subsequent Presidential term unless renominated by the President and reconfirmed by the Senate would, if applied to officers appointed before the bill was enacted, unconstitutionally interfere with the President's appointment and removal powers. Even were the bill limited to prospective effect, it would be subject to serious constitutional doubt as contrary to the Constitution's placement of the Executive power in the President.

March 6, 1987

LETTER FOR THE CHAIRMAN,
SENATE COMMITTEE ON THE JUDICIARY

This letter presents the views of the Department of Justice on S. 318, the Senate Confirmation Act of 1987. The Department of Justice strongly opposes the enactment of this bill.

The bill would provide that the heads of the Executive and Military Departments, the United States Trade Representative, the Director of the Office of Management and Budget, the Director of the Central Intelligence Agency, and the Director of the Arms Control and Disarmament Agency who have served in that position during the last year of a Presidential term may not serve in the same position during the succeeding Presidential term unless reappointed by the President by and with the advice and consent of the Senate.[1] The bill does not facially distinguish between officers appointed after its enactment and officers who are incumbent at the time of the bill's enactment.

The application of the reconfirmation requirement to persons in office on the effective date of the bill clearly would be unconstitutional. At present, these incumbent officers serve at the pleasure of the President and could therefore remain in office after the expiration of the term of the President who appointed them, if he were re-elected or if a newly elected President should wish to retain

[1] Section 2(b) of the bill would require that all information obtained in the course of a background investigation conducted by the Federal Bureau of Investigation with respect to specified nominees which is transmitted to the President shall also be transmitted to the Senate. The bill does not explicitly waive or preserve any statutory non-disclosure provisions that could apply to materials found in a background investigation, such as brand jury materials, for example. We believe that Congress should make clear its intent to waive or preserve any such provisions.

them.[2] Under the bill, however, they could not serve during the next Presidential term unless reappointed by the President by and with the advice and consent of the Senate. Thus, the bill would purport to remove incumbent officers from their offices and in so doing would contravene the Constitution.

As the Supreme Court held in *Myers* v. *United States,* 272 U.S. 52, 122 (1926), the power to remove officers of the Executive Branch is vested exclusively in the President with the exception of impeachment or the *bona fide* abolition of their office. Indeed, the exclusivity of the President's removal power cannot be circumvented by an attempt of the Senate to withdraw a confirmation; 36 Op. Att'y Gen. 382 (1931); *United States* v. *Smith,* 286 U.S. 6 (1932); by cutting off of the salaries of incumbent officials, *United States* v. *Lovett,* 382 U.S. 303 (1946); by making new, limiting qualifications for an office applicable to an incumbent, 111 Cong. Rec. 17597–98 (1965) (statement of Assistant Attorney General Schlei); or by "ripper" legislation which purports to abolish an office and immediately recreate it. Veto Message re: S. 518, 93rd Cong., 1st Sess., 9 Weekly Comp. Pres. Doc. 681 (1973).

The proposal raises constitutional concerns, even as to officers who are appointed after the enactment of the bill. The United States Constitution explicitly states: "The executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, §1. In addition, §3 of the same article provides that the President "shall take Care that the Laws be faithfully executed." A law which has the effect of subjecting executive officers to renomination and reconfirmation by the Senate is in tension with the placement of the executive power in the President. If the Congress sets a duration for the service of executive officers, those officers will naturally be responsive to the concerns of the Senate in executing the laws; otherwise, those officers would run the risk that the Senate would not reconfirm them at the end of their term.[3] Such a sharing of the responsibility for the execution of the laws is at odds with separation of powers principles.[4]

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[2] The opinion of the Attorney General in 36 Op. Att'y Gen. 12 (1929) dealt with that situation.

[3] Making executive officers accountable in this manner to the Legislative Branch is contrary to our constitutional scheme. As the Supreme Court has explicitly recognized, the power to remove is "an indispensable aid" to the "effective enforcement of the law." *Myers* v. *United States,* 272 U.S. 52, 132 (1926). The Court, therefore, found this power to be an incident of the President's power to take care that the laws be faithfully executed. Last Term, in *Bowsher* v. *Synar,* 478 U.S. 714 (1986), the Supreme Court recognized the logical corollary to this principle:

> To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Congress could simply remove, or *threaten to remove,* an officer for executing the laws in any fashion found to unsatisfactory to Congress. This kind of congressional control over the execution of the laws . . . is constitutionally impermissible.

Id. at 726–27 (emphasis added). Though the encroachment on executive power posed by this bill is different in degree from that presented in *Bowsher,* in which Congress had the sole authority to remove the Comptroller General, the principle is the same. Legislation giving Congress the effective power of removal over executive officers, even when applied prospectively, is questionable in view of the Constitution's exclusive vesting of the executive power in the President and his constitutional duty to take care that the laws be faithfully executed.

[4] The Constitution specifies the role of the Congress in the removal of executive officers: the House has the sole power of impeachment, U.S. Const. art. I, §2, cl. 5, and the Senate has the sole power to try all impeachments. *Id.*, art. I, §3, cl. 6.

Although the Tenure of Office Act of 1867 furnishes an historical example of legislation purporting to limit the terms of the Heads of Departments, that precedent hardly resolves our constitutional concerns.[5] The Tenure of Office Act led to a constitutional crisis of immense proportions and was repealed once the turmoil of the Reconstruction Period had subsided. While other issues were also involved, we believe that this prompt repeal is some evidence of the suspect nature of such limitations.

On policy grounds, we believe that history demonstrates the inadvisability of this legislation in light of the existing power of Congress to call high government officials to account for their conduct in office. Similarly, an electorate dissatisfied with a President's direction of his subordinate officers has not hesitated to express its view through the Presidential ballot. So too, the electorate's satisfaction with such direction is expressed through the re-election of a President. The Constitution's mechanism for democratic, electoral expression should not be thwarted or made dependent upon idiosyncratic reasons which may determine the fate of an individual reconfirmation.

We are also concerned about the disruption to the operations of the government that would be occasioned by this proposal. The present disruption which occurs when a new President takes office, selects new administrators and secures their confirmation by the Senate is an adjunct to the President's constitutional responsibility for the execution of the laws. He must be able to select those who shall assist him in his constitutionally assigned task. There is, however, no corresponding constitutional justification for the interference with the operations of the government when a President seeks to retain officials who are in office.

We conclude, therefore, that S. 318 would be unconstitutional if applied to persons holding any of the offices covered by it on the effective date of the bill. Furthermore, in our judgment, the bill would be subject to serious constitutional doubt even if it had only a prospective effect. For these reasons, the Department of Justice strongly recommends against enactment of the legislation and will urge its veto should it be enacted.

The Office of Management and Budget has advised this Department that the submission of this report is in accord with the Administration's program.

JOHN R. BOLTON
Assistant Attorney General
*Office of Legislative Affairs**

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[5] Section 1 of the Tenure of Office Act of 1867, 14 Stat. 430, provided in pertinent part

> [t]hat the Secretaries of the Treasury, of War, of the Navy, and of the Interior, the Postmaster-General, and the Attorney-General, shall hold their offices respectively for and during the term of the President by whom they may have been appointed and for one month thereafter, subject to removal by and with the advice and consent of the Senate.

This provision was enacted during the struggle between Congress and President Andrew Johnson and was repealed immediately after President Grant assumed the Presidency Act of Apr. 5, 1869, §1, 16 Stat. 9. The position of the Postmaster General was not covered by this repeal because the limitation of the Postmaster General's term had been incorporated in the legislation codifying the laws governing the Post Office Department. This limitation on the tenure of the Postmaster General lasted until the recent establishment of the U S Postal Service.

*NOTE: This letter was drafted by the Office of Legal Counsel for the signature of the Assistant Attorney General for the Office of Legislative Affairs

Relevance of Senate Ratification History to Treaty Interpretation

The most relevant extrinsic evidence of a treaty's meaning are exchanges between the parties negotiating it, *i.e.*, the President and the foreign power. The portions of the ratification record entitled to the greatest weight are representations of the Executive, who is in essence the draftsman of the treaty. The Senate's advice and consent function was designed by the Framers as a check on the President's treaty-making power, and the Senate's deliberations cannot be ignored altogether. Nonetheless, in all but the most unusual cases, the ratification record is not the determinative source of evidence as to the treaty's meaning under domestic law.

April 9, 1987

MEMORANDUM OPINION FOR THE LEGAL ADVISER,
DEPARTMENT OF STATE

I. Introduction and Summary

This memorandum responds to your request for the views of this Office concerning the relevance of the Senate's deliberations on ratification of a treaty to subsequent interpretations of ambiguous treaty language by the Executive Branch. We use the term "deliberations" or "ratification record" to encompass sources such as hearings, committee reports, and floor debates, which are generally analogous to the "legislative history" of domestic statutes. Our focus is on the relevance of those sources to interpretation of a treaty as domestic law, *i.e.*, their relevance to the President's constitutional responsibility to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.[1] We understand that you are reviewing separately the relevance that would be ascribed under international law to the Senate's ratification record.

The question you raise does not lend itself to any clear or easy answer. As discussed below, the dual nature of treaties as international agreements and as domestic law and the concomitant division of the treaty-making power between the President and the Senate create an inevitable tension. Primarily, treaties are international obligations, negotiated by the President in his capacity as the "sole organ of the federal government in the field of international relations," *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320

[1] It is indisputable that treaties are among the "supreme Law[s] of the Land," U.S. Const. art. VI, cl. 2, and that the President's constitutional duty under Article II extends to treaties as well as to statutes and the Constitution itself. *See* 1 Op. Att'y Gen. 566, 570 (1822); *In re Neagle*, 135 U.S. 1, 64 (1890).

(1936). The most relevant evidence of the meaning of a treaty lies in the mutual exchange of views between the negotiating parties — an exchange in which the Senate does not formally participate unless it explicitly conditions its consent to a treaty and that condition is communicated to and accepted by the other party. Because the advice and consent function of the Senate, however, was designed by the Framers as a constitutional check on the President's otherwise broad authority to make treaties that have the force of law, we believe that the deliberative record that is created when the Senate advises and consents to a treaty cannot be ignored in the interpretative process. Nonetheless, in all but the most unusual case, the ratification record would not be the determinative — or even the primary — source of evidence as to the treaty's meaning under domestic law.

In determining the weight to be assigned to that record, it should be observed that, conceptually, the constitutional division of treaty-making responsibility is essentially the reverse of the division of law-making authority. Congress initially agrees upon and enacts the language of domestic legislation, while the President reserves the right to determine whether that legislation will go into effect (subject, of course, to the override of any veto). Treaties, however, are proposed and negotiated by the President, subject to the approval or disapproval of the Senate. Given this conceptual framework, it is clear that the portions of the treaty ratification record that should be accorded more weight as to the treaty's meaning are the representations of the executive — the draftsman, in effect, of the treaty. Statements by individual Senators, or even groups of Senators, are certainly entitled to no more consideration — and perhaps less — than the limited weight such statements are given in the interpretation of domestic legislation when they are not confirmed by the legislation's sponsor in colloquy or otherwise.

II. Constitutional Division of Treaty Authority

The powers of the national government were deliberately divided by the Framers among the three coordinate branches, because they considered the concentration of governmental power to be the greatest threat to individual liberty. "Basic to the constitutional structure established by the Framers was their recognition that '[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.'" *Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982) (quoting *The Federalist* No. 47, at 300 (J. Madison) (H. Lodge ed. 1888)). Accordingly, "[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." *INS* v. *Chadha*, 462 U.S. 919, 951 (1983); *see also Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976). The Supreme Court has long acknowledged that the partitions separating each branch of government from the others must be maintained

inviolable if liberty is to be preserved. "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *INS* v. *Chadha*, 462 U.S. at 951.

Under this separation of powers, the President has a dual role with respect to treaties. First, the President is responsible for "making" treaties, *i.e.*, entering into negotiations with foreign governments and reaching agreement on specific provisions. U.S. Const. art. II, § 2, cl. 2. Second, as part of his responsibility to "take Care that the Laws be faithfully executed,"[2] and as the "sole organ of the federal government in the field of international relations,"[3] the President is responsible for enforcing and executing international agreements, a responsibility that necessarily "involve[s] also the obligation and authority to interpret what the treaty requires." L. Henkin, *Foreign Affairs and the Constitution* 167 (1972) (Henkin); *see also Collins* v. *Weinberger*, 707 F.2d 1518, 1522 (D.C. Cir. 1983); American Law Institute, *Restatement of the Law, Foreign Relations Law of the United States (Second)*, §§ 149, 150 (1965) (*Restatement (Second)*); *accord* American Law Institute, *Restatement of the Law, Foreign Relations Law of the United States (Revised)* (Tentative Final Draft, July 15, 1985) § 326 (*Restatement (Revised)*).[4]

The President's authority to make treaties is shared with the Senate, which must consent by a two-thirds vote.[5] This "JOINT AGENCY of the Chief Magistrate of the Union, and of two-thirds of the members of [the Senate]"[6] reflects the Framers' recognition that the negotiation and acceptance of treaties incorporates both legislative and executive responsibilities:

> [T]he particular nature of the power of making treaties indicates a peculiar propriety in that union. Though several writers on the subject of government place that power in the class of executive authorities, yet this is evidently an arbitrary disposition; for if we attend carefully to its operation it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive

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[2] U.S. Const. art. II, § 3.

[3] *United States* v. *Curtiss-Wright Export Corp*., 299 U.S. at 320; *see also Haig* v. *Agee*, 453 U.S. 280, 291–292 (1981); *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 190 (1948).

[4] The President's interpretation of a treaty is, of course, subject to review by the courts in a case or controversy that meets Article III requirements. *See* U.S. Const. art. III, § 2 ("The judicial Power shall extend to all Cases, . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"); *see also Kolovrat* v. *Oregon*, 366 U. S 187, 194 (1961); *Factor* v. *Laubenheimer*, 290 U.S. 276, 294 (1933); *Jones* v. *Meehan*, 175 U.S. 1, 32 (1899).

[5] "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . . ." U.S. Const. art. II, § 2, cl. 2.

[6] *The Federalist* No. 66, at 406 (A. Hamilton) (C. Rossiter ed. 1961).

> magistrate. The power of making treaties is, plainly, neither the one nor the other . . . . The qualities elsewhere detailed as indispensable in the management of foreign negotiations point out the executive as the most fit agent in those transactions; while the vast importance of the trust and the operation of treaties as laws plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.

The Federalist No. 75, at 450–51 (A. Hamilton) (C. Rossiter ed. 1961); *see also The Federalist* No. 64, at 390–93 (J. Jay); *The Federalist* No. 66, at 402–03 (A. Hamilton); *see generally* Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate*, 98th Cong., 2d Sess. 25–28 (Comm. Print prepared for the Senate Comm. on Foreign Relations, 1984) (CRS Study). Rather than vest either Congress or the President with the sole power to make treaties, the Framers sought to combine the judgment of both, providing that the President shall make the treaties, but subject to the "advice and consent" of the Senate. Thus, the Framers included the Senate in the treaty-making process because the result of that process, just as the result of the legislative process, is essentially a law that has "the effect of altering the legal rights, duties and relations of persons . . . outside the Legislative Branch." *INS* v. *Chadha*, 462 U.S. at 952. As discussed above, however, conceptually the constitutional division of treaty-making responsibility between the Senate and the President is essentially the reverse of the division of law-making authority, with the President being the draftsman of the treaty and the Senate holding the authority to grant or deny approval.

III. Senate Practice

In practice, the Senate's formal participation in the treaty-making process begins after negotiation of the treaty.[7] At that time, the President transmits the treaty to the Senate, with a detailed description and analysis of the treaty, and any protocols, annexes, or other documents that the President considers to be integral parts of the proposed treaty. *See* CRS Study at 105. Under the Senate's rules, treaties are referred to the Senate Foreign Relations Committee,[8] which

[7] President Washington attempted to consult with the Senate, with limited success, on the negotiation of several treaties with the Indians. By 1816 the practice had become firmly established that the Senate would grant its "advice and consent" to treaties already negotiated by the President or his representatives. *See* Henkin at 131–132; CRS Study at 34–36.

[8] Although jurisdiction to review treaties is vested solely in the Foreign Relations Committee, Rule 25, Standing Rules of the Senate, S. Doc. No. 99–13, 99th Cong., 1st Sess. (1985), upon occasion other committees have asserted an interest in the subject matter of the treaty, even though they have no jurisdiction to make formal recommendations. For example, the Senate Armed Services Committee has held extensive hearings on the "military implications" of various treaties, including the ABM and SALT II treaties. *See Hearings on the Military Implications of the Treaty on the Limitations of Anti-Ballistic Missile Systems and the Interim Agreement on Limitation of Strategic Offensive Arms before the Senate Comm on Armed Services*, 92d Cong., 2d Sess. (1972); *Hearings on the Military Implications of the Treaty on the Limitation of Strategic Offensive Arms and Protocol Thereto before the Senate Comm. on Armed Services*, 96th Cong , 1st Sess. (1979); *see generally* CRS Study at 106–07.

may hold hearings to develop a record explaining the purposes, provisions, and significance of the agreement. Typically, the principal witnesses at such hearings are representatives of the Executive Branch. The Foreign Relations Committee then issues a report to the full Senate, with its recommendation on approval of the treaty.

The Senate's practice has been to approve, to disapprove, or to approve with conditions, treaties negotiated by the Executive Branch. Express conditions imposed by the Senate may include "understandings," which interpret or clarify the obligations undertaken by the parties to the treaty but do not change those obligations,[9] or "reservations" and "amendments," which condition the Senate's consent on amendment or limitation of the substantive obligations of the parties under the agreement.[10] On occasion, the Senate has accompanied its consent by "declarations," which state the Senate's position, opinion, or intention on issues raised by the treaty, although not on the provisions of the specific treaty itself.[11] *See* CRS Study at 110.

IV. Relevance of the Senate Ratification Record

A. Express Conditions

When the Senate includes express conditions as part of its resolution of consent to ratification, the President may, if he objects, either refuse to ratify the treaty or resubmit it to the Senate with the hope that it will be approved unconditionally the second time. *See* 14 M. Whiteman, *Digest of International Law*, 138 (1970). If the President proceeds with ratification, however, such understandings or other conditions expressly imposed by the Senate are generally included by the President with the treaty documents deposited for ratification or communicated to the other parties at the same time the treaty is deposited for ratification.[12] *See id.* at 188–93. Because such conditions are

[9] *See generally* CRS Study at 11, 109–110; S. Rep. No. 47, 96th Cong., 1st Sess. 13–25 (1979) (Panama Canal Treaty); S. Rep. No. 29, 97th Cong., 1st Sess. 45 (1981) (SALT II Treaty).

[10] *See generally* CRS Study at 109–110; Henkin at 134 & n.23 (1972); S. Rep. No. 47, 96th Cong., 1st Sess. 24–25 (Panama Canal Treaty); S. Rep. No. 29, 97th Cong., 1st Sess. 44–45 (SALT II Treaty).

[11] Such "declarations," which do not purport to interpret the treaty but only to express a "sense of the Senate" with respect to related issues, may or may not be included by the President in the instrument of ratification submitted to the other parties. *See, e.g.*, CRS Study at 110 & n.10 (discussing 1976 Treaty of Friendship and Cooperation with Spain).

[12] Treaties usually require international action such as the exchange or deposit of instruments of ratification in order to establish international obligations. *See* 14 Whiteman, *supra*, at 62; Vienna Convention on the Law of Treaties, art. 2. In general, conditions that alter the obligations of a party under the treaty must be presented with the treaty documents. *See* 14 M. Whiteman, *supra*, at 188–193. "Understandings" or "declarations," which only clarify the meaning of a treaty provision or describe a policy, rather than alter the meaning of the treaty, are generally communicated to the other parties, but are not necessarily included with the official treaty documents. *Id.* In 1976, the President communicated five Senate "declarations" relating to the Treaty of Friendship and Cooperation with Spain of 1976, 27 U.S.T. 3005, T.I.A.S. No. 8360, separately from the ratification, explaining that he viewed the declarations as appropriate "statements of hope and expressions of opinion" and as "statements of domestic United States processes." [1976] *Digest of U.S. Practice in International Law* 214–17 (described in *Restatement (Revised)* § 314, n.1). The Senate Foreign Relations

Continued

considered to be part of the United States's position in ratifying the treaty, they are generally binding on the President, both internationally and domestically, in his subsequent interpretation of the treaty.[13] *See generally United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 107 (1801); *Haver* v. *Yaker*, 76 U.S. (9 Wall.) 32, 35 (1869); *Hidalgo County Water Control and Improvement District No. 7* v. *Hedrick*, 226 F.2d 1, 8 (5th Cir. 1955); *Restatement (Revised)* § 323.

B. Statements in the Ratification Record

The more difficult question is what relevance, if any, the President must give to less formal, contemporaneous indications of the Senate's understanding of the treaty, *i.e.*, statements in committee reports, hearings, and debates which may reflect an understanding of certain treaty provisions by some Senators, but which were not embodied in any formal understanding or condition approved by the entire Senate.[14] With the not insubstantial exception of representations made or confirmed by the Executive Branch (discussed below), we believe such statements have only limited probative value and therefore are entitled to little weight in subsequent interpretations of the treaty.[15]

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[12] (. . . continued)
Committee has criticized this practice in the past, and has recommended a three-tiered categorization of conditions: (1) those that do not directly involve formal notice to or agreement by the other parties; (2) those that would be formally communicated to the other parties as official statements of the position of the United States in ratifying the treaty, but that do not require their agreement; and (3) those that would require the explicit agreement of the other parties for the treaty to come into force. S. Exec. Rep. 96–14, 96th Cong., 1st Sess. 18, 28 (1979).

[13] This presumes, of course, that the condition is within the Senate's authority to impose as part of its treaty-making authority. The Senate's authority to impose conditions is not unlimited merely because it may withhold its consent. The general principle that Congress cannot attach unconstitutional conditions to a legislative benefit or program merely because it has authority to withhold the benefit or power entirely applies equally to the Senate's advice and consent authority. *See generally Wong Wing* v. *United States*, 163 U.S. 228, 237 (1896); *Myers* v. *United States*, 272 U.S. 52, 126 (1926). The Senate may not, for example, use its advice and consent power to impose conditions that affect separate, wholly domestic, statutory schemes. *See Power Authority* v. *Federal Power Comm'n*, 247 F.2d 538 (D.C. Cir.), *vacated as moot sub nom. American Pub. Power Association* v. *Power Authority*, 355 U.S. 64 (1957). As we have advised before, we do not believe the Senate may impose conditions that interfere with the President's responsibility to execute the laws. *See* "Constitutionality of Proposed Conditions to Senate Consent to the Interim Convention on Conservation of North Pacific Fur Seals," 10 Op. O.L.C. 12 (1986).

[14] It is clear that *post hoc* expressions of legislative intent, after the treaty has been duly ratified, cannot change the legal effect of an international agreement to which the Senate has given its approval. *See Fourteen Diamond Rings* v. *United States*, 183 U.S. 176, 179–180 (1901) (resolution adopted by Congress after the Senate had consented to ratification of a treaty is "absolutely without legal significance"). Congress may, of course, in effect validate an Executive Branch interpretation of a treaty by passing legislation consistent with that view. *See generally Foster & Elam* v. *Neilson*, 27 U.S. (2 Pet.) 253, 309 (1830).

[15] We note that while a few courts have alluded to the record the Senate creates in advising and consenting to the ratification of treaties, none has advanced a comprehensive theory of what weight should be given to particular portions of the ratification record and none, to our knowledge, has specifically relied on representations in the Senate record to support a particular construction of a treaty. *See Hidalgo County Water Control & Improvement District* v. *Hedrick*, 226 F.2d at 8 (refusing to consider evidence from Senate hearings, committee discussions, and debates because the meaning of the treaty was otherwise clear); *Coplin* v. *United States*, 6 Ct. Cl. 115, 144 (1984), *rev'd on other grounds*, 761 F.2d 688 (Fed. Cir. 1985), *aff'd sub nom. O'Connor* v. *United States*, 479 U.S. 27 (1986) (reviewing Senate "legislative history" of the Panama Canal Treaty but finding that it was entitled to little weight).

First, it must be observed that a treaty is fundamentally a "contract between or among sovereign nations,"[16] and the primary responsibility — whether of the executive or the courts — is "to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France* v. *Saks*, 470 U.S. 392, 399 (1985). *See generally Foster & Elam* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1830) ("A treaty is in its nature a contract between two nations, not a legislative act."). International agreements, like "other contracts . . . are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the States thereby contracting." *Rocca* v. *Thompson*, 223 U.S. 317, 331–332 (1912). Necessarily, the best evidence of the intent of the parties is the language and structure of the treaty and, secondarily, direct evidence of the understanding reached by the parties, as reflected in the negotiating record and subsequent administrative construction,[17] rather than unilateral, post-negotiation statements made during the Senate ratification debates.

Moreover, the constitutional role of the Senate is limited to approval or disapproval of the treaty, much as the President's constitutional role in enacting domestic legislation is limited to his veto power. The Senate may, if it chooses, amend or interpret the treaty by attaching explicit conditions to its consent, which are then transmitted to, and either accepted or rejected by, the other parties. Absent such conditions, the Senate does not participate in setting the terms of the agreement between the parties, and therefore statements made by Senators, whether individually in hearings and debates or collectively in committee reports, should be accorded little weight unless confirmed by the Executive. We note that even in the case of domestic legislation, where Congress — rather than the President and other foreign governments — directly shapes the operative language, "[r]eliance on legislative history in divining the intent of Congress is . . . a step to be taken cautiously." *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 (1977).[18]

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[16] *TWA, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 262 (1984) (Stevens, J., dissenting); *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979).

[17] *See generally O'Connor* v. *United States*, 479 U.S. 27, 31–33 (1986); *Air France* v *Saks*, 470 U.S. at 396; *Maximov* v. *United States*, 373 U.S. 49, 54 (1963); *Kolovrat* v *Oregon*, 366 U.S. at 194; *Factor* v. *Laubenheimer*, 290 U.S. at 294; *Jones* v. *Meehan*, 175 U.S. at 4, 23.

[18] For example, "ordinarily even the contemporaneous remarks of a single legislator . . . are not controlling in analyzing legislative history." *Consumer Products Safety Comm'n* v. *GTE Sylvania*, 447 U.S. 102, 118 (1980). As the Court stated in *Weinberger* v. *Rossi*, 456 U.S. 25 (1982):

> [O]ne isolated remark by a single Senator, ambiguous in meaning when examined in context, is insufficient to establish the kind of affirmative congressional expression to evidence an intent to abrogate provisions in 13 international agreements.

Id. at 35. Similarly, statements made during legislative hearings provide only limited guidance as to the intent or understanding of the Senate as a whole. *See, e.g., McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, 493–494 (1931); *Austasia Intermodel Lines, Ltd.* v. *CFMC*, 580 F.2d 642, 645 (D C. Cir. 1978). Committee reports provide important evidence of the legislative intent, but are at best "only aids" in interpreting ambiguous statutory language. *See Abourezk* v. *Reagan*, 785 F 2d 1043 (D.C. Cir. 1986); *General Motors Corp.* v. *Ruckelshaus*, 742 F.2d 1561 (D.C. Cir. 1984), *cert. denied*, 471 U.S 1074 (1985); *NLRB* v. *Res-Care, Inc.*, 705 F.2d 1461 (7th Cir. 1983); *Mills* v. *United States*, 713 F.2d 1249 (7th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984).

Indeed, profound foreign policy implications would be raised if the United States were to supplement or alter treaty obligations to foreign governments based on statements made by members of the Senate during its consideration of the treaty that were not communicated to those governments in the form of express conditions. "[F]oreign governments dealing with us must rely upon the official instruments of ratification as an expression of the full intent of the government of the United States, precisely as we expect from foreign governments." *Coplin* v. *United States*, 6 Ct. Cl. at 145. In *New York Indians* v. *United States*, 170 U.S. 1, 22–23 (1898), for example, the Supreme Court refused to give effect, vis-a-vis the Indians, to a proviso adopted by the Senate but not included in the treaty documents subsequently presented to the Indians for their acceptance:

> There is something . . . which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it. The proviso never appears to have been called to the attention of the tribes, who would naturally assume that the treaty, embodied in the Presidential proclamation contained all the terms of the arrangement.

We can well imagine that the United States would be deeply disturbed if the Soviet Union resolved ambiguities in a treaty by reference to deliberations in a Soviet legislative body charged with consenting to its ratification.[19] If individual Senators believe that portions of a treaty are ambiguous, they may resolve that ambiguity in a manner consistent with the mutual process through which treaties are negotiated: either by requesting the Executive to state more clearly the meaning of the agreement it has reached with the foreign country, or by making explicit the Senate's understanding of the provision through a formal reservation or understanding attached to its resolution of approval. Thus, while statements made by individual senators or even in committee reports may at times provide a gloss on other, more direct sources of evidence of a treaty's meaning, we believe they are entitled to little weight in and of themselves.[20]

On the other hand, statements made to the Senate by representatives of the Executive Branch as to the meaning of a treaty should have considerably more

[19] Consistent with this view, when questions arose concerning the Panamanian interpretation of certain key provisions of the Panama Treaties, the State Department took the position that the United States would rely on the final instruments of ratification as expressing the full intent of the parties. *See* CRS Study at 128 & n.62.

[20] The latest tentative draft of the *Restatement* takes the position that "indication in the record that the Senate ascribed a particular meaning to the treaty is relevant to the interpretation of the treaty by a United States court in much the same way that the legislative history of a statute is relevant to its interpretation." *See Restatement (Revised)* § 314, comment d (Tentative Final Draft). As the discussion makes clear, we believe the *Restatement* position exaggerates somewhat the general evidentiary significance of the Senate ratification record in interpreting ambiguous provisions of an international treaty.

weight in subsequent interpretations of ambiguous terms of the treaty. Such statements do not present as substantial a threat to the reliance interests of foreign governments, because the Executive Branch negotiated the treaty and is therefore in a position to represent authoritatively the meaning of the agreement that emerged from the negotiating process. Moreover, given that the Senate's constitutional role is limited to approving a treaty already negotiated by the Executive Branch and that much of the extra-textual evidence of a treaty's meaning remains in the control of the Executive Branch, we believe the Senate itself has a substantial reliance interest in statements made by the Executive Branch officials seeking that approval.

Accordingly, consistent with the President's role as the nation's exclusive negotiator of treaties with foreign governments, we believe that statements made to the Senate by the Executive Branch during the ratification debates are relevant in much the same way that contemporaneous statements by congressional draftsmen or sponsors of domestic legislation are relevant to any subsequent interpretation of the statute. *See, e.g.*, *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (statement by one of legislation's sponsors "deserves to be accorded substantial weight in interpreting the statute"); *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 640 (1967); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394–395 (1951). We note that because of the primary role played by the Executive Branch in the negotiation of treaties and the implementation of foreign policy, courts generally accord substantial deference — albeit not conclusive effect — to interpretations advanced by the Executive Branch. "While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." *Kolovrat* v. *Oregon*, 366 U.S. at 194; *see also Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982); *Collins* v. *Weinberger*, 707 F.2d 1518, 1522 (D.C. Cir. 1983) ("Courts should defer to such executive actions [interpreting a treaty] provided they are not inconsistent with or outside the scope of the treaty."); *Restatement (Revised)* § 326, comment b. Although the courts often rely on interpretative statements made by the Executive Branch prepared well after negotiation and ratification of the treaty,[21] they find particularly persuasive a consistent pattern of Executive Branch interpretation, reflected in the application of the treaty by the Executive and the course of conduct of the parties in implementing the agreement. *See, e.g.*, *O'Connor* v. *United States*, 479 U.S. at 32–33. Much as contemporaneous administrative construction of domestic statutes by agencies charged with their implementation is generally accorded considerable deference by the courts, particularly when those agencies have made explicit representations to Congress during consideration of the

[21] On occasion, the State Department makes specific suggestions to the court about the interpretation of an agreement. *See, e.g.*, *Coplin* v. *United States*, 761 F.2d 688, 691 (Fed. Cir. 1985), *aff'd sub nom. O'Connor* v. *United States*, 479 U.S 27 (1986). The courts in fact often invite the United States to file amicus briefs giving the views of the Executive Branch in cases to which the United States is not a party. *See, e.g.*, *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176 (1982); *Zschernig* v. *Miller*, 389 U.S. 429 (1968); *Kolovrat* v. *Oregon*, 366 U.S. 187 (1961).

legislation,[22] statements made to the Senate by members of the Executive Branch about the scope and meaning of a treaty would be relevant evidence of the Executive Branch's view, and therefore would be accorded deference by a court in assessing the domestic effect of the treaty.

The weight to be given to an interpretative statement made by an Executive Branch official to the Senate during the ratification process will likely depend upon such factors as the formality of the statement, the identity and position of the Executive Branch official making the statement, the level of attention and interest focused on the meaning of the relevant treaty provision, and the consistency with which members of the Executive Branch adhered at the time to the view of the treaty provision reflected in the statement.[23] All of these factors affect the degree to which the Senate could reasonably have relied upon the statement and, in turn, the weight that courts will attach to it. At one extreme, a single statement made by a middle-level Executive Branch official in response to a question at a hearing would not be regarded as definitive. Rather, in interpreting the domestic effect of a treaty, the courts would likely accord such a statement in the ratification record a degree of significance subordinate to more direct evidence of the mutual intent of the parties, such as the language and context of the treaty, diplomatic exchanges between the President and the other treaty parties, the negotiating record, and the practical construction of the provision reflected in the parties' course of dealings under the treaty. Moreover, courts often give substantial weight to the Executive Branch's current interpretation of the treaty, in recognition of the President's unique role in shaping foreign policy and communicating with foreign governments,[24] and, accordingly, would be unlikely to bind future chief executives on the basis of an isolated remark of an Executive Branch official in a previous administration. In general, therefore, less formal statements made by the Executive Branch before the Senate (such as the one described in the preceding hypothetical) will be but one source of relevant evidence to be considered in interpreting an ambiguous treaty provision.

In contrast, in a case in which the statements by the Executive Branch amount to a formal representation by the President concerning the meaning of a particular treaty provision, the ratification record may be conclusive. If, for example, the ratification record unequivocally shows that the President presented the treaty to the Senate based on specific, official representations regarding the meaning of an ambiguous provision, that the Senate regarded that

[22] *See, e.g., United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16, 30 (1982) (court necessarily attaches great weight to agency representations to Congress when the administrators participated in drafting the statute and directly made known their views to Congress); *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 202–212 (1980) (statements by administration witnesses during hearings on patent infringement legislation strongly reinforce the court's conclusion that Congress intended to immunize respondent's behavior from patent misuse charges). In general, courts give "great weight" in construing domestic statutes to contemporaneous constructions by the executive branch. *See generally Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

[23] Similarly, the weight of statements by senators confirmed by the executive will depend, *inter alia*, on the formality of the confirmation and the identity and position of the person confirming the statement.

[24] *See, e.g., Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. at 184 n.10.

understanding as important to its consent, and that the Senate relied on the representations made by the Executive Branch in approving the treaty (and thus in refraining from attaching a formal reservation setting forth the understanding), we believe the President would, in effect, be estopped from taking a contrary position in his subsequent interpretation of the treaty, just as he would be bound by a formal reservation or understanding passed by the Senate to the same effect. *See generally United States* v. *Vogel Fertilizer Co.*, 455 U.S. at 31 (refusing to uphold current Treasury Department interpretation in light of evidence that the Treasury Department proposed and presented the legislation to Congress on a different understanding). Obviously, a President could not negotiate a treaty with other nations on the basis of one understanding of its import, submit the treaty to the Senate on a wholly different understanding, and then, in implementing the treaty, rely solely on the understanding he had reached with the other parties. Similarly, he could not reach a secret agreement with the other party that substantially modifies the obligations and authorities created by the text of the treaty submitted to the Senate, and then seek to use the secret agreement as a basis for actions inconsistent with the text of the treaty. Such results would essentially eviscerate the Senate's constitutional advice and consent role, because it would deprive the Senate of a fair opportunity to determine whether, or with what conditions, the treaty should become the "supreme Law of the Land." Accordingly, in such extreme cases, we have little doubt that, as a matter of domestic law, the courts would construe the treaty as presented to and accepted by the Senate, even if as a matter of international law the treaty might have a different meaning.[25]

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[25] Although courts generally seek to construe treaties consistent with their international import, on occasion courts have adopted constructions of particular treaties that conflict with the President's view of the international obligations created by the treaty. *See, e.g., Maiorano* v. *Baltimore & Ohio R.R.*, 213 U.S. 268 (1909) (interpreting an 1871 treaty with Italy giving aliens access to courts of justice). Moreover, Congress can enact domestic legislation that is inconsistent with existing treaty obligations, and thus has the effect of tying the President's hands domestically, while leaving the international obligations intact. *See generally Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 412–413 (1968); *Moser* v. *United States*, 341 U.S. 41, 45 (1951); *Torres* v *INS*, 602 F.2d 190, 195 (7th Cir. 1979). It would not be unprecedented, therefore, for a court to construe a treaty more narrowly — or more broadly — as a matter of domestic law than the President construes the treaty as a matter of international law. As Professor Henkin has observed, "[i]t could happen . . . that Congress and the courts would in effect apply treaty provisions different from those that bind the United States internationally — another cost of the separation of powers." Henkin at 167.

Temporary Workers Under § 301 of the Immigration Reform and Control Act

"Temporary" work under § 301 of the Immigration Reform and Control Act of 1986, which permits aliens to enter the United States temporarily to perform "temporary" services or labor, refers to any job where the employer's need for the employee is temporary. The nature of the underlying job and, in particular, whether the underlying job itself can be described as permanent or temporary, is irrelevant.

April 23, 1987

MEMORANDUM OPINION FOR THE COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE

This responds to your request for our opinion on what constitutes "temporary" work under § 301 of the Immigration Reform and Control Act of 1986 (Act), to be codified as 8 U.S.C. § 1101(a)(15)(H)(ii). We believe that temporary work refers to any job where the employer's need for the employee is temporary, regardless of whether the underlying job can be described as permanent or temporary. Because this conclusion differs in part from the analysis proposed both by the Immigration and Naturalization Service (INS) and the Department of Labor, we set forth our analysis below in some detail.

The Immigration and Nationality Act has for many years included a provision permitting aliens to come "temporarily to the United States to perform temporary services or labor." 8 U.S.C. § 1101(a)(15)(H)(ii) (1982). These aliens are known as "H2" workers. The 1986 Act amended § 1101(a)(15)(H)(ii) to add a new section specifically covering agricultural workers. The statute now covers:

> (H) an alien having a residence in a foreign country which he has no intention of abandoning . . . (ii) who is coming temporarily to the United States (a) *to perform agricultural labor or services . . . of a temporary or seasonal nature*, or (b) to perform other temporary service or labor.

Id. (emphasis added).[1] Agricultural workers who receive visas under this new section are referred to as H2A workers.

[1] Agricultural labor will be defined by the Secretary of Labor and will include all the forms of agriculture listed in the Internal Revenue Code, 26 U.S.C § 3121(g), and the Fair Labor Standards Act, 29 U.S C. § 203(f).

The INS and the Department of Labor have each drafted regulations implementing this provision. The INS regulation would permit an alien to obtain an H2A visa for any job in the United States for a period of up to three years, after which the alien would have to depart for six months.[2] Thus, INS would simply define a "temporary" job as any job for up to three years. The Department of Labor, in contrast, takes a somewhat stricter view by defining temporary to exclude any permanent job which an employer needs to fill on a temporary basis. Proposed Department of Labor regulation, *Supplementary Information*, at 7. Under the Labor Department's proposed regulation, "A year-round or otherwise long-term job does not qualify as temporary." *Id.*

In order to resolve the issue of how to define "temporary" work, we examined several sources: the statutory language, the legislative history, the dictionary definition of "temporary," and the case law. On the basis of our review, we have concluded that temporary work under § 1101(a)(15)(H)(ii)(a) includes any agricultural work where the employer needs a worker for, as a general rule, a year or less.

We begin our analysis with the language of the statute. As noted above, the new language permits aliens to enter this country "temporarily" in order to perform agricultural work "of a temporary or seasonal nature." 8 U.S.C. § 1101(a)(15)(H)(ii)(a). The plain language of the statute thus requires that the alien's stay must be temporary and that the work must be of a temporary nature.

As a starting point, we believe that "temporary" means something other than seasonal. Although seasonal work refers to tasks that are tied to one of the four seasons, such as spring planting or fall harvesting, temporary work is not that strictly limited. Moreover, it is clear, especially given the specific incorporation into the new section of the broad definitions of agriculture from the Tax Code and the Fair Labor Standards Act, that every kind of agricultural work is covered.[3] *See* H.R. Rep. No. 99–682, 99th Cong., 2d Sess. 80 (1986). The kind of agricultural work listed in these statutes is extremely broad, covering, for example, "all service performed . . . in connection with raising or harvesting any agricultural or horticultural commodity," including "management of livestock." 26 U.S.C. § 3121(g). Neither the Tax Code nor the Fair Labor Standards Act definitions distinguish between agricultural jobs of a transient nature, such as harvest work, and those of a permanent nature, such as caring for livestock.[4] Therefore, the language of § 1101(a)(15)(H)(ii)(a) permits all job occupations within the agricultural field, not just seasonal ones, to be certified as H2A jobs.

In deciding how long such a job may be held on a "temporary" basis, we referred to two sources. First, the dictionary definition of the word "temporary"

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[2] Proposed 8 C.F.R. § 214.2(h)(3)(vi)(B). The Department of Agriculture has submitted a brief statement that it agrees with the INS proposal.

[3] 26 U.S.C. § 3121(g); 29 U.S.C. § 203(f).

[4] Thus, we disagree with the Department of Labor's apparent argument that H2A workers may not fill permanent jobs that an employer needs to fill on a temporary basis — for example, because the regular American employee has fallen ill or extra hands are needed during a busy period.

refers to a limited period of time.[5] Second, we examined the existing INS and Department of Labor regulations governing H2 workers. The Department of Labor's regulations for H2 workers state that temporary labor certifications "shall never be for more than eleven months." 20 C.F.R. § 655.206(b)(1). Similarly, INS's H2 regulations provide that the petition will be approved for the length of the certificate issued by the Department of Labor (eleven months) or, if no date is given on the certificate, "approval of the petition will not exceed 1 year." 8 C.F.R. § 214.2(h)(6)(i). Thus, although the regulations provide for extensions,[6] the basic rule for H2 petitions is that a "temporary" job means one for a year or less.[7]

These regulations reflect the present administrative interpretation of the word "temporary" under the H2 provision and are consistent with the common meaning of the word "temporary." One would expect that the same word would have the same meaning within a single sentence — *i.e.*, that "temporary" would have the same meaning in both § 1101(a)(15)(H)(ii)(a) and (b). There is nothing in either the language of the statute or the legislative history that would lead us to question this otherwise self-evident proposition. Therefore, we believe that the definition of temporary for H2A workers should be the same as that for H2 workers: twelve months or less. It may be that there are unusual circumstances where a "temporary" job might last longer than a year.[8] Nevertheless, a blanket assumption that all jobs are "temporary" simply because the alien cannot occupy a job — any job — for more than three years, as proposed by INS, appears to us to be an interpretation not supported by the statute.[9]

In view of all these factors, we believe that in order to determine whether a particular job is "temporary" within the meaning of § 1101(a)(15)(H)(ii)(a), INS and the Department of Labor must focus upon the employer's need. If an employer makes a *bona fide* application showing that he needs to fill a job on a temporary basis, the work is "of a temporary or seasonal nature." It is irrelevant whether the job is for three weeks to harvest a crop or for six months to replace a sick worker or for a year to help handle an unusually large lumber contract. What is relevant is the employer's assessment — *evaluated, as required by*

[5] Temporary is defined as "[l]asting for a time only; existing or continuing for a limited time; not permanent; ephemeral; transitory." *Webster's New International Dictionary* 2598 (2d ed. unabridged 1958).

[6] 8 C.F.R. § 214.2(h)(10) (extensions authorized in increments of not more than twelve months).

[7] Indeed, the longer the employer needs a "temporary" worker, the more likely it would seem that the job has in fact become a permanent one. Thus, we assume that INS takes an increasingly careful look at repeated petitions for the same job. INS regulations already forbid extensions that would permit the alien to stay for more than three years. 8 C.F.R. § 214.2(h)(10).

[8] *See Wilson* v. *Smith*, 587 F. Supp. 470 (D.D.C. 1984) (H2 application approved for nanny until child was old enough for day care).

[9] Moreover, the blanket three-year provision threatens the integrity of the Immigration and Nationality Act, which already has a provision for immigrant visas for permanent positions. 8 U.S.C. § 1153(a)(6). Because the number of these "sixth preference" visas is strictly limited (10 percent of each year's total visa quota), employers would be strongly tempted to call a permanent position temporary in order to fill it with an H2A worker. As one court observed:

> The INS's present interpretation of [H2] prevents the likelihood of so-called "temporary" workers from entering this country permanently under the less rigorous standard of [H2], rather than applying properly as immigrants under the more stringent [sixth] preference classification. . . .

Volt Technical Services Corp. v. *INS*, 648 F. Supp. 578, 581 (S.D.N.Y. 1986).

statute, by the Department of Labor and the INS — of his need for a short-term (as opposed to a permanent) employee. The issue to be decided is whether the employer has demonstrated a *temporary need for a worker* in some area of agriculture. The nature of the job itself is irrelevant. What is relevant is whether the employer's need is truly temporary.

This interpretation is supported in part by administrative and judicial interpretations of the H2 provision. As was stated in the leading case of *In re Artee*, 18 I. & N. Dec. 366 (1982):

> It is not the nature or the duties of the position which must be examined to determine the temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the position.

Id. at 367. In *Artee*, the INS reversed a long-standing rule that the functional nature of the duties of the job controlled its characterization in favor of determining that eligibility for an H2 visa was controlled by "the intent of the petitioner and the beneficiary concerning the time that the individual would be employed." *Id. See also In re Ord*, 18 I. & N. Dec. 285 (1982).

This position has been affirmed by the courts. Thus, in *Wilson* v. *Smith*, 587 F. Supp. 470 (D.D.C. 1984), the court held that a nanny was a "temporary" worker because the parents of the child only needed child care until the infant was old enough for day care:

> Plaintiffs have made a plausible case for their assertion that their need for live-in help is temporary, based on their daughter's youth. . . . The Wilsons have credibly established that their need will end in the "near, definable future."

Id. at 473 (quoting *Artee*). The court did not focus on whether those engaged in child care occupy a permanent job function, although they arguably do since child care could be said to last at least until children enter high school. What the court based its ruling on was its determination that the parents only needed the nanny for a short period, until their child entered day care.

Similarly, in *Volt Technical Services Corp.* v. *INS*, 648 F. Supp. 578 (S.D.N.Y. 1986), the court adopted the *Artee* standard: a temporary job is one where "it is clearly shown that the petitioner's need for the beneficiary's services or labor is of a short, identified length, limited by an identified event located in time." *Id.* at 580. In doing so, the court recognized that aliens could be hired as engineers — a permanent job description — if they were hired by a temporary help service "to fill a specific contract with a client and the beneficiaries entered the United States with the understanding that their employment was to be for a temporary period." *Id.* at 581.

Finally, in *North American Industries, Inc.* v. *Feldman*, 722 F.2d 893 (1st Cir. 1983), the court discussed at some length the position of a man who programmed and operated computerized lathes and high-speed gear cutters. The underlying job was permanent. Indeed, the issue in the case was whether

the alien, having held the position as an H2 worker on a temporary basis, could apply to hold it on a permanent basis using a "sixth preference" visa. As in the other cases cited above, the U.S. Court of Appeals for the First Circuit noted that "the INS has conceded that the needs of an employer should determine whether a position offered an alien is temporary or permanent." *Id.* at 900 (citing *Artee*).[10]

We understand that focusing on the employer's need may encourage numerous applications by employers to the Department of Labor and that it is often difficult to distinguish between temporary and permanent jobs, especially if the employer is not honest. Nevertheless, we believe a one-year limitation will serve as at least a restraint, if not a disincentive, to dishonesty. We also believe it best reflects Congress' intent and will be administratively workable.

Conclusion

In determining what the word "temporary" means, we have relied on a number of sources: the language of the statute, the legislative history, the dictionary meaning of the word, the administrative interpretation of similar language, and the relevant case law. Based on all of these factors, we believe that the word "temporary" in 8 U.S.C. § 1101(a)(15)(H)(ii)(a) refers to any job in agriculture where the employer needs a worker for a limited period of time, generally of less than one year's duration.

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[10] *See also Hess* v. *Esperdy*, 234 F Supp. 909 (S.D.N.Y. 1964); 9 *Foreign Affairs Manual* § 41 55, n.17.

Constitutionality of Proposed Budget Process Reform Legislation

Proposed legislation that would assign the Congressional Budget Office the duty to determine whether a spending bill would exceed current spending limits, thereby requiring a supermajority (two-thirds) vote in each House of Congress for passage, is constitutional. Such a delegation would not raise problems under *INS* v. *Chadha*, because Congress may by rule require a supermajority majority vote in each House for passage of certain legislation under Art. I, § 5, cl. 2.

The proposed legislation may also subject spending bills passed in this manner to rescission by the President. With respect to entitlements, however, Congress must enact legislation specifically making the expenditure of a certain percentage of the appropriated funds non-mandatory before such rescission authority may be exercised.

May 26, 1987

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

At the request of your staff, this Office has considered the constitutionality of draft legislation, prepared by the White House Working Group on Budget Reform, entitled the "Budget Process Reform Act of 1987." We are satisfied that the basic process that the bill would establish would be constitutional. The following comments suggest ways certain specific provisions of the bill might be changed in order to avoid or minimize possible constitutional issues.

I. Determinations by the Congressional Budget Office

A central feature of the draft bill is the assignment (in § 21) to the Congressional Budget Office (CBO) of the duty to determine, with respect to each spending bill, whether passage of the bill would cause the budget category within which the bill falls to exceed the spending ceiling established by the "budget law" enacted earlier in the year (or the previous year's spending level, if no budget law is enacted). This determination has two important consequences under the draft bill: (1) under § 7, a supermajority (two-thirds) vote in each House of Congress would be required for passage of the spending bill if CBO determines it would exceed its spending ceiling (or previous year's spending level); and (2) under § 25, any bill that would thus be subject to a supermajority vote requirement would also be subject to the rescission authority that would be granted to the President under that section.

This delegation to CBO of authority to make a determination that has such significant consequences gives rise to a possible constitutional question of whether that determination constitutes legislative action, and if it does, whether the constitutional requirements for legislative action would be satisfied. The Supreme Court has made it clear that any legislative action — *i.e.*, any congressional action that has binding legal effect outside the Legislative Branch — must comply with the constitutional requirements of bicameral passage and presentment to the President. *INS* v. *Chadha*, 462 U.S. 919, 952 (1983).

It seems clear that the first consequence of a positive CBO determination — requirement of a supermajority vote in each House of Congress — does not run afoul of these requirements. Its effect would only be on the internal legislative practices of each House of Congress, and would thus be limited to the Legislative Branch. It would therefore not constitute legislative action within the meaning of *Chadha*. Moreover, because "[e]ach House may determine the Rules of its Proceedings," U.S. Const. art. I, § 5, cl. 2, it is within Congress' constitutional authority to adopt legislative procedures of this kind.

We note in passing that, unlike a constitutional amendment, the draft legislation would not have a truly binding effect on Congress. Clearly, Congress cannot by legislation prevent itself from enacting future legislation pursuant to whatever procedures it chooses to follow at that future time. A future Congress can always legislatively change what a previous Congress has done. In a legally enforceable sense, therefore, such future lawmaking would be regulated only by the requirements of the Constitution. Thus, notwithstanding the provisions of the draft bill, a future Congress could follow whatever procedures it chooses to apply with respect to a particular appropriations bill, including passage by less than a supermajority. Or it could choose simply to disregard the CBO determination. Although strong political pressures would certainly operate against defiance of the budget process requirements, and the President could surely cite noncompliance as a basis for a veto decision, a subsequent appropriations law passed in compliance with constitutional requirements would be valid, notwithstanding any noncompliance with the procedures of this bill.

We also believe that the second consequence of a positive CBO determination — identification of appropriations that would be subject to Presidential rescission — does not violate the bicameral action and presentment requirements, but we base this conclusion on different grounds from those applicable to the first consequence. The practical effect in this regard of the CBO determination would indeed be to bind parties outside the Legislative Branch, because the President's authority to rescind appropriations would extend only to appropriations based on bills that are enacted under the supermajority requirement, which in turn is based on the CBO determination. Legislative action would thus be involved, but in our view the actual legislative action would be the enactment of the spending bill subsequent to the CBO determination and prior to the rescission authorization to the President becoming effective. The essential point is that the scope of the President's rescission authority would be defined not by the CBO determination itself, but rather by the subsequent congressional

enactment of the spending bill. That enactment would satisfy the bicameral action and presentment requirements.[1]

We stress that under the draft legislation the ultimate decisionmaker on defining the scope of the President's rescission authority would not be an arm of the Congress, but rather would be Congress itself acting in compliance with the constitutional requirements for legislative action. The budget process role that is contemplated for CBO under this bill thus differs in a critical respect from the role the General Accounting Office (GAO) was given under the Gramm-Rudman-Hollings Act. *See Bowsher* v. *Synar*, 478 U.S. 714 (1986). Under Gramm-Rudman-Hollings, GAO was authorized to present binding budget reduction calculations *directly to the President.* In contrast, under the draft bill, CBO's implicit instructions to the President concerning what programs are subject to his rescission authority are presented *through the Congress*, pursuant to procedures that satisfy constitutional requirements.[2]

Although, for the reasons stated above, we believe that a strong argument can be made to sustain the role of CBO in defining the scope of the President's rescission authority, that argument turns principally on whether the subsequent enactment of the spending bill may properly be viewed as congressional action that itself has the effect of defining that scope. Under the draft bill, it would appear that any such congressional action would have to be viewed as *implied.* We suggest, therefore, that consideration be given to requiring in the draft bill that the congressional action be *express*. Under one possible version of such a requirement, any spending bill enacted pursuant to a CBO determination would have to include, most likely in introductory language (such as the "whereas" section), a statement that a two-thirds vote was required on the basis of the CBO determination that the bill would exceed the spending ceiling. An alternative approach would be to require that each such spending bill state that appropriations authorized under the bill would be subject to the President's rescission authority.

III. Rescission of Entitlement Appropriations

Section 25 of the draft bill would add a new § 689 to Title 2, United States Code. Under that section, the President would be authorized to rescind any spending appropriations that are authorized by legislation enacted pursuant to the supermajority voting requirement. Thus, under the regime established by

[1] An alternative way to analyze this second consequence of the CBO determination is to take the view that the subsequent appropriations law — which is passed pursuant to a supermajority vote triggered by the CBO determination — would amount to an implied congressional ratification or adoption of the CBO determination. We prefer the analysis taken in the text, because in our view it is based on a more accurate description of the process contemplated under the draft legislation. Under either analysis, however, the critical fact is that intervening between the CBO determination and the establishment of the President's rescission authority is a legislative action effected in compliance with constitutional requirements.

[2] An additional distinction — although of less significance for this analysis — is that Gramm-Rudman-Hollings involved a delegation to GAO of an executive function (determining how to implement spending reductions), while the draft bill involves a delegation to CBO of a legislative function (defining the programs with respect to which the President is being delegated rescission authority).

the draft bill, any such appropriations law would by clear implication provide that all appropriations are non-mandatory.

Congress certainly may make expenditure of a particular appropriation non-mandatory. *See Train* v. *City of New York*, 420 U.S. 35 (1975). *A fortiori*, Congress may expressly grant the President the authority to rescind any appropriation pursuant to a congressionally established procedure. In contrast to the non-mandatory appropriation situation, however, a Presidential rescission of a mandatory appropriation would amount to an unconstitutional unilateral amendment of the appropriations law. Congress may not authorize the President to circumvent the constitutionally required process for amending previously enacted laws any more than it may authorize itself to do so. *Cf. INS* v. *Chadha, supra.*

Application of the draft bill's Presidential rescission authority to entitlement appropriations presents a special situation. Unlike spending based on the usual appropriations bill, entitlement payments are generally made on the basis of two separate statutory enactments. The first statute establishes the entitlement and generally fixes a specified amount to which each person meeting the statutory requirements is entitled. The second statute is an appropriations bill that authorizes the expenditure of funds up to a given amount.[3] Thus, if the President utilized the rescission authority granted by the draft bill to reduce entitlement payments below the statutorily prescribed level, he would, in effect, be amending unilaterally the previously adopted entitlement statute. However, entitlement statutes may be changed only by other duly adopted statutes; Congress may not delegate to the President unilateral power to do so himself.

This conclusion does not mean, however, that it would be impossible for Congress to delegate to the President power to control expenditures under entitlement programs. To the contrary, the statute could be drafted so as to provide such authority. First, it is clear that Congress itself has the power to amend or reduce entitlements that it has previously granted. For example, the Supreme Court has held with respect to Social Security that "a person covered by the Act has not such a right in benefit payments as would make every defeasance of 'accrued' interests violative of the Due Process Clause of the Fifth Amendment." *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960). The Court has also held that the "fact that social security benefits are financed in part by taxes on an employee's wages does not in itself limit the power of Congress to fix the levels of benefits under the Act or the conditions upon which they may be paid. Nor does an expectation of public benefits confer a contractual right to receive the expected amounts." *Richardson* v. *Belcher*, 404 U.S. 78, 80 (1971).

Congress could utilize this power to effect a general cross-cutting amendment to all entitlement statutes that would make a certain percentage of the entitlement amounts subject to limitation or complete withdrawal either by Congress through the appropriations process, or by the President through the rescission process proposed by the draft bill. Thus, the draft bill could include a

[3] In many cases, such appropriations bills set no absolute limits on entitlement expenditures, but rather state that the Executive may expend an amount sufficient to pay all individuals who qualify under the provisions of the relevant entitlement statute.

provision explicitly amending all entitlement acts so as to permit some Presidential control over entitlement expenditures in the same way as the draft bill would permit control over expenditures pursuant to appropriations bills. A cross-cutting provision would thus avoid the constitutional problem by making the expenditure of a certain percentage of appropriated funds non-mandatory.[4]

III. Limiting the Reasons on which the President Can Rely When Exercising the Rescission Authority

Proposed 2 U.S.C. § 689(b) (*see* § 25 of the draft bill) would permit the President to rescind "excess budget authority" only for "reasons of economy, efficiency, or fiscal management of the Government." The apparent purpose of this provision would be to indicate that the President's authority is not intended to extend to situations in which the President's primary reason for desiring to rescind budget authority is disagreement with congressional programmatic objectives. Although the provision does not give rise to an issue of constitutional law, you may wish to consider its separation of powers policy implications.

The distinction that § 689(b) would draw might turn out to be illusory and unenforceable. It would be very difficult to separate motives of economy from policy judgments concerning the efficacy of a particular program. Moreover, although we believe that disputes arising under this section between Presidents and Congress would almost always involve only "political questions" that should not be resolved by the courts,[5] the litigation potential created by such a provision should be recognized. Giving the courts an additional excuse to attempt to second-guess or inquire into the motives of the President could potentially give the courts an opportunity to seek to exercise significant "political" power, a role that is not contemplated under the Constitution and that they are institutionally ill-suited to exercise.

IV. Technical Language Change to Avoid Authorizing Legislative Veto

Proposed 2 U.S.C. § 689(d)(1) (*see* § 25 of the draft bill) is clearly intended to provide for congressional disapproval of a Presidential rescission by the constitutionally permissible means of a bill that is enacted in compliance with

[4] We note that Congress has already effected such an amendment to a specific entitlement statute in the context of the food stamp program. The so-called Lugar Amendment authorized the Secretary of Agriculture to reduce the otherwise required food stamp allotments if insufficient funds were appropriated to fund the program at its full level, and additionally authorized the Secretary to change the allocation formula if such a reduction were necessary. 7 U.S.C. § 2027(b)–(d).

[5] *See Goldwater* v. *Carter*, 444 U.S. 996, 1002–06 (1979) (Rehnquist, J., concurring); *Barnes* v. *Kline*, 759 F.2d 21, 57 (D.C. Cir. 1985) (Bork, J., dissenting) ("[I]t is absolutely inconceivable that Framers who intended the federal courts to arbitrate directly disputes between the President and Congress should have failed to mention that function or to have mentioned judicial review at all. The statesmen who carefully spelled out the functions of Congress and the President and the details of how the executive and legislative branches might check each other could hardly have failed even to mention the judicial linchpin of the constitutional system they were creating — not if they had even the remotest idea that the judiciary was to play such a central and dominant role"), *vacated on other grounds sub nom. Burke* v. *Barnes*, 479 U.S. 361 (1987).

the bicameral action and presentment requirements of the Constitution. As written, however, the provision technically provides instead for a two-house legislative veto: a rescission would take effect unless within 45 legislative days of Congress' receipt of the President's rescission statement, "*Congress shall have completed action on and sent to the President for his approval*" a bill disapproving the rescission. *Id.* (emphasis added). Thus, the disapproval would technically take effect upon presentment to the President, and the constitutional requirement that the President have an opportunity to veto the disapproval bill would be circumvented. *See INS* v. *Chadha*, *supra*.

To accomplish the purpose that we assume is intended, we suggest that the above-quoted language be deleted and the phrase "is enacted into law" be added at the end of the sentence. Thus, under the draft bill as revised, a rescission would take effect "unless within 45 legislative days of the receipt of the President's rescission message, a bill dealing solely with such rescission that restores all or part of such excess budget authority is enacted into law." If you believe that 45 days would not be enough time to allow for a congressional attempt to override a Presidential veto,[6] you might consider allowing instead for some longer period, such as 60 days.

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

[6] A veto would be almost a certainty. Because the joint resolution would be a rejection of the President's rescission, a veto would constitute a simple reassertion of the rescission.

Damages and Arbitration Provisions in Proposed Amendments to the Fair Housing Act

Certain proposed amendments to the Fair Housing Act would provide that parties may voluntarily submit their dispute to an arbitrator empowered to impose compensatory and punitive damages (as opposed to equitable relief or restitution). These amendments would be permissible under the Seventh Amendment because they amount to a waiver of a right, that would otherwise obtain, to a jury trial on compensatory and punitive damages. The amendments also comport with the strictures of Article III. The Supreme Court has held that Article III strictures cannot be waived, but the Court also has found that purely voluntary procedures severely minimize any Article III concerns.

Other aspects of the proposed amendments to the Fair Housing Act, which authorize mandatory proceedings before an arbitrator or administrative law judge with the power to award compensatory and punitive damages, would likely not survive scrutiny under the Seventh Amendment and Article III. The cause of action created by the Fair Housing Act appears to be derived from a common law action that is historically within the exclusive preserve of Article III courts operating with a jury. Furthermore, the right at issue is private in nature, in that it is intended to determine the liability of one individual to another. In addition, the housing market is not a specialized area of administrative regulation by the Federal Government. Finally, the Fair Housing Act setting does not seem to involve an imperative necessity for Congress to choose an administrative remedy, as demonstrated by the fact that judicial proceedings would remain available to plaintiffs and there would be only minimal differences in the relief available in the administrative and judicial forums. Under the Supreme Court's admittedly confusing and inconsistent precedents, these factors suggest that the proposed mandatory administrative proceedings would not comport with Article III or the Seventh Amendment.

June 8, 1987

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION

This responds to your request for our opinion on the Seventh Amendment issues raised by the use of civil penalties and punitive damages in proposed amendments to the Fair Housing Act, 42 U.S.C. §§ 3602–3631. The Civil Rights Division has drafted a bill entitled "Fair Housing Amendments Act of 1987" (draft bill), while the Senate is considering S. 558.

The draft bill and S. 558 raise three questions. First, may an arbitrator award anything other than equitable relief in a voluntary arbitration proceeding? Second, is the defendant in a civil action entitled to a jury trial on the issue of liability for civil penalties? Third, may an arbitrator or an administrative law judge award compensatory damages, punitive damages, or civil penalties in an administrative proceeding?

I. Analysis

A. Punitive Damages in Voluntary Arbitration

The first question is whether an arbitrator may award damages in a voluntary proceeding under § 812 of the draft bill. The bill would permit the parties to agree to voluntary arbitration that would be binding on the parties. § 812(a)(2).[1] There is certainly no impediment to the arbitrator in such a voluntary proceeding imposing the equitable relief now outlined in the draft bill: a permanent or temporary injunction and restitution. Nor do we believe that the Seventh Amendment precludes the parties from agreeing voluntarily to submit their dispute to an arbitrator who could impose punitive damages. In these circumstances, both parties will have waived any Seventh Amendment rights that would otherwise obtain.

The question whether this proceeding is consistent with Article III of the Constitution is somewhat more problematic. The voluntary participation of private litigants in a proceeding outside the confines of the federal judiciary does not *ipso facto* insulate it from Article III attack. *Commodities Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 851–54 (1986). The Court in *Schor* emphasized that the strictures of Article III (unlike the protection of Seventh Amendment) cannot be waived by the consent of the parties. *Id.* For the reasons discussed more fully below, however, we believe that the arbitration proceeding contemplated in § 812 of the draft bill would survive Article III scrutiny because a very similar administrative scheme was upheld in *Schor* primarily because of its voluntary nature. *Id.* at 856–57.

B. Jury Trial in a Civil Action

On the issue of liability for punitive damages, we believe that the Seventh Amendment entitles the defendant to a jury trial in a civil action under either § 814(c) of the draft bill or § 813 of S. 558.

The Supreme Court has held that suits by the Government to recover civil penalties are analogous to a common law action in debt, an action covered by the Seventh Amendment's requirement of a jury trial. *Tull* v. *United States*, 481 U.S. 412, 420–23 (1987). Therefore, the defendant in an action to recover a civil penalty under the Clean Water Act, 33 U.S.C. § 1319(d), is entitled to a jury trial. The Court distinguished between actions at law, which are covered by the Seventh Amendment, and actions in equity, which are not.[2] *Tull*, 481 U.S. at 416. Noting that civil penalties were punitive in nature, and were intended to do more than make the offender disgorge unlawful profits, the Court in *Tull* observed:

[1] Section 812(a)(4), although incomplete, supports our assumption that the hearing will be conducted according to rules that provide for presentation of witnesses and evidence so as to satisfy any due process concerns.

[2] Actions at equity include temporary and permanent injunctions and orders, such as reparations, that restore the *status quo*.

> A civil penalty was a type of remedy at common law that could only be enforced in courts of law. Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity.

Id. at 422. The Court analyzed the legislative history of the Clean Water Act's penalty provision and determined that it was intended to punish offenders and therefore reflected "more than a concern to provide equitable relief." *Id.* "Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties." *Id. Tull* therefore stands for the proposition that civil penalties that are designed to punish are actions at law that must be tried to a jury under the Seventh Amendment. *See also Curtis* v. *Loether*, 415 U.S. 189, 194 (1974). The determination in a civil action of liability for "punitive damages" thus requires a trial by jury. Punitive damages are designed to punish and were, not surprisingly, identified by the Court as another kind of action at law that requires a jury trial. *Tull*, 481 U.S. at 422 n.7. Therefore, a defendant in an action brought under § 814(c) of the draft bill or § 813 of S. 558 would be entitled to a jury trial.

Moreover, even if civil penalties or punitive damages were not available, a jury trial would still be required so long as a private litigant could recover actual, compensatory damages. The Court in *Curtis*, noting that "[a] damages action sounds basically in tort," held that a suit by an aggrieved person to collect damages under § 812 of the Fair Housing Act required a trial by jury. 415 U.S. at 194–95.

C. Seventh Amendment and Article III: Permissibility of Mandatory Arbitration

Having concluded that an action for compensatory or punitive damages would require a jury trial in an Article III court, we turn to the most difficult question posed by the draft bill and S. 558: whether providing precisely the same cause of action in an administrative tribunal where no jury is available can survive constitutional scrutiny under the Seventh Amendment and Article III.

1. Case Law

The Supreme Court has held that the Seventh Amendment does not prohibit Congress from assigning adjudication of certain statutory rights to an administrative forum, even if a jury would have been required under the Seventh Amendment had Congress assigned adjudication of the same rights to a federal court: *Atlas Roofing Co.* v. *Occupational Safety & Health Comm'n*, 430 U.S. 442, 450 (1977):

> At least in cases in which "public rights" are being litigated — *e.g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact — the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.

See also Tull, 481 U.S. at 418 n.4; *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Block* v. *Hirsh*, 256 U.S. 135 (1921). The Court made clear, however, that actions involving "private rights" as distinguished from "public rights" could not be transferred to administrative proceedings:

> Our prior cases support administrative factfinding in only those situations involving "public rights," *e.g.*, where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases are not at all implicated.

Atlas Roofing, 430 U.S. at 458.[3]

The problem is that the Court has never stated with any clarity what distinguishes a public right from a private right.[4] "The distinction between public rights and private rights has not been definitively explained in [the Court's] precedents." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982) (plurality opinion). But while the Court's application of the public rights doctrine has not been particularly consistent or coherent, the conceptual underpinnings of this theory are reasonably discernible.

Essentially, the public rights doctrine reflects the Court's recognition that the nature and historical backdrop of the federal right at issue are quite significant in determining whether congressional substitution of alternative tribunals for Article III courts impermissibly encroaches on the independence and authority of the federal judiciary. At one end of the spectrum, the Court has sought to prevent Congress from usurping the constitutional prerogatives of courts and, in some circumstances, juries, by removing from Article III tribu-

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[3] *Tull* does not diverge from this line of cases. In a footnote, the majority stated:

> The Court has also considered the practical limitations of a jury trial and its functional compatibility with proceedings outside of traditional courts of law in holding that the Seventh Amendment is not applicable to administrative proceedings. But the Court has not used these considerations as an independent basis for extending the right to a jury trial under the Seventh Amendment.

481 U.S. at 418 n.4 (citing *Atlas Roofing* and *Pernell* v. *Southall Realty*, 416 U.S. 363 (1974)). We are not certain what these two sentences mean. At a minimum, however, they indicate that *Tull* is not meant to signal a reexamination of the principles underlying *Atlas Roofing*.

[4] We believe the public rights doctrine is primarily based on Article III principles and thus will discuss this issue principally in those terms. The conclusion that a right is "public" for Article III purposes would seem to subsume any Seventh Amendment objections on this basis. *Cf. Atlas Roofing*, 430 U.S. at 456; *Northern Pipeline*, 458 U.S. at 67 n.18. In any event, in analyzing the public rights doctrine, the Court has treated the constraints of the Seventh Amendment and Article III as virtually coextensive, discussing and citing Seventh Amendment and Article III cases interchangeably.

nals matters which the Constitution's text, structure and history suggest are theirs to resolve. At the other end of the spectrum, the Court has perceived no plausible threat to an independent judiciary or trial by jury from non-Article III resolution of matters that are committed by the Constitution or historical consensus to political branches, and which thus "could have been determined exclusively" by the executive and legislative branches absent any judicial review save that required by the Due Process Clause.[5] *Northern Pipeline*, 458 U.S. at 68 (plurality opinion) (citing *Crowell* v. *Benson*, 285 U.S. 22 (1932)). In short, the dividing line that has emerged from the Court's precedent is that cases which are "inherently . . . judicial," *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929), because they involve traditional rights governing "the liability of one individual to another," *Crowell*, 285 U.S. at 51, may not be removed from adjudication in the federal courts absent extraordinary circumstances, while those involving disputes "between the government and others" may permissibly be committed to agency adjudication. *Ex parte Bakelite Corp.*, 279

[5] This and similar phrases, often repeated but rarely explained by the Court, apparently refer to those matters that the political branches could have disposed of in a summary fashion before the evolution of modern substantive and procedural due process theories. This would include those areas where the text of the Constitution grants plenary authority to one of the political branches — such as immigration or taxation — and disputes concerning the removal of "privileges" such as Government financial assistance, rather than "rights" as traditionally understood. "The understanding of these cases is that the Framers expected that Congress would be free to commit such matters completely to non-judicial executive determination, and that as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency." *Northern Pipeline*, 458 U.S. at 68 (plurality opinion). *See also Crowell* v. *Benson*, 285 U.S. at 50, *Thomas* v. *Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 596–97 n.1 (1985) (Brennan, J., concurring). Moreover, "[t]his doctrine may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued " *Northern Pipeline*, 458 U.S. at 67. *See also Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 283–85 (1856); *Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929). In other words, the original Article III cases seem to be premised on concepts akin to the "bitter with the sweet" theory of procedural due process and the "right/privilege" distinction. *See Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Bailey* v. *Richardson*, 182 F.2d 46 (1950), *aff'd*, 341 U.S. 918 (1951). That is, the Government could condition suit against itself on the plaintiff's waiver of any right to choose a forum or a jury trial, and in connection with exercising plenary grants of authority or limiting financial benefits, the political branches were fully free to dispose of government-created entitlements without providing any means of contesting such summary action.

Of course, as a due process matter, subsequent case law has undermined these conceptual underpinnings. It is now clear that there is a property interest in Government entitlements, a substantive due process right against arbitrary or capricious government practices, and a prohibition against conditioning the extension of Government benefits on the waiver of constitutional rights. *See, e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532 (1985); *Speiser* v. *Randall*, 357 U.S. 513 (1958). Nevertheless, for Article III purposes, we believe these concepts help to describe what is meant by matters which "could be conclusively determined" by the executive and legislative branches. The notion is that traditional, private state law claims antedating the newly created federal statutory rights are the type that should remain within the province of Article III courts. These rights do not exist *solely* by virtue of the federal statutory scheme, do not involve disputes between a private individual and the Government *qua* Government, and do not concern alleged deprivations caused by the Government's administration of its own regulatory or financial assistance schemes. Accordingly, even under a "consent to suit" or "bitter with the sweet" theory, such matters would not be subject to summary disposition by the political branches because they involve traditional disputes solely between private individuals and would thus fall outside the rationale supporting the earlier Article III cases. Again, the rise of modern due process theory should not affect the Article III analysis. That recent due process cases create checks against the Government's power to engage in summary disposition of certain matters does not provide a rationale supporting the non-Article III adjudication of matters *not* previously subject to summary disposition.

U.S. at 451. Although the Court has not comprehensively or even consistently defined this concededly abstract line of demarcation, it has identified the factors that tend to differentiate public from private rights.

Probably the most important factor in defining the nature of the federal right presented is the historical underpinnings of the right. If the claim at issue is analogous to "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," there is at least a strong presumption that it must be resolved by an Article III court. *Northern Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring). Although the *Northern Pipeline* plurality and some earlier cases seem to hold that Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty, *Northern Pipeline*, 458 U.S. at 67 (plurality opinion) (quoting *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)), the Court's recent decisions seemingly conclude that the traditional common law attributes of a claim do not, standing alone, prohibit such a withdrawal. Nevertheless, even these recent decisions have emphasized that such traditional legal and equitable causes of action are at the "protected core" of Article III judicial powers. *Thomas* v. *Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 587 (1985). *See also Schor*, 478 U.S. at 853. As the Court put it in *Schor*, "the state law character of a claim is significant for purposes of determining the effect that an initial adjudication of those claims by a non-Article III tribunal will have on the separation of powers for the simple reason that private, common law rights were historically the types of matters subject to resolution by Article III courts." *Id.* at 854.[6]

Accordingly, if Congress creates a statutory cause of action, the roots of which can fairly be traced to a traditional legal *or equitable* claim, there is a heavy, albeit rebuttable, presumption that the claim may not be delegated to administrative adjudication.[7]

Conversely, "matters arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments,' [and] matters that historically could have been determined exclusively by those departments" are clearly

[6] The Court has emphasized that the historical antecedents of a particular right, not an objective evaluation of whether it is of the sort that *should* be resolved by the judiciary, are paramount in public rights analysis. As the plurality noted in *Northern Pipeline*:

> Doubtless it could be argued that the need for independent judicial determination is greatest in cases arising between the Government and an individual. But the rationale for the public-rights line of cases lies not in political theory, but rather in Congress' and this Court's understanding of what power was reserved to the Judiciary by the Constitution as a matter of historical fact.

458 U.S. at 68 n.20, *cited in Schor*, 478 U.S. at 854.

[7] The public rights analysis obtains with respect to "new" rights created by congressional statutes, as well as to non-Article III adjudication of common law claims not embodied in a congressional statute. *See Curtis* v. *Loether*, 415 U.S. 189, 193 (1974) ("We have considered the applicability of the constitutional right to jury trial in actions enforcing statutory rights 'as a matter too obvious to be doubted.'"). *See also Tull*, 481 U.S at 420; *Pernell* v. *Southall Realty*, 416 U.S. 363, 375 (1974). Indeed, a contrary conclusion would make nonsense of the Court's emphasis on the historical lineage of the right and would essentially eviscerate the protection of Article III and the Seventh Amendment, because Congress always makes law by embodying "new" rights in a statute.

public rights. *Northern Pipeline*, 458 U.S. at 67–68 (plurality opinion) (quoting *Crowell*, 285 U.S. at 50). *See also Schor*, 478 U.S. at 853–54 ("when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is less than when private rights, which are normally within the purview of the judiciary, are relegated as an initial matter to administrative adjudication"); *Thomas*, 473 U.S. at 589; *Ex parte Bakelite Corp.*, 279 U.S. at 458; *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909). The Court has thus concluded that disputes involving newly created rights unknown to the common law or matters that, as an historical matter, "could be conclusively determined by the Executive and Legislative Branches," may be adjudicated by non-Article III forums. *Thomas*, 473 U.S. at 589 (quoting *Northern Pipeline*, 458 U.S. at 68 (plurality opinion)). In such circumstances, the dispute is not over the scope of the federal statutory duty X owes to Y, but the scope of the Government's authority in administering its own programs; it is thus a dispute between the Government and others. Accordingly, the Court has looked to whether the rights asserted are derived from a comprehensive regulatory scheme concerning a specialized area, such as federal broadcast licenses and "entitlements" to federal welfare benefits. *See, e.g.*, *Schor*, 478 U.S. at 854–56; *Thomas*, 473 U.S. at 600–01 (Brennan, J., concurring).

It is more difficult to discern whether public rights are created by virtue of the Government's participation in matters not committed to its exclusive and all-encompassing regulatory discretion. Specifically, it is unclear what significance should be attached to the mere fact of Government participation in a representative or prosecutorial capacity, rather than in its capacity as administrator of its own regulatory programs.

The Court has recently established that neither the presence nor the absence of the Government as a party of record is dispositive in resolving whether a particular right is public or private.[8] Rather, one must "loo[k] beyond form to the substance of what [the statutory scheme] accomplishes" with due regard for "the origin of the right at issue [and] the concerns guiding the selection by Congress of a particular method for resolving disputes." *Id.* at 587, 589.

For this reason, as we previously stated with respect to another proposed amendment to the Fair Housing Act, the Government's participation is of little significance if it "simply has stepped into the individual's shoes in [the] administrative proceeding, and is suing in a representative capacity."[9] In this

[8] In *Northern Pipeline*, the plurality stated: "It is thus clear that the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing 'private rights' from 'public rights.' " 458 U.S. at 69 n.23. Only a few years later, however, a majority of the Court rejected this "bright-line test" as exalting form over substance, holding that the United States' party status was neither necessary nor sufficient in resolving the public rights question for purposes of Article III. *Thomas*, 473 U.S. at 586. In *Thomas*, the Court rejected both the view that "the right to an Article III forum is absolute unless the federal government is a party of record" and the contrary view that "Article III has no force simply because a dispute is between the Government and an individual." *Id.*

[9] "Seventh Amendment Implications of Providing for the Administrative Adjudication of Claims Under Title VIII of the Civil Rights Act of 1968," 9 Op. O.L.C. 32 (1985).

context, the Government simply acts as a prosecutor to vindicate the rights of one private individual against another, not to resolve a dispute between an individual and the Government *qua* Government; it is thus difficult to discern why the presence of the United States should convert such private disputes into "public" rights. Giving such talismanic effect to the Government's mere initiation of an administrative complaint would be inconsistent with *Thomas*' admonition that public rights analysis should not be a formalistic endeavor that focuses on the "identity of the parties alone" without "regard to the origin of the right at issue." *Id.* at 587. As one commentator has noted, any such understanding of the Court's Article III precedent does indeed result in "[f]orm . . . replac[ing] substance: Congress could avoid conferring jurisdiction upon an Article III court simply by altering the party structure in its new action, by replacing the private plaintiff with a government prosecutor." L. Tribe, *American Constitutional Law* 43 (1978).[10]

Nevertheless, there are cases in which administrative schemes have provided incidental relief to private parties in the course of enforcing public policy. *See Schor, supra*; *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Block* v. *Hirsh*, 256 U.S. 135 (1921). The relief available in *Jones & Laughlin*, however, was essentially equitable in nature (reinstatement and backpay), and only the NLRB could seek court enforcement of the order.[11] Moreover, although the Court often cites *Block* v. *Hirsh*, 256 U.S. 135 (1921), for the proposition that what would usually be viewed as a private right — a landlord/tenant dispute — can be a "public right,"[12] it does so without noting what the *Block* court itself recognized. The case arose during an extraordinary housing shortage in the District of Columbia caused by World War I, which had transformed housing from its normal status as a matter of private sector concern into a matter of grave public concern: "circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law." *Id.* at 155. Thus, *Block* did not involve a purely private right: "The [rent] commission did not . . . afford all-purpose relief to complaining private parties." 2 Op. O.L.C. 16, 19 (1978). As we have previously observed, "[i]t cannot be concluded, based on these rather limited precedents, that administrative proceedings initiated by a public agency but providing the full panoply of judicial relief to private parties are necessarily permitted under the Seventh Amendment." *Id.*

Further, the Court, principally in the *Schor* opinion, has considered two other factors in determining whether judicial resolution of particular disputes is

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[10] As we stated with regard to a 1978 proposal that would have authorized the Department of Housing and Urban Development to file administrative complaints:

> It could be argued that Congress should not be able, under the vague rubric "public right," to circumvent the Seventh Amendment completely by creating a chain of administrative courts capable of giving traditional common-law remedies to private litigants seeking relief from wrongs (such as dignitary torts) traditionally regarded as private in character.

"Fair Housing — Civil Rights Act," 2 Op. O.L.C. 16, 20 (1978).

[11] 2 Op. O.L.C. at 19 (citing *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261 (1940)).

[12] *See, e.g.*, *Thomas*, 473 U.S. at 589.

constitutionally required. Although the Court's language admits of differing interpretations, we do not view these factors as interpretive aids in defining the public right but rather as exceptions to the public right doctrine. In other words, these factors identify the narrow circumstances in which non-Article III adjudication of arguably private rights may be permissible.

First, *Schor* establishes that the Court will attach great, if not dispositive, significance to whether the party asserting a constitutional deprivation has participated in the non-Article III proceeding on a purely voluntary basis and thus has effectively waived any right to complain. The complaining party in *Schor* had opted for the CFTC's administrative forum rather than state or federal courts with full knowledge that the regulatory scheme allowed the CFTC to exercise jurisdiction over all counterclaims, including those involving matters of state law; indeed, the complaining party then "expressly demanded that [the opposing party] proceed on its [state law] counterclaim in the [administrative] proceeding rather than before the District Court." 478 U.S. at 849. Although the *Schor* Court determined that Article III separation of powers limitations, unlike Seventh Amendment rights, cannot be "waived" by a private litigant, it nonetheless made clear that the purely voluntary nature of the proceedings severely minimized any Article III concerns that might otherwise have obtained: "just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences." *Id.* at 855. *See also id.* at 849 (noting that "the absence of consent to an initial adjudication" was "a significant factor" in *Northern Pipeline*'s condemnation of Article I bankruptcy courts).[13]

Second, the *Schor* Court also seemed to permit administrative adjudication of private rights, at least where participation in the administrative process is voluntary, if those private claims are wholly ancillary to the public rights created by the federal regulatory scheme and if their resolution in the administrative process is necessary to enable resolution of the statutory public rights in that forum. The issue in *Schor* concerned a CFTC administrative process established to provide reparations to "disgruntled customers of professional commodity brokers seek[ing] redress for the brokers' violations of the Act or CFTC regulations." *Id.* at 836. When Mr. Schor invoked this procedure, his broker counterclaimed, on state law grounds, for a debit balance which Mr. Schor alleged had resulted from the broker's violations of the Commodity Exchange Act that were at issue in the administrative proceeding. If resolution of such private state law counterclaims was not permitted in the administrative forum, administrative resolution of the public rights created by the CEA would never occur, as a practical matter, "for when the broker files suit to recover the debit balance, the customer will normally be compelled either by compulsory

[13] The Court in *Thomas* described the chemical companies as "voluntary participants in the program," 473 U.S. at 589, although the only element of choice seems to have been whether to engage in the manufacture of chemicals.

counterclaim rules or by the expense and inconvenience of litigating the same issues in two fora to forgo his reparations remedy and to litigate his claim in court." *Id.* at 843–44.

Accordingly, *Schor* created an exception to the public rights doctrine, which permits resolution of private claims in otherwise valid administrative schemes where resolution of those private rights "is limited to that which is necessary to make the [scheme] workable" by resolving the public rights created by the regulatory scheme. *Id.* at 856. As the Court put it, "absent the CFTC's exercise of that authority [over state law counterclaims], the purposes of the [administrative] reparations procedure would have been confounded." *Id.* at 856. In context, then, *Schor*'s departure from the public rights line of cases is clearly premised on the voluntary and necessary aspects of the administrative tribunal's resolution of private rights.

Finally, and most generally, the Court has looked to the "concerns motivating the legislature" in choosing a non-Article III forum. *Thomas*, 473 U.S. at 590. In this regard, the Court has attached significance to a showing that there is an "imperative necessity" for administrative procedures because of the specialized, complex nature of the subject matter and a demonstrated need for expedited adjudication. *Murray's Lessee*, 59 U.S. (18 How.) at 282. *See also Schor*, 478 U.S. at 852; *Thomas*, 473 U.S. at 590. *Cf. Palmore* v. *United States*, 411 U.S. 389, 407–08 (1973). The rationale here is that strong "evidence of valid and specific legislative necessities," *Schor*, 478 U.S. at 855, can be accommodated without unduly disrupting separation of powers concerns because such exceptions are limited in scope and reveal that Congress' sole motivation was to solve a pressing emergency, not to avoid Article III adjudication for its own sake. *See id.* at 855–57; *Thomas*, 473 U.S. 590–593.

2. Analysis

Application of these principles to the draft bill leads us to conclude that it is of doubtful constitutional validity. Although S. 558, unlike the draft bill, provides that the Department of Housing and Urban Development (HUD) will act as the moving party in an administrative proceeding, we do not believe that this difference alone should substantially affect the constitutional inquiry.[14] We will analyze each of the proposed bills in turn.

[14] We do not believe that the use of administrative law judges to determine punitive damages may be upheld on the theory that the administrative proceeding is merely an adjunct to the district court. The Supreme Court has upheld against Article III challenges the use of administrative agencies as factfinders in cases involving private rights "only as an adjunct to an Art. III court, analogizing the agency to a jury or a special master." *Atlas Roofing*, 430 U.S. at 450 n 7. However, we do not believe that these cases uphold the use of adjuncts in cases involving private rights that are also actions at common law. As originated in *Crowell*, the adjunct theory did not include private rights of action found at common law. *Crowell* involved a case arising in *admiralty* and the Court distinguished this from common law actions: "In cases of equity and admiralty, it is historic practice to call to the assistance of courts" non-judicial factfinders. 285 U.S. at 51. However, "on the common law side of the Federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution itself." *Id.* Thus, the Court recognized that juries — not non-judicial factfinders — Continued

Perhaps the most important consideration in assessing the draft bill's proposed administrative proceeding is that the right adjudicated is derived from a common law action that is historically within the exclusive preserve of Article III courts. In *Curtis* v. *Loether*, 415 U.S. 189 (1974), the Court concluded:

> We think it is clear that a damages action under 812 [of the Fair Housing Act] is an action to enforce "legal rights" within the meaning of our Seventh Amendment decisions. A damages action under the statute sounds basically in tort — the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach. As the Court of Appeals noted, this cause of action is analogous to a number of tort actions recognized at common law. More important, the relief sought here — actual and punitive damages — is the traditional form of relief offered in the courts of law.

Id. at 195–96 (citations omitted). Thus, the statutory right to be adjudicated in the draft bill's administrative proceeding is directly analogous to a cause of action that was subject to judicial resolution at the time the Constitution came into being, thus creating a strong presumption that it must be tried in an Article III court pursuant to normal procedures. Moreover, the Civil Rights Division draft bill provides that actual and punitive damages may be awarded in the arbitration hearing. § 813. As indicated earlier, these are classic "legal" remedies of the type that could be awarded only by a court of law with a jury, not by a court of equity. *See Tull*, 481 U.S. at 423 n.7. *Cf. Atlas Roofing*, 442 U.S. at 459, 460 (The Seventh Amendment is intended to "preserve" the right to a jury trial in common law suits, not to require them where none was previously required.).

Further, wholly apart from its historical roots, the right at issue here is private in nature, in that it is intended to determine the liability of one individual to another. *Crowell*, 285 U.S. at 51. Under the Civil Rights Division draft bill, virtually the only role played by the Government is to provide a

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[14] (. . . continued)
were required in cases involving common law questions. *Crowell*'s language certainly supports an argument that the Seventh Amendment prevents Congress from placing actions that are both private and based on common law actions beyond the reach of a jury trial. *Crowell* reads the Seventh Amendment as requiring a jury in cases arising under the common law, while permitting agencies to act as *de facto* juries for private rights arising in equity or admiralty. *Id.* at 51. *See also Northern Pipeline*, 458 U.S. at 81–82 (plurality opinion) ("*Crowell* does not support the further proposition necessary to appellants' argument — that Congress possesses the same degree of discretion in assigning traditionally judicial power to adjuncts engaged in the adjudication of rights *not* created by Congress.") (emphasis in original); *United States* v. *Raddatz*, 447 U.S. 667 (1980). We are especially reluctant to adopt this adjunct theory in the Seventh Amendment context when to do so would permit Congress to take from the courts a factfinding function that courts do not have in common law actions under the Seventh Amendment. *See Tull, supra*. Unlike the action at issue in *Raddatz*, the right being resolved under the draft bill is not one a court could decide if it wished; the right to punitive damages has to be resolved by a jury. The adjunct theory, if applied to private rights based on common law actions would render the Seventh Amendment's protection hollow, dependent entirely upon the whim of a congressional majority.

federal rule of decision that defines the liability between private actors. Under the proposed bill, only private litigants may initiate the administrative proceeding and they may themselves seek review or enforcement of the arbitrator's order in court. § 813(a)(1), (c). Although HUD may prevent formal arbitration by not issuing a "reasonable cause" determination and may intervene in the hearing, the entire matter may well proceed to final judgment without Government participation, and, in any event, HUD's intervenor role would clearly be limited to vindicating the rights of the private litigant. In this regard, we note as well that civil rights statutes generally are intended to create personal rights, guaranteed to the individual. *See generally Connecticut* v. *Teal*, 457 U.S. 446 (1982); *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 299 (1978) (opinion of Powell, J.); *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 708, 709 (1978); *Shelly* v. *Kraemer*, 334 U.S. 1, 22 (1948). In short, because the statutorily created right here derives from a dignitary tort and is enforceable primarily by private individuals for their own benefit pursuant to common law remedies, the Court's precedents strongly indicate that these administrative hearings will be viewed as "wholly private tort . . . cases [that] are not at all implicated" by the public right exception described in *Atlas Roofing*. *Atlas Roofing*, 430 U.S. at 458.

Moreover, none of the other factors on which the Court has focused militate in favor of the draft bill's validity. It is clear that a defendant would be an involuntary participant in the arbitration proceedings, and it seems quite doubtful that the private housing market in the United States would generally be considered a "specialized area" for administrative regulation by the federal government. Further, the exception created in *Schor* for ancillary and necessary private claims is inapplicable since adjudication of common law claims is clearly not "incidental to, and completely dependent upon, adjudication of . . . claims created by federal law." *Schor*, 478 U.S. at 856.[15]

[15] We note that the Civil Rights Division's draft bill, as well as S. 558, provides for court enforcement of the administrator's award. Draft bill, § 813(d), (g); S. 558, § 812(h), (i). We confess that we are uncertain whether this is an argument in favor of or against the proposed bill's constitutional validity, because the Court's precedents point in opposite directions. Under the adjunct theory of Article III, assignment of some limited functions to a non-Article III tribunal is sometimes permissible, so long as "'the essential attributes' of judicial power are retained in the Art. III court." *Northern Pipeline*, 458 U.S. at 81 (plurality opinion). *See also Crowell*, 285 U.S. at 51. Thus, under the adjunct theory as traditionally understood, it was quite clear that the constitutional permissibility of the statutory scheme was *enhanced* if the non-Article III forum was given only quite limited "judicial" powers, such as the right to enforce its own orders. Quite naturally, therefore, *Northern Pipeline*, in contrasting *Crowell*, said that a major *defect* in the bankruptcy courts scheme was that those non-Article III tribunals could enforce their own orders without "seek[ing] enforcement in the district court." *Northern Pipeline*, 458 U.S. at 85 (plurality opinion). *See also id.* at 91 (Rehnquist, J., concurring); *Crowell*, 285 U.S. at 51. In *Thomas*, however, the Court stated that the Article III validity of the arbitration scheme was *enhanced* because it "relie[d] tangentially, if at all, on the Judicial Branch for enforcement" of the arbitrators' orders, *Thomas*, 473 U.S. at 591, a conclusion that seems directly at odds with *Crowell*, *Northern Pipeline*, and the entire rationale of the adjunct theory as previously understood. *See Crowell*, 285 U.S. at 33–38. Fortunately, we need not engage in the task of reconciling these cases, because we have previously concluded that the adjunct theory is probably inapposite here because the statutory right to be enforced is derived directly from a private, common law claim. We note, parenthetically, that the powers assigned to the arbitrator under the draft bill and S. 558 are considerably greater than the power (*i.e.*, assessment of value) assigned to the adjunct in *Crowell*, but less than the plenary powers given to the bankruptcy courts in *Northern Pipeline*. *See* 9 Op. O.L.C. at 40.

We further note that the Fair Housing Act certainly does not seem to involve the imperative necessity that the Court recognized in *Thomas* as a legitimate motivating factor for Congress' consideration in choosing an arguably prompter administrative remedy. 473 U.S. at 590. Indeed, the *Curtis* Court rejected similar arguments advocating the need for expedited *judicial* review of Title VIII actions without a jury trial. Noting the availability of preliminary injunctions and non-jury trials in cases seeking only equitable relief, the Court stated "[m]ore fundamentally, however, these considerations are insufficient to overcome the clear command of the Seventh Amendment." 415 U.S. at 198. It is nonetheless conceivable that a strong legislative record demonstrating that administrative trials are for some reason necessary meaningfully to resolve Fair Housing cases would tend to support the validity of the congressional purpose in opting for these proceedings. Of course, any such claim is substantially undermined by the fact that judicial proceedings remain available to plaintiffs so inclined, thus undercutting any notion that administrative proceedings are "necessary."

Indeed, in the circumstances presented here, the congressional purpose underlying the establishment of administrative proceedings may well be viewed as a substantial deficiency, because the draft bill's structure and background suggest that the sole purpose of the administrative alternative is simply to supplement or displace adjudication by Article III courts and juries. In this regard, it is significant that "there are only minimal differences between the relief available in the administrative forum (in which a civil penalty for the Government replaces punitive damages for the individual) and the judicial forum." 9 Op. O.L.C. at 37. By providing for punitive damages in either the administrative or judicial forum, moreover, the draft bill leaves it entirely up to a plaintiff in an individual case to choose between the Article III and Article I fora, without sacrificing any weapon in his arsenal of remedies. Thus, the clear effect of the Act is to create parallel, virtually identical Article III and Article I processes — a dualism that serves no apparent purpose other than enhancing plaintiff's options and his ability to avoid bringing his case before a jury or an Article III judge.

We do not mean to suggest that providing plaintiffs with a choice between such parallel schemes by itself raises independent due process problems, even where, as here, it renders the defendant's right to a jury trial utterly dependent on the plaintiff's choice of fora. However, the dual structure may well directly signal "the concerns guiding the selection by Congress of a particular method for resolving disputes." *Thomas*, 473 U.S. at 587. In this regard, it is also noteworthy that "the Department would enter the fray, not at the outset, but nearly [19] years after the creation of a private cause of action in the district court which provides for identical remedies, and nearly [13] years after the Supreme Court expressly ruled that under such circumstances trial by jury must be available on demand." 2 Op. O.L.C. at 20.

Against this backdrop, a reviewing court may fairly conclude that, in contrast to *Schor*, Congress' "primary focus was [not] on making effective a

specific and limited federal regulatory scheme, [but] on allocating jurisdiction among federal tribunals." *Schor*, 478 U.S. at 855. In other words, the background and parallel structure of the Act might well strongly suggest that the "concerns that drove Congress to depart from the requirements of Article III," *id.* at 851, were merely Congress' desire to depart from the requirements of Article III because of the cost and delay that attend a jury trial in a federal court. Although the speed and efficiency of Article I tribunals are virtues, we believe that speed and efficiency alone cannot be viewed as sufficient reason for establishing Article I adjudication absent "imperative necessity." Indeed, acceptance of such a justification would lead to the somewhat circular rule that Congress may avoid the constraints of Article III and eliminate the Seventh Amendment rights ringingly endorsed in *Tull* solely on the ground that it believes that Article III adjudication is more cumbersome than alternative dispute resolution without judges and juries.

We turn next to consideration of S. 558, which is identical to the draft bill in all material respects save one: it provides that HUD may institute administrative proceedings "on behalf of the aggrieved person filing the complaint" of housing discrimination, rather than the aggrieved person himself. S. 558, § 810(g)(2)(A). Significantly, the private complainant has a right to file a complaint or to intervene as a full party in an administrative proceeding initiated by HUD, and he apparently may obtain both judicial enforcement and review of an adverse decision even if HUD does not go forward. *Id.*, §§ 810(a), 812(h)(2). Although, for the reasons noted above, the issue is hardly free from doubt, we think that the better view is that HUD's participation in initiating the complaint is not alone sufficient to obviate the constitutional difficulties previously described.

As we have suggested, HUD's participation as a party in these circumstances says very little about the "public" nature of the right involved, but simply describes the parties that are authorized to enforce that right. For this reason, the better understanding of the Court's precedent is that the Government's party status should not be given dispositive weight, particularly where, as here, the Government does not possess exclusive enforcement authority.

We are fortified in our conclusion by the fact that this Office has previously determined, albeit not without equivocation or difficulty, that a proposed 1978 amendment to the Fair Housing Act, virtually indistinguishable from S. 558, was probably unconstitutional. We so concluded because, as with S. 558, HUD "would not be the sole enforcer of the statutorily created" government policy and would not be acting in a regulatory capacity with regard to a public right.[16]

An opinion that we rendered in 1985 points to a similar conclusion. There we concluded, albeit tentatively, that a proposed amendment would probably survive constitutional scrutiny, but we did so in large part because the administrative process failed to "provide the aggrieved individual the punitive dam-

[16] 2 Op. O.L.C. at 20. Although acknowledging the difficulty of the issue, we concluded: "were we to opine one way or the other, our conclusion would probably favor a finding that [the proposal] is unconstitutional." *Id.*

ages typically available at common law." 9 Op. O.L.C. at 38. As noted, S. 558, like the draft bill, does provide this traditional legal remedy, thus substantially reinforcing the private, common law nature of the cause of action and rendering the administrative hearing virtually identical to a judicial proceeding.

It should be noted, however, that *Thomas* and *Schor*, two subsequent decisions of the Supreme Court have evinced less sympathy for constitutional challenges to administrative proceedings and upheld statutes that share some, though clearly not all, of the defects described above. Nevertheless, for the reasons that we have previously indicated, a review of the *Thomas* and *Schor* opinions persuades us that they contain nothing that requires an analysis or conclusion different from those expressed in our prior memoranda. First, with respect to the specific question of the Government's party status, *Thomas* reinforces the correctness of our previous determination that such party status means little unless it affects the "substance of what [the statute] accomplishes." *Thomas*, 473 U.S. at 589. Second, *Schor*'s arguable departure from prior cases is not of controlling importance here because the proposed bills contemplate the involuntary participation of the defendant in administrative hearings and do not adjudicate private rights in order to preserve the agency's practical ability to adjudicate public rights.

Finally, we discern nothing in *Thomas* that either signals any sort of wholesale retreat from the Court's Article III jurisprudence or lends meaningful support to the proposed bills. *Thomas* simply upheld the administrative implementation of a comprehensive federal regulatory scheme in an opinion joined by every member of the *Northern Pipeline* plurality that reached the merits of the case. *See Thomas*, 473 U.S. at 595 (Brennan, J., concurring). At issue in *Thomas* was administrative resolution of a very mechanical and straightforward dispute over the amount of compensation owed for access to privileged data, a dispute that nonetheless needed to be resolved expeditiously if the administrative scheme was to accomplish its purpose. As the Court noted, "Congress, without implicating Article III, could have authorized EPA to charge follow-on registrants *fees*" and that such "rate-making is an essentially legislative function." *Id.* at 590 (emphasis added). Thus, the charging of such fees was a matter that "could be conclusively determined by the Executive and Legislative Branches." *Id.* at 589 (quoting *Northern Pipeline*, 458 U.S. at 68). Conversely, the Court placed heavy reliance on the fact that the statute at issue did not "displac[e] a traditional cause of action [or] affec[t] a pre-existing relationship based on a common-law [claim]" because the statutory right to compensation "does not depend on or replace a right to such compensation under state law." *Id.* at 584, 587. In short, *Thomas* broke no new Article III ground because "at its heart the dispute involve[d] the exercise of authority by a federal government arbitrator in the course of administration of [the statute's] comprehensive regulatory scheme. As such it partakes of the characteristics of a standard agency adjudication." *Id.* at 600 (Brennan, J., concurring).

Having said all that, we emphasize that, due to the meandering and confusing course of the Court's precedent, it is both impossible to offer any determi-

native opinion in this area and possible to construct a defense of the proposed bills that may prevail in some courts. A line of defense that might be accepted by a sympathetic court would proceed along the following lines. First, elimination of racial and ethnic discrimination in housing is a paramount public purpose. Further, Congress has great discretion in choosing the manner in which to resolve disputes, so long as the subject matter of the dispute concerns an area over which Congress permissibly exercises authority, including any area it may reach pursuant to the Commerce Clause. *See Atlas Roofing*, 430 U.S. at 456–457; *Northern Pipeline*, 458 U.S. at 105–113 (White, J., dissenting) (collecting authorities). Moreover, under a highly formalistic approach, a court could conclude that the common law antecedents of § 812 of the Fair Housing Act are unimportant because Congress created a "new" statutory duty when it outlawed housing discrimination, and that the presence of the United States, at least as the moving party under S. 558, is of great significance. The court could further determine that housing discrimination is a "specialized area" requiring administrative expertise and that it should defer to Congress' determination that there is a tangible need for expedited review. More generally, a court could fairly note that differentiating between public and private rights or the regulatory and prosecutorial role of the government is a highly abstract endeavor that has not received, and is not susceptible to, principled or consistent resolution.

We acknowledge that there is language in some of the Court's cases that can be interpreted to support such a line of analysis. This sort of analysis would place virtually no limits on congressional authority to remove the resolution of disputes entirely from Article III courts. Congress always creates "new" rights by enacting statutes; these statutes must always be directed at an area which Congress has the power to regulate, and administrative tribunals are always more expeditious and convenient than juries and judges. Indeed, such an analysis comes perilously close to subordinating Article III's reservation of the "judicial Power" and the express guarantees of the Seventh Amendment to the Necessary and Proper Clause.[17] Accordingly, we believe the draft bill and S. 558 in their current form are and would likely be declared unconstitutional on Article III and Seventh Amendment grounds.

II. Conclusion

Although the policy implications of any modification to the draft bill are obviously for you to resolve, we recommend certain changes in order to enhance the constitutional viability of the draft bill. All concerns under the Seventh Amendment and Article III would be alleviated, of course, by deletion of the provisions establishing an administrative hearing process. Short of this, the best solution from a constitutional perspective would be to limit the relief available in an administrative proceeding to equitable remedies such as injunc-

[17] Nor do we understand why the grave importance of a public policy is an argument supporting *removal* of that controversy from an impartial judiciary insulated from political influence.

tions and restitution, thus avoiding any conflict with the Seventh Amendment's preservation of jury trials in "suits at Common Law." At a minimum, serious consideration should be given to eliminating at least punitive damages for private litigants in the arbitration proceedings. The retention of compensatory damages alone might be upheld under reasoning similar to that the reasoning that we outlined in 1985. *See* 9 Op. O.L.C. 32.

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Applicability of 18 U.S.C. § 219 to Retired Foreign Service Officers

A retired foreign service officer is not a public official of the United States subject to 18 U.S.C. § 219, which provides criminal penalties for conduct that would usually constitute a violation of the Emoluments Clause of the Constitution, Article I, § 9, cl. 8.

June 15, 1987

MEMORANDUM OPINION FOR THE LEGAL ADVISER, DEPARTMENT OF STATE

This responds to your request for our views on the applicability of 18 U.S.C. § 219 to retired foreign service officers.[1] Section 219 provides criminal penalties for any "public official of the United States" who is required to register under the Foreign Agents Registration Act of 1938 (FARA) because he acts as an agent for a foreign principal. Essentially, § 219 provides criminal penalties for conduct that would usually constitute a violation of the Emoluments Clause of the Constitution.[2] The question is whether a retired foreign service officer should be considered a "public official of the United States" for purposes of

[1] This question was raised originally in a letter from a retired foreign service officer to the Office of Government Ethics (OGE). The OGE referred the letter to this Office, taking the position that it had no authority to construe this particular provision of Title 18. Although we have no specific authority to render legal opinions to private individuals, the inquiry seemed to us of sufficient general interest to the government to warrant a response. And, because the statute in question is a criminal law enforced by this Department, it seemed appropriate for us to interpret it. In the course of responding to our request for the views of the State Department on the issues involved, you requested that we do so

[2] The Emoluments Clause of the Constitution prohibits persons holding "an Office of Profit or Trust" under the United States from accepting any "Emolument, Office, or Title" from a foreign state, without the consent of Congress. U.S. Const. art. I, § 9, cl. 8. The term "emolument" has been interpreted to include compensation for employment. *See, e.g.*, 40 Op. Att'y Gen. 513 (1947). Persons prohibited from being compensated for foreign employment by the Emoluments Clause may be subject to criminal penalties under § 219 if they accept such employment, although that section, applying to conduct that would violate the FARA, is both broader and narrower than the Emoluments Clause itself It is broader in that the FARA applies to agents for foreign partnerships, corporations and private persons as well as foreign governments, *see* 22 U.S.C. § 611(b), whereas the Emoluments Clause concerns only emoluments received, in some cases indirectly, from foreign governments or officials. Section 219 is narrower in that it does not criminalize everything that would violate the Emolument Clause, such as the acceptance of a "Title" or "Office" that would not require registration under the FARA. Moreover, the categories of persons covered by the constitutional and statutory prohibitions may not be precisely coextensive, although for practical purposes they are the same.

this statute.[3] The State Department is of the view that they should not. For reasons set forth in the following paragraphs, we agree.

The question of the applicability of § 219 to retired foreign service agents arises because, historically, such individuals appear to have been considered by the Department of State to hold an "office of profit or trust" within the Emoluments Clause. If they do, they would be disabled by this provision of the Constitution from accepting employment with a foreign government, and at least arguably subject to the penalties contained in § 219 if such employment would require them to register under FARA.[4]

As far as we can determine, no court has ever considered the constitutional status of retired foreign service officers under the Emoluments Clause, or the applicability to them of § 219. The Registration Unit in the Criminal Division of this Department, which has responsibility for interpreting § 219, indicates that it is a matter of first impression. As you point out in your submission, the State Department's historical position on the applicability of the Emoluments Clause appears to have been derived from certain cases and administrative rulings dealing with the status of retired military officers as "officers of the United States."[5] It seems to have been assumed that the factual circumstances

[3] As originally enacted in 1966, § 219 applied to "an officer or employee of the United States in the executive, legislative, or judicial branch of the Government." *See* Pub. L. No. 89–486, § 8, 80 Stat. 244, 249. In 1984, § 219 was amended by the Comprehensive Crime Control Act to apply to "public officials of the United States." Pub. L. No. 98–473, § 1116, 98 Stat. 1837, 2149. "Public official" is defined in the amended § 219 to include Members of Congress and Delegates from the District of Columbia, as well as "any officer or employee or person acting on behalf of the United States . . . in any official function." Without more, this language on its face would not seem naturally to encompass an officer who is retired and thus no longer "acting on behalf of the United States . . . in any official function." Moreover, there is no reason to believe the 1984 change in the description of the class of persons covered by § 219 was intended to effect any change in the statute's coverage of retired foreign service officers. There is no documented legislative history that would illuminate the purpose of the change, which was added to the Crime Control bill in a joint House-Senate mark-up session after the bill had been reported out of committee in both Houses. The amendment to § 219 was not discussed on the floor. According to Criminal Division attorneys who were monitoring the Crime Control bill, the sole purpose of the amendment to § 219 was to bring Members of Congress within the section's prohibition.

[4] Our files indicate that in 1961 the State Department attempted to secure the passage of legislation to authorize retired foreign service officers to accept employment with foreign governments, subject to the approval of the Secretary of State. The State Department draft bill was explicitly premised on the assumption that the Emoluments Clause would otherwise preclude such employment. *See* Memorandum to Byron R. White, Deputy Attorney General from Nicholas DeB. Katzenbach, Assistant Attorney General, Office of Legal Counsel (Nov. 3, 1961). A subsequent legislative enactment gave Congress' consent to the employment of certain retired officers of the United States by foreign governments, but did not address the situation of retired foreign service officers. *See* Pub. L. No. 95–105, § 509(a)-(c), 91 Stat. 844, 859 (1977) (codified at 37 U.S.C. § 908) (consenting to the employment by foreign governments of retired military officers, retired Public Health Service officers, and members of the armed forces reserves). It may be, as you point out, that Congress' failure in 1977 to include retired foreign service officers among those exempted from § 219 can be attributed to the fact that by that time neither the State Department nor Congress believed that they would otherwise be subject to its provision. In light of the State Department's earlier contrary belief, however, and the potential criminal penalties involved, it seems important to settle the matter clearly one way or the other.

[5] *See, e.g., United States* v. *Tyler*, 105 U.S. 244 (1881) (retired military officer still a member of the armed forces for purposes of a statutory pay increase); *Morgenthau* v. *Barrett*, 108 F.2d 481 (D.C. Cir. 1939), *cert. denied*, 309 U.S. 672 (1940) (retired military officers are officers of the United States and subject to all conflict of interest laws from which they have not been exempted). The Comptroller General has taken the position that retired military officers are prohibited by the Emoluments Clause from holding employment

Continued

of retirement from the foreign service were sufficiently close to those prevailing in the military to warrant according retirees from both services similar treatment under § 219. For the reasons set forth in your submission, we agree that this assumption should be reexamined.

Under the laws establishing the terms and conditions of retirement status for foreign service officers, their situation differs in a number of important respects from that of retired military officers. Most significantly, retired military officers are subject to recall to active duty without their consent, and this obligation may be enforced by court martial under the Uniform Code of Military Justice. *See* 10 U.S.C. §§ 688, 802.[6] By contrast, according to your submission, the statutory provision authorizing recall of a retired foreign service officer, 22 U.S.C. § 3948, has never been understood to allow nonconsensual recall. There is in any event no provision for enforcing it.

While the difference in the recall status of the two classes of retirees seems to us sufficient in and of itself to justify according them different treatment under the Emoluments Clause and § 219, there is other statutory evidence of Congress' expectation that retired foreign service officers would not be regarded as on the same footing as retired military officers as far as their continuing relationship with the government was concerned. For example, unlike retired military officers, retired foreign service officers are not listed as members of the service in the pertinent provisions of the United States Code. *Compare* 10 U.S.C. § 3075 *with* 22 U.S.C. § 3903. Also, retired foreign service officers receive a retirement "annuity," while retired military officers receive "retired pay." *See* 10 U.S.C. § 1401.

Accordingly, we agree with your conclusion that a retired foreign service officer should not be regarded as holding "an Office of Profit or Trust" within the Emoluments Clause, nor, consequently, as a "public official of the United States" for purposes of 18 U.S.C. § 219.

MICHAEL A. CARVIN
Deputy Assistant Attorney General
Office of Legal Counsel

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[5] (. . . continued)
with a foreign government because they are subject to being recalled to active service. *See, e.g.*, 53 Comp. Gen. 753 (1974). The legislative history of § 219 indicates an expectation that the provision might be construed to apply to retired military officers. *See* H.R. Rep. No. 1470, 89th Cong., 2d Sess. 18–19 (1966) (reproducing letter from the Department of the Navy requesting the addition of a provision specifically exempting retired military officers from § 219).

[6] It is this aspect of the status of retired military officers that has led courts to conclude that they should be considered officers of the United States even in retirement. *See United States* v. *Tyler*, 105 U.S. at 246; *supra* note 5.

Resolution of Legal Dispute Between the Department of Energy and the Tennessee Valley Authority

The Tennessee Valley Authority is a part of the Executive Branch. The members of its board of directors serve at the pleasure of the President. In a legal dispute between two Executive agencies whose heads serve at the pleasure of the President, Executive Order No. 12146 requires that the dispute be referred to the Attorney General for resolution.

July 8, 1987

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF ENERGY

This responds to your request of June 30, 1987 for the opinion of the Attorney General on whether a dispute between the Department of Energy (DOE) and the Tennessee Valley Authority (TVA) is subject to resolution under Executive Order No. 12146, 3 C.F.R. 409 (1979 Comp.).[1] We believe that Executive Order No. 12146 requires that the dispute be submitted to the Attorney General for settlement.

Executive Order No. 12146 provides the President's orders to his subordinates regarding inter-agency disputes. Section 1–4 states:

> 1–4. *Resolution of Interagency Legal Disputes.*
>
> 1–401. Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.

[1] The TVA and DOE disagree on the amount of money DOE owes the TVA for certain electric power. The TVA has filed suit against DOE. *Dean* v. *Herrington*, No. 3–87–436 (E.D. Tenn. filed June 16, 1987).

NOTE: After this opinion was issued by the Office of Legal Counsel, the District Court held that Executive Order No. 12146 did not apply to the TVA. *See Dean* v. *Herrington*, 668 F. Supp. 646, 652–53 (E.D. Tenn. 1987). Without deciding "whether TVA's head 'serves at the pleasure of the President,'" *id.* at 653, the court found that Executive Order No. 12146 was intended to coordinate the legal resources of agencies represented by the Justice Department and therefore did not apply to agencies such as TVA that have independent litigating authority. *Id.* The Claims Court rejected that conclusion after the district court had transferred the case to it. Although finding the case justiciable, the Claims Court held that Executive Order No. 12146 did apply, *see Dean* v. *Herrington*, 13 Cl. Ct. 692, 700–02 (1987), and therefore temporarily suspended the action and ordered the parties to submit the dispute to the Attorney General for administrative resolution *Id.* at 703.

> 1–402. Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere.

3 C.F.R. 411 (1979 Comp.). Because we believe that both DOE and the TVA are headed by individuals who serve at the pleasure of the President, we believe that § 1–402 requires that the TVA-DOE contract dispute be submitted to the Attorney General prior to any court resolution.

The Secretary of Energy is appointed by the President with the advice and consent of the Senate. 42 U.S.C. § 7131. The statute places no limit on the President's power to remove the Secretary, and there is no question that the Secretary serves at the pleasure of the President within the meaning of § 1–402.[2]

The TVA is a government corporation established by Congress and governed by a board of directors. 16 U.S.C. §§ 831, 832(a).[3] Its board of directors is "composed of three members, to be appointed by the President, by and with the advice and consent of the Senate." 16 U.S.C. § 832(a). In the absence of any other guidance, we are of the view that the President may remove board members in his discretion because, as with the Secretary of Energy, the statute places no limit on his removal authority.

The historical record supports this proposition. Shortly after the TVA was created in 1933, it was enveloped in scandal. As the board members quarreled over responsibility, President Roosevelt asked the chairman, Dr. A. E. Morgan, to provide evidence to support his charges of corruption among his fellow board members. When Dr. Morgan refused to do so, the President held a hearing and dismissed Dr. Morgan from office.[4] Attorney General Robert Jackson subsequently issued an opinion that concluded that the TVA was an executive agency and that, therefore, the President could remove its members. 39 Op. Att'y Gen. 145 (1938).

This view was not confined to the Executive Branch. Dr. Morgan sought relief in court, charging that the TVA was a quasi-legislative body responsible to Congress. The U.S. Court of Appeals for the Sixth Circuit rejected his claim:

> It requires little to demonstrate that the Tennessee Valley Authority exercises predominantly an executive or administrative function. To it has been entrusted the carrying out of the dictates of the statute to construct dams, generate electricity, manage and develop government property. Many of these activities, prior to the setting up of the T.V.A., have rested with the several

[2] *See generally Myers* v. *United States*, 272 U.S. 52 (1926), *Shurtleff* v. *United States*, 189 U.S. 311 (1903); *In re Hennen*, 38 U.S. (13 Pet.) 230 (1839); *Kalaris* v *Donovan*, 697 F.2d 376, 389 (D.C. Cir), *cert. denied*, 462 U.S. 1119 (1983).

[3] Government corporations are agencies of the United States. *Rainwater* v. *United States*, 356 U S 590, 591–92 (1958).

[4] 83 Cong. Rec. 3917–18, 3951–53 (1938).

> divisions of the executive branch of the government. . . . [The TVA] is not to be aligned with the Federal Trade Commission, the Interstate Commerce Commission, or other administrative bodies mainly exercising clearly quasi-legislative or quasi-judicial functions — it is predominantly an administrative arm of the executive department.

Morgan v. *TVA*, 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941). This decision, upholding the President's authority to dismiss TVA directors, has remained the law for the last forty years.[5]

Because the Secretary of Energy and the members of the board of directors for the TVA carry out executive functions and serve under the direction and control of the President, the dispute between these two agencies must be submitted to the Attorney General for resolution. This would bring the two agencies into compliance with the Executive order and comply with the constitutional requirements pertaining to the separation of powers, which necessarily render judicial resolution of a dispute between two agencies in the Executive Branch, both of which are headed by officers answerable to the President of the United States, non-justiciable.[6]

DOUGLAS W. KMIEC
Deputy Assistant Attorney General
Office of Legal Counsel

[5] *See also TVA* v. *Kinzer*, 142 F.2d 833, 837 (6th Cir. 1944); 1959 *Pub. Papers* 566 (Aug. 6, 1959) ("TVA is, however, part of the Executive Branch of the Government.") (statement of President Eisenhower on signing bill amending TVA's authorizing statute).

[6] *See United States* v. *Easement & Right of Way Over Certain Land in Bedford County, Tennessee*, 204 F. Supp. 837 (E.D. Tenn. 1962).

Proposed Legislation to Establish the National Indian Gaming Commission

A bill that proposes to create an "independent commission" within the Department of the Interior to regulate gambling on Indian reservations and that would give the commission the power, *inter alia*, to impose civil fines, gives rise to several constitutional issues. The extent to which Congress may restrict the removal of subordinate executive officers such as the members of the Indian Gaming Commission is unclear, but such restrictions should be avoided. Furthermore, consistent with the Appointments Clause, the authority to waive a federal statute should be subject to the approval of a principal officer, such as the Secretary of the Interior.

Under the Due Process Clause, civil penalties imposed by members of the Indian Gaming Commission should be imposed by an unbiased administrative judge rather than an interested official.

Under the Fourth Amendment, the Indian Gaming Commission may conduct warrantless searches of gambling establishments, which are part of a closely regulated industry, only if: (1) there is a substantial government interest; (2) the searches are necessary to further the regulatory scheme; and (3) the statute provides a constitutionally adequate substitute for a warrant. The first and second requirements are met in this case. The third requirement may be met by providing notice in the statute that inspections will be made on a regular basis and will have a particular scope.

July 24, 1987

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION

This responds to your request for our views on S. 1303, a bill that would establish a National Indian Gaming Commission (Commission) within the Department of the Interior to regulate gambling on Indian reservations. We have several comments.

First, the Commission is established as "an independent commission" within the Department of the Interior. S. 1303, § 5(a). As a part of the Department of the Interior, the Commission is subordinate to the Secretary of the Interior and cannot be independent of that authority. Section 5(b)(5) states that the four members appointed by the Secretary may only be removed for cause. The extent of Congress' power to place limitations on the removal of subordinate executive officers is unclear,[1] and in this context, should be avoided. The Secretary is responsible for the actions of the Commission's members, a majority of whom he appoints, and will be charged with defending them if they are sued or act in a controversial fashion. Limiting his removal power will

[1] *Cf. United States* v. *Perkins*, 116 U.S. 483 (1886).

handicap his supervisory authority. This is especially important given that the Commission is acting in an area that will undoubtedly attract criminals and subject the Commissioners to a variety of pressures. If enacted as is, we would read the "for cause" provision broadly, in order to give the Secretary maximum flexibility. To provide the Secretary with adequate authority to supervise the Commission's members, however, we urge that he be given the clear right to remove the members at will.

Second, § 4, which prohibits gaming on certain Indian lands, does not apply "if the Indian tribe . . . obtains the concurrence of the Governor of the State, and the governing bodies of the county or municipality in which such lands are located" to the tribe's obtaining the land. *Id.*, § 4(b). This provision would give individuals not appointed in accordance with the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, the authority to waive a federal statute. In order to avoid the constitutional problems inherent in such a situation, § 4(b) should be revised to begin: "Subject to the approval of the Secretary." This would insure that implementation of the statute remained in the hands of a properly appointed Executive Branch officer.

Third, we are concerned by § 15(a)(1), which permits the Chairman of the Commission to levy civil fines of up to $25,000 against the managers of the gambling establishments.[2] "Fines collected pursuant to this section shall be utilized by the Commission to defray its operating expenses." *Id.*[3] The use of civil penalties to supplement the Commission's appropriation raises due process concerns. The Due Process Clause requires that such fines be assessed by a neutral tribunal. *Ward* v. *Monroeville*, 409 U.S. 57, 62 (1972). Although it is true that Commission members will not benefit personally from any civil fines imposed,[4] the provision raises questions about how impartial the Chairman will be in levying fines when he knows the proceeds will be applied directly to the "operating expenses" of the Commission.

The Supreme Court addressed this issue most recently in *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238 (1980).[5] In upholding the assessment provision at issue in *Marshall*, the Court highlighted several factors. First, the Court noted that the regional administrator levying the fine did not have the role of a judge, as in *Ward* and *Tumey*, but was akin to a prosecutor. Prosecutors, the Court said, need not be entirely neutral and detached, as judges must be. *Marshall*, 446 U.S. at 248. The regional administrator had the role of a prosecutor because the employer was "entitled to a *de novo* hearing before an administrative law judge," where the administrator would have to prove his case. *Id.* at 247. Thus, the first level of *adjudication* (rather than accusation) was before an unbiased judge.

[2] The manager may have the Commission hear the evidence against him before the fine is collected by the Chairman. S. 1303, § 15(a)(2).

[3] Operating expenses are not defined.

[4] *See Tumey* v. *Ohio*, 273 U.S. 510, 523 (1927).

[5] *Marshall* involved the power of a Department of Labor regional administrator to assess a civil penalty of up to $1000 against employers who violated the child labor laws. The penalties collected in each region were returned to the national office, which allocated them for various parts of the program, including the regional offices. The statute was challenged on the ground that regional administrators would assess extra fines in the hope that some of the money would be returned to their regions.

By contrast, under S. 1303 the Chairman (and the Commission) are not analogous to prosecutors: they do not have to prove their case before an independent administrative law judge. The Chairman's decision to levy a fine is reviewed not by an independent administrative law judge but by the Commission, which is as interested in the matter as the Chairman. Thus, the Chairman and the Commission constitute the initial level of adjudication for the owners. The next level of adjudication is in the court of appeals. S. 1303, § 16. The *Marshall* opinion seems to indicate that if a financially interested administrator acts as a judge, the "rigid requirements of *Tumey* and *Ward*, designed for officials performing judicial or quasi-judicial functions" apply. *Marshall*, 446 U.S. at 248.

Moreover, the Court in *Marshall* emphasized that the penalties collected by the regional administrators constituted "substantially less than 1%" of the agency's budget. *Id.* at 245. In fact, the agency returned money each year to the Department of the Treasury because it was not even using up its appropriation, so that the collection of penalties did not "resul[t] in any increase in the funds available to the [agency] over the amount appropriated by Congress." *Id.* at 246. In light of these figures, the Court did not believe that there was "a realistic possibility that the [administrator's] judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts." *Id.* at 251. The Commission's initial appropriation is $2,000,000. S. 1303, § 20. We cannot say at this point how much money the Commission will collect in penalties, but there is certainly a significant possibility that the Commission may generate more than 1 percent of its operating expenses from assessing penalties of up to $25,000 per offense.

As the Supreme Court has said, one of the most important functions served by having an impartial and disinterested judge is the preservation of a fair adjudicative *process*: "Indeed, 'justice must satisfy the appearance of justice.'" *Marshall*, 446 U.S. at 243 (citation omitted). While we cannot state definitively whether the penalty provision in S. 1303 would survive court scrutiny, we do believe it would provide a serious ground for attack. We would therefore recommend that this provision be eliminated. If it is not, we recommend that the amount of money collected be used as a credit against the Commission's appropriation, rather than as a supplement to it, or that some cap be placed on the amount that the Commission may retain.

Our next concern with the bill is that it would permit the Commission to inspect the premises and records of any establishment where gambling is conducted. S. 1303, § 7(b)(2), (4). As we noted last year when commenting on an earlier version of this bill,[6] the Supreme Court has recognized the applicability of the Fourth Amendment to commercial enterprises, but has created certain exceptions: first, for closely regulated industries in which owners have reduced expectations of privacy; and second, for laws providing such a regular and certain pattern of inspections that there is a predictable and guided federal

[6] Memorandum for Stephen S Trott, Assistant Attorney General, Criminal Division from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel (Apr 1, 1986).

regulatory presence.[7] The Supreme Court has held that closely regulated industries include the liquor trade, firearms, mining, and, in its most recent decision in this area, automobile junkyards. *New York* v. *Burger*, 482 U.S. 691 (1987). We think it is fair to assume that gambling would be considered a closely regulated industry in the United States.

In *Burger*, the Supreme Court held that warrantless inspections of closely regulated industries are permissible if three criteria are met. First, there must be a substantial federal interest at stake. *Id.* at 702. Regulation of gambling on Indian reservations in order to prevent the infiltration of organized crime is certainly an important federal interest. Second, warrantless inspections must be necessary to further the regulatory scheme. *Id.* As with the scheme upheld in *Burger*, effective inspections of gambling establishments require surprise. Otherwise, the owners would have ample time to hide or destroy ledgers or other evidence of malfeasance. Third, the statute must provide "a 'constitutionally adequate substitute for a warrant.'" *Id.* at 703 (quoting *Donovan* v. *Dewey*, 452 U.S. 594, 603 (1981)). In *Burger*, this condition was met because:

> [t]he statute informs the operator of a vehicle dismantling business that inspections will be made on a regular basis. Thus [he] knows that the inspections . . . do not constitute discretionary acts by a government official but are conducted pursuant to statute. [The statute] also sets forth the scope of the inspection and, accordingly, places the operator on notice as to how to comply with the statute.

Id. at 711 (citations omitted). The only restraint on the scope of the inspection identified by the Court was limiting the inspections to regular business hours. *Id.*

S. 1303 puts the operators of gambling establishments on notice that they will be inspected and lists the items that are subject to inspection, thus placing operators on notice as to the scope of what can be examined. Accordingly, our only suggestion is that the bill be amended to state that inspections will take place during regular business hours.[8]

DOUGLAS W. KMIEC
Deputy Assistant Attorney General
Office of Legal Counsel

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[7] *See Donovan* v. *Dewey*, 452 U.S. 594, 598 (1981); *Marshall* v. *Barlow's Inc.*, 436 U.S. 307, 311 (1978); *United States* v. *Biswell*, 406 U.S. 311, 313 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 75 (1970); *See* v. *City of Seattle*, 387 U.S. 541, 542 (1967).

[8] Earlier cases such as *Donovan* also required inspections on more than an annual basis: *Donovan* upheld a statutory scheme in part because it provided for irregular inspections at least twice a year. 452 U.S. at 604. *Burger* does not appear to insist on this factor, but such a provision would provide further protection against constitutional attack.

Title X Family Planning Program Proposals

Section 1008 of Title X prohibits Title X programs from counseling and making referrals related to abortion as a method of family planning, except where such counseling and referrals are medically indicated. Such a limitation on the use of government funds does not violate the Constitution.

The Secretary of Health and Human Services is authorized to prohibit Title X programs from engaging in abortion advocacy and to require that organizations engaged in both Title X programs and abortion-related programs segregate the two. Such requirements do not violate the Constitution.

July 30, 1987

MEMORANDUM OPINION FOR THE SENIOR ASSOCIATE COUNSEL TO THE PRESIDENT

I. Introduction and Summary

You have requested the opinion of this Office on three proposals to modify the administration of the Title X family planning program. This memorandum confirms our earlier, oral advice to you that the Secretary of Health and Human Services may implement these proposals by appropriate regulations promulgated pursuant to Title X to be effective on or after October 1, 1987.[1]

The three proposals relating to Title X are as follows:[2]

> (1) Title X programs would be prohibited from providing counseling and referral for abortion services as a method of family planning;
>
> (2) Title X programs would be prohibited from engaging in abortion-related advocacy activities; and
>
> (3) Organizations maintaining both Title X programs and programs that provide abortion-related services would be required

[1] Unless HHS has adopted contrary regulations or special statutory requirements exist, such regulations would not be subject to the notice-and-comment requirements of the Administrative Procedure Act because of the grant exception in 5 U.S.C. § 553(a). We have not, however, examined any specific questions relating to the procedural requirements for promulgating regulations under Title X, or considered whether it would be prudentially advisable to promulgate these proposals by notice-and-comment rulemaking or as revisions to the existing internal departmental guidelines.

[2] There is a fourth proposal relating to medical research by the Surgeon General which we have not addressed.

> to segregate the abortion-related programs from the Title X programs.

In brief, our conclusions are as follows. First, we believe that the proposal to restrict counseling and referral for abortion services as a method of family planning is mandated by § 1008 of Title X, but that, in accordance with current regulations, such counseling and referral should be permitted where medically indicated. Second, we believe that the Secretary of HHS has ample statutory authority to prohibit abortion advocacy by Title X programs. Third, we believe that the Secretary of HHS has ample authority to require reasonable physical and other segregation between Title X programs and programs providing abortion-related services. Finally, we believe that the three proposals can be implemented in a constitutional manner.

II. Analysis

A. Abortion Counseling and Referral Activities

We believe that § 1008 compels the Secretary of the Department of Health and Human Services (HHS) to prohibit in Title X programs all counseling and referrals related to abortion as a method of family planning, although abortion counseling and referrals should not be prohibited where they are medically indicated. Accordingly, § 8.6 of the HHS's current *Program Guidelines for Family Planning Services*, which requires abortion counseling and referrals in circumstances in addition to where medically indicated, is contrary to the statutory prohibition in § 1008 and should be amended.

Section 1008 of the Family Planning Services and Research Act of 1970, Pub. L. No. 91–572 (codified at 42 U.S.C. § 300a-6), provides:

> None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning.

We believe that this prohibition prevents any program receiving Title X funds from carrying out any activity related to abortion as a method of family planning. We understand the term "abortion as a method of family planning" to include all abortions except where the abortion is medically indicated.

We believe that our construction of § 1008 is supported by both the express language of the provision and by its legislative history. Although HHS has construed this section to permit family planning counseling concerning abortion and family planning referrals for abortion, we believe that this construction is erroneous. In any event, even if HHS's previous interpretation was reasonable, it does not preclude HHS from promulgating regulations on the basis of the construction advanced here given that this interpretation is itself reasonable.

On its face, § 1008 prohibits the granting of government funds to a program in which abortion is a method of family planning. The plain meaning of this language would seem to be that a program that offers any family planning

services related to abortion is a program in which abortion is a method of family planning. In particular, a program that includes abortion among the family planning options about which it counsels women is one in which abortion is a method of family planning. Because a large part of family planning consists of counseling or other forms of information distribution, it cannot be said that counseling is not "family planning."[3]

The view that the plain meaning of § 1008 prohibits abortion counseling and referral is supported by its legislative history. Preeminent among this legislative history is the lengthy speech that Representative Dingell, the sponsor of § 1008, delivered on the subject of abortion and family planning. Representative Dingell made it clear that abortion was simply not a proper method of family planning. He stated:

> There is a *fundamental difference* between the prevention of contraception and the destruction of developing human life. Responsible parenthood requires different attitudes toward human life once conceived than toward the employment of preventive contraceptive devices or methods. What is unplanned contraceptively does not necessarily become unwanted humanly . . . .
>
> *If there is any direct relationship between family planning and abortion, it would be this, that properly operated family planning programs should reduce the incidence of abortion.*

116 Cong. Rec. 37375 (1970) (emphasis added). Representative Dingell's clearly delineated contrast between abortions and preventive contraceptive methods demonstrates that he did not believe abortion was a proper method of family planning. Permitting organizations to provide counseling or referrals with respect to abortion would be squarely at odds with a view that abortion is, unlike contraception, not a method of family planning but a practice which Congress believed family planning services would reduce.

The Conference Committee Report confirms the dichotomy between abortions and preventive contraception. It states:

> [i]t is, and has been, the intent of both Houses that the funds authorized under this legislation be used only to support *preventive* family planning services, population research, infertility services, and other related medical, informational, and educational activities. The conferees have adopted the language con-

[3] Moreover, when Congress wished to craft a more narrow prohibition limited to the use of federal funds to provide abortions, it knew how to do so *See* Pub. L. No. 96–123, § 109, 93 Stat. 923, 926 (1979) (prohibiting funds appropriated for Medicaid program from being used to provide abortions). In § 1008, however, Congress chose broader language that prohibited funds from being used to support any program where abortion is a method of family planning. We believe that the plain meaning of § 1008 becomes clearer if one imagines a similar provision that prohibited federal funds from being received by a program in which a particular form of contraception is a method of family planning. It would seem absurd to conclude that such a prohibition permitted family planning counseling about the proscribed form of contraception.

> tained in section 1008, which prohibits the use of such funds for abortion, in order to make clear this intent.

H.R. Conf. Rep. No. 572, 91st Cong., 1st Sess. 2 (1970) (emphasis added). Although the Conference Report authorized "medical, informational and educational activities," these activities must be "related" to "preventive family planning services." Counseling concerning abortion is manifestly not related to preventive family planning services, given the explicit contrast between abortion and family planning that Representative Dingell drew on the floor.

Moreover, in his floor statement, Representative Dingell explicitly stated that the prohibition was not limited to the provision of abortions:

> With the "prohibition of abortion" amendment — title X, section 1008 — the committee members clearly intend that abortion is not *to be encouraged or promoted in any way through this legislation*. Programs which include abortion as a method of family planning are not eligible for funds allocated through this act.[4]

116 Cong. Rec. 37375 (1970) (emphasis added).

We believe that counseling or referrals concerning abortions are clearly actions that promote abortion. The purpose of counseling programs for pregnant women is to provide information upon which a course of action may be based. The intended effect of that education is that a pregnant woman select and act upon some of the information and referrals offered. Where abortion counseling and referral comprise a part of the counseling, a program is best construed to include abortion as "a method of family planning" because the intended and actual effect of the counseling and referral is to provide the option of abortion with the natural expectation that some pregnant women will select that method of family planning. Indeed, counseling concerning abortion or any other subject would be pointless in the absence of an expectation that some people will act on the information received.

We are aware that HHS has adopted a construction of § 1008 which permits counseling and referrals concerning abortions as a method of family planning. *See, e.g.*, Memorandum from Cayetano Santiago, Division of Public Health Services Delivery, to the Office of General Counsel (Mar. 4, 1982) (1982 Memorandum); Memorandum from Senior Attorney, Public Health Division to Elsie Sullivan, Assistant for Information and Education Office for Family Planning, HHS (Apr. 14, 1978) (1978 Memorandum). Under this construction, counseling or referrals concerning abortion as a method of family planning are not proscribed under Title X because, according to HHS, neither the purpose nor the principal effect of such counseling or referrals is to promote abortion.[5]

[4] It should also be noted that, in enacting Title X, Congress fully understood that family planning included a wide range of services, including counseling and referrals. *See* S. Rep. No. 1004, 91st Cong., 2d Sess. 4 (1970). Therefore, § 1008's reference to family planning should, in the absence of contrary evidence, be deemed to include all such forms of family planning. Accordingly, when a program offers counseling or referrals concerning abortion the program is one in which abortion is one of the methods of family planning.

[5] In the 1978 Memorandum, the test for permitting an abortion-related activity is the immediate effect test, *i.e.*, abortion-related activities may be funded by Title X unless they have the immediate effect of promoting abortion. 1978 Memorandum at 13.

1982 Memorandum at 13. Presumably, this legal construction is the basis for the requirement in the present guidelines that counseling and referrals for abortion *must* be offered, although, at most, this construction would appear only to favor *permitting* rather than *requiring* such counseling.[6]

We believe that the HHS's "purpose or principal effect" test is not warranted by the legislative history, and even if it were, counseling concerning abortion as a method of family planning would be invalid under that test because it would have the "purpose or principal effect" of promoting abortion. First, there is simply nothing in the legislative history of § 1008 to suggest the "purpose or principal effect test" in this context.[7] The language of the statute simply prohibits abortion as a method of family planning. Moreover, the legislative history makes clear that any activity that promotes abortion as a method of family planning is prohibited. Accordingly, if the activity has the effect of promoting abortion as a method of family planning it is prohibited by the statute even if such promotion is not the activity's purpose or principal effect. There is simply no value or goal adduced elsewhere in the statutory scheme which supports the introduction of a limiting principle such as the "purpose or

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[6] These guidelines provide:

> Pregnant women should be offered information and counseling regarding their pregnancies. Those requesting information on options for the management of an unintended pregnancy are to be given non-directive counseling on the following alternative courses of action, and referral upon request:
>
> Prenatal care and delivery
>
> Infant care, foster care, or adoption
>
> Pregnancy termination.

Program Guidelines for Project Grants For Family Planning Services at 13.

[7] The Memorandum from Carol Conrad, Attorney-Adviser, Public Health Division, to Ernest G. Peterson, Associate Bureau Director, Office of Planning (Mar. 19, 1976), contends that the purpose or principal effect test is supported by certain remarks in a debate over provisions in Pub L. No. 94–63, 89 Stat. 304 (1975), to amend § 1004 of Title X, which authorizes the Secretary to make grants "to promote research in the biomedical, contraceptive development, behavioral and program implementation fields related to family planning." The *only* substantive amendment to this provision was to permit the Secretary to conduct such research at HHS as well as making grants to outside organizations. *See* Pub. L. No. 94–63, § 202(c), 89 Stat. at 306. In the course of the discussion of the amendment, Representative Bauman complained that HHS was not carrying out the intent of § 1008 which he saw as "enforc[ing] a wall of separation between family planning and abortion." 121 Cong. Rec. 17218 (1975). He therefore asked and received assurances that § 1004 would not include research on abortion techniques. *Id.* at 17219. Noting that a 1971 House Conference Report stated that § 1008 should not prevent research into the causes of abortion, Representative Bauman asked:

> But I would like to make clear that this language does not allow the HEW to purchase or grant contracts whose *purpose or principal effect* would be to develop new techniques for performing abortions. Would I be correct in assuming that this language does not allow such research?
>
> Mr. Rogers: That is correct, as a method of family planning.

Id. (emphasis added).

Given the context in which they were made, these remarks manifestly cannot be construed as a qualification and limitation on § 1008's prohibition of abortion as a method of family planning. First and foremost, these remarks do not constitute legislative history concerning § 1008 or an amendment to that section, but rather to an amendment to § 1004 that had nothing to do with abortion. The views of a subsequent Congress form a dubious basis for inferring the intent of an earlier legislative action, and clearly cannot override a reasonable interpretation of a statute based on its language and contemporaneous legislative history. *See Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980). Moreover, because he clearly believed that § 1008 should be given a broader scope, one must completely ignore the purpose of Representative Bauman's remarks to take these as an intended limitation on the meaning of § 1008.

principal effect test" to § 1008's unequivocal expression of disapproval of abortion as a method of family planning. HHS's construction has in effect created a balancing test where there are no values to balance.

Second, we have serious doubts that counseling for abortions as a method of family planning would even pass muster under the "purpose or principal effect" test. The principal and foreseeable effect of counseling on abortions as a method of family planning is that some women will choose abortion as such a method. Indeed, it is impossible to discern what other effect such counseling could have or could be intended to have. In addition, we do not believe that the present guidelines are saved from inconsistency with the mandate of § 1008 by virtue of the fact that they contemplate only "nondirective" counseling. It is probable that Congress intended that all family planning counseling be nondirective, but that does not mean that nondirective abortion counseling is consistent with the prohibition in § 1008.

Although HHS's construction of § 1008, which requires counseling on abortions or referrals as a method of family planning, is fairly well-established, we do not believe that this construction should be deemed binding on this or any future administration.[8] It is a well-settled axiom of administrative law that an administrative construction of a statute even if consistently advanced for a long period of time is binding only to the extent it is supported by valid reasons. *See Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 21 (1932). While weight should be given to an agency's expertise in interpreting a statute it is charged with executing, deference to an administrative interpretation "is constrained by [the] obligations to honor the clear meaning of a statute, as revealed by its language, purpose and history." *See International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 556 n.20 (1979). As we have suggested above, we simply do not believe the "purpose or principal effect" test is warranted given the language, manifest purpose and legislative history of § 1008.

Moreover, although we have concluded that HHS's past interpretation is incorrect as a matter of law, such a conclusion is not necessary in order to promulgate regulations based on the interpretation of § 1008 advanced here. While the reasonableness of a particular construction of a statute may be supported by the fact that such construction is contemporaneous with the enactment of the statute and has been consistently adhered to since that time, a subsequent and different administrative construction is not rendered unreasonable by virtue of its inconsistency with the former construction. In other words, a previous interpretation of a statute no matter how reasonable cannot be deemed to preclude subsequent administrative constructions so long as they are themselves reasonable. *A fortiori*, an erroneous previous interpretation does not preclude a subsequent correct one.

[8] HHS formally addressed the issue of counseling and referrals in the 1978 Memorandum, *supra* Although before that time it addressed a number of related issues, such as the provision of Title X funds for scientific research, *see* Memorandum for Jim Goodman, Public Health Division, to Louis M. Hellman, Deputy Assistant Secretary for Population Affairs (Oct. 5, 1972), these opinions constituted ad hoc approaches to particular problems. The 1978 Memorandum was the first to advance a comprehensive theory for the construction of § 1008 in the form of the immediate effect test.

The Executive's permanent discretion to construe statutes it is charged with executing in novel but reasonable ways is a consequence of both the constitutional requirement of the enactment of legislation and the constitutional underpinning of the delegation doctrine. First, a prior administrative construction of the statute no matter how reasonable cannot permanently modify the meaning of the underlying legislation because an administrative construction does not meet the procedural requirements in Article I for the passage of binding legislation. *See INS* v. *Chadha*, 462 U.S. 919 (1983). Accordingly, a particular construction of a statute cannot limit the range of possible constructions that a subsequent administration may adopt. Second, a central premise of the delegation doctrine is that the popularly elected Executive may implement his policy choices within the discretion the statute entrusts to him. *See Chevron U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837, 865 (1983).[9] *See also Motor Vehicle Manufacturers Ass'n* v. *State Farm Automobile Insurance Co.*, 463 U.S. 29, 45 (1983) (Congress' ratification of an agency construction through failure to change the underlying statute does not incorporate agency construction into statute). If a prior administrative construction were permitted to circumscribe the discretion of subsequent administrations, the authority Congress delegated would not be exercised in a manner responsive to the popular will.

Accordingly, even if § 1008's meaning were less plain than we believe it to be and the legislative history less clear than it appears to be, this administration would have the discretion to interpret § 1008 to prohibit abortion counseling and referrals.[10] Section 1008 prohibits abortion as a method of family planning and nowhere in the statute is any countervailing policy suggested. Thus, the

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[9] The *Chevron* court in relevant part stated:

> Judges are not experts in the field, and are not part of either political branch of the government. Courts must, in some cases, reconcile competing political interests, but not on the basis of judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. *While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the government to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities*
>
> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really enters on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such case, federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do.

467 U.S. at 865 (emphasis added)

[10] Implementing the mandate of § 1008 by prohibiting abortion counseling and referral as a method of family planning is also constitutional While abortion counseling and referral are constitutionally-protected activities, the government is under no constitutional obligation to subsidize those activities. What the government is forbidden to do under the doctrine of "unconstitutional conditions" is to require that a grantee not engage in a constitutionally-protected activity with nongovernmental funds as a condition of receiving governmental funds or benefits As discussed more fully in the subsequent sections of this memorandum, so long as any restrictions on abortion counseling and referral are limited to the Title X programs themselves (as opposed to other programs conducted by the same organization) and are a reasonable implementation of the statutory prohibition, no "unconstitutional condition" will be created

administrator of the statute has discretion to effectuate this prohibition in any way that is reasonable and consistent with the statutory scheme.[11]

We reiterate, however, that the prohibition on abortion counseling and referrals should not apply when abortion is medically indicated. Section 1008's prohibition is limited to abortion as a "method of *family planning*." Abortions that are medically indicated are not a method of family planning but rather are medical procedures. This view is embodied in 42 C.F.R. § 57.5(b)(1) which requires that Title X grantees "provide for medical services related to family planning . . . and necessary referral to other medical facilities when medically indicated."[12] Accordingly, limiting the implementation of § 1008's prohibition to abortion as a method of family planning makes it unnecessary to address any statutory and constitutional questions that would need to be resolved before this regulation could be changed.[13]

B. Abortion Advocacy

The previous section of this memorandum concluded that § 1008 mandates that Title X programs be prohibited from providing counseling and referral for abortion services as a method of family planning. That statutory analysis is equally applicable to the proposal to prohibit Title X programs from engaging in abortion-related advocacy activities. Section 1008 — particularly when read against the background of its legislative history — furnishes HHS with an ample mandate to prohibit Title X programs from in any way promoting abortion as a method of family planning, and abortion advocacy is clearly a form of promoting abortion. The only caveat we would cite is that, for reasons noted above, guidelines should not be drafted so broadly as to prohibit advocacy of abortion when abortion is medically indicated.

In addition to being authorized by the statute, a prohibition on abortion advocacy would be constitutional. Although abortion advocacy is a form of expression protected by the First Amendment, *see Bigelow* v. *Virginia*, 421 U.S. 809 (1975) (statute making it a misdemeanor to sell or circulate any

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[11] Of course issuing these new guidelines or new directives would represent a change in policy, and HHS would have to supply a "'reasoned analysis'" of why it is changing its position. *See Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Insurance*, 463 U.S. 29, 57 (1983) (quoting *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)). Although changed circumstances are not needed to supply the basis for such a change in position, *see* 463 U.S. at 157, the agency must offer some reason for the action it undertakes.

[12] The construction of § 1008 embodied in this regulation is supported by the legislative history. For instance, in his lengthy speech on the floor, Representative Dingell contrasted abortion as a method of family planning with abortions performed for medical reasons. *See* 116 Cong. Rec. 37379 (1980).

[13] Limiting the prohibition on abortion as a method of family planning is also advisable to avoid conflict with *Valley Family Planning* v. *North Dakota*, 661 F.2d 99 (8th Cir. 1981). In that case, the U.S. Court of Appeals for the Eighth Circuit invalidated a state statute that prohibited federal funds passing through a state treasury from being used as family planning funds by any agency that performs, refers or encourages abortion on the ground that the statute conflicted with Title X of the Public Health Service Act. The specific conflict the court identified was that the flat prohibition on abortion was inconsistent with "Title X's mandate that comprehensive health care provided, including referrals to other services when *medically indicated*." 661 F.2d at 102 (emphasis added).

publication encouraging or promoting the procuring of an abortion declared an infringement of speech), the government is under no obligation to subsidize particular forms of expression. *See Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540, 546–547, 599 (1983) (in granting tax exemption to certain nonprofit organizations that do not engage in lobbying activities, Congress simply chose not to pay for nonprofit corporation's lobbying out of public funds, and did not regulate any First Amendment activity).

Accordingly, while an organization may have a constitutional right to speak in favor of abortion, it does not have a right to have its advocacy subsidized by the federal government. Thus, the government can prohibit programs receiving Title X funds from spending those funds to promote abortion. On the other hand, the government cannot preclude organizations whose programs receive Title X funds from using nongovernmental resources in other programs to advocate abortion.[14]

C. Segregation of Title X Programs from Abortion-Related Programs

The statutory issue presented by the proposal to segregate abortion-related programs from Title X programs is the program-specific language of Title X's abortion restrictions. As interpreted by the Supreme Court in *Grove City College* v. *Bell*, 465 U.S. 555 (1984), and its progeny, such language has been construed in accordance with its plain meaning — restrictions apply to the *program* only, not to the *organization* within which that program exists. The constitutional issue is closely linked to the statutory issue: the government may refuse to subsidize the exercise of a constitutional right (such as abortion advocacy), but it may not refuse to provide other government benefits on the grounds that such a constitutional right is being exercised. Requiring program segregation could be viewed as burdening an organization that exercises rights that have been held by the Court to be constitutionally-protected and thereby indirectly conditioning the grant of government benefits on relinquishment of constitutional rights. We conclude, however, that HHS may require reasonable segregation between Title X programs.

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[14] It should be noted, however, that the fact that government is not required to subsidize abortion advocacy, does not mean that Title X funds could necessarily be used to subsidize anti-abortion advocacy. First, there is some question — even given § 1008 — whether the use of Title X funds for anti-abortion advocacy is within the scope of the statute. Second, while the Constitution does not require the government to subsidize abortion advocacy, if Title X regulations were to permit anti-abortion advocacy while forbidding pro-abortion advocacy, they might be subject to challenging as a form of unconstitutional viewpoint discrimination. *Cf. Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540, 548 (1983) (while Congress did not violate appellee's constitutional rights "by declining to subsidize its First Amendment activities," a different case would be presented "if Congress were to discriminate invidiously in its subsidies"). By noting the caveat, however, we do not mean to suggest necessarily that a mere negative reference to abortion in the course of family planning counseling — for instance, an observation by the counselor that one of the virtues of preventive family planning is that it avoids the medical risks entailed by an abortion — should be viewed as "anti-abortion advocacy" and thus trigger these statutory and constitutional concerns.

In *Grove City, supra*, the Supreme Court held that the language in § 901(a) of Title IX of the Education Amendments prohibiting sex discrimination in "any education program or activity receiving Federal financial assistance" meant that the sanction imposed by Title IX — the cut-off of the federal student grants provided by the statute — could only be imposed on the program receiving the financial assistance, not on the institution or organization of which that program was a part. On the facts of *Grove City*, the Court held that the relevant "program" was the financial aid program and not Grove City College as a whole.

The construction in *Grove City* of the phrase "program" in Title IX has been applied by the Supreme Court and by lower federal civil rights statutes which prohibit discrimination in programs receiving federal assistance. *See, e.g., U.S. Dep't of Transp.* v. *Paralyzed Veterans*, 477 U.S. 597 (1986) (§ 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794). Although Title X is not a civil rights statute on the model of Title IX of the Education Amendments, *see id.* at 600 n.4, there is no reason to believe that the term "program" in Title X should be interpreted any differently than it was interpreted by the Supreme Court in *Grove City*. Thus, the prohibition in § 1008 on the use of funds where abortion is a method of family planning must — as the statute expressly provides — be applied only to the specific program at issue.

In assessing the range of possible guidelines in light of the program-specific language of § 1008, it is useful to view several hypothetical proposals along a continuum. At one extreme, for instance, we believe that a proposal which would require that each Title X program maintain separate accounting records would be entirely consistent with the program-specific language of § 1008. To ensure compliance with the congressional mandate in § 1008, HHS must, at the very least, be able to determine that there is a distinct "program" providing family planning services, and requiring separate accounting records would seem to be an eminently reasonable means of ensuring that HHS will have the means to make that determination.

On the other hand, a proposal that separate entities be established to conduct the Title X program would fall at the other extreme of the continuum. While *Grove City* does not provide criteria for defining a "program," it does establish the principle that "program" does not mean "organization" or "institution." Moreover, it appears that the statutory requirement of program-specificity is met notwithstanding the fact that the program has links with other programs within an organization. As the Supreme Court observed in *Paralyzed Veterans, supra*: "In *Grove City*, despite the arguably 'indissoluble nexus' among the various departments of a small college, we concluded that only the financial aid program could be subject to Title IX." 477 U.S. at 611.

To require that a Title X program be limited to a separate corporation or other distinct juridical entity would be, in effect, to require that it be conducted by a separate organization. As such, it would be inconsistent with *Grove City's* construction of the term "program." In *Grove City* itself, for instance, the Court held that the financial aid department was a separate "program" within Grove

City College, although it was apparent from the facts that the financial aid department had no juridical identity apart from Grove City College. Lower court decisions have similarly held that various activities constituted "programs" without even addressing whether such activities were conducted within a separate juridical entity. *See, e.g., Jacobson* v. *Delta Airlines, Inc.*, 742 F.2d 1202 (9th Cir. 1984) (airlines service to small communities was a separate program), *cert. dismissed*, 471 U.S. 1062 (1985); *O'Connor* v. *Peru State College*, 781 F.2d 632 (8th Cir. 1986) (physical education department was separate program within college).[15]

We also think that a very extreme requirement of functional separation would be at odds with the program-specific language of § 1008. If total *de jure* separation cannot be required between different programs, then total *de facto* separation cannot be required either. Again, it is useful to advert to *Grove City* and its progeny. In *Grove City*, the Court did not even inquire as to whether separate physical facilities existed or whether the financial aid program had its own full-time staff that did not perform work in other college programs. Similarly, in *Jacobson* v. *Delta Airlines*, *supra*, the Court held that the small community service was a separate program without mentioning whether there was any separation of facilities or separate staff. It seems highly likely that there was no such functional separation; presumably, for instance, tickets to flights to the small communities were sold at the same Delta flight counters by the same personnel who sold tickets to the major cities. Thus, we think that a proposal which requires total functional separation between programs would be inconsistent with *Grove City*.

However, if a requirement of total functional separation is inconsistent with the program-specific statutory language, it is nevertheless important not to slight the specific prohibition of § 1008 — a factor not present in the *Grove City* line of cases. Thus, a reasonable amount of functional separation may not only be possible, but required. For instance, it may be reasonable in some cases to require that the abortion counseling be provided in a different office than the family planning counseling. This separation would become increasingly important if it was the only reasonable means to segregate abortion-related materials or personnel from the family planning context.

Nevertheless, we caution that a functional separation requirement may, in a given case, be argued to be an unconstitutional condition. As we indicated above, the government may not condition the receipt of Title X funds on a grantee's promise not to undertake abortion-related activities with nongovernment funds. For the same reason, the government must be wary of imposing unreasonable functional separation requirements. Thus, it is impor-

[15] Of course, if a program were conducted within a separate corporate entity, it might strengthen the conclusion that a distinct program existed. *Cf. Eivins* v. *Adventist Health System/Eastern & Middle America, Inc.*, 651 F. Supp. 340 (D. Kansas 1987) (holding as a matter of law that a nonprofit corporation acting as a holding corporation for certain hospitals and providing services to others was not within the same "program" as such hospitals) But this conclusion does not support the converse: that an activity must be separately incorporated to constitute a program.

tant that the new guidelines requiring a level of functional separation impose restrictions that can be feasibly complied with by grantee organizations that also provide abortion-related programs with nongovernmental funds.*

DOUGLAS W. KMIEC
Deputy Assistant Attorney General
Office of Legal Counsel

*NOTE: Subsequent to this opinion, HHS promulgated the regulations discussed herein. 53 Fed. Reg. 2922 (1988) (codified at 42 C.F.R. Part 59). A facial challenge to the regulations was rejected by the Supreme Court, which held that they constituted a permissible construction of § 1008 and were consistent with the First and Fifth Amendments to the Constitution. *Rust* v. *Sullivan*, 111 S. Ct. 1759 (1991).

Applicability of Emoluments Clause to Proposed Service of Government Employee on Commission of International Historians

A government employee's proposed service as a member of a commission of international historians established under the auspices of the Austrian government would violate the Emoluments Clause of the Constitution, U.S. Const. art. I, § 9, cl. 8.

July 30, 1987

MEMORANDUM OPINION FOR THE ACTING ARCHIVIST OF THE UNITED STATES

This memorandum responds to your request of July 27, 1987, for our views on the applicability of the Emoluments Clause of the Constitution to proposed service by Mr. A, an employee of the National Archives, as a member of a commission of international historians established to review the wartime record of Dr. Kurt Waldheim, President of Austria. According to the information you have provided us, the Commission was established at the request of the Austrian government, and is being funded entirely by the Austrian government. You indicate that Mr. A has asked that he be permitted to accept an invitation to serve as a member of the commission, extended to him by the commission's co-chairman, in his private capacity. Although you have stated that Mr. A would be entitled to reimbursement of his expenses and an honorarium from the Austrian government, we understand that Mr. A has indicated a willingness to forego the honorarium and to rely upon private sources of funding for his expenses.

As discussed more fully below, we believe that, in the circumstances as we understand them, Mr. A's acceptance of the invitation to serve as a member of the Commission would be inconsistent with the prohibition in the Emoluments Clause against a federal official's accepting an "office" from a foreign state.

Article I, § 9, cl. 8 of the Constitution provides:

> No title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the consent of Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

The Emoluments Clause, adopted unanimously at the Constitutional Convention of 1787, was intended by the Framers to preserve the independence of foreign ministers and other officers of the United States from "corruption and

foreign influence." 3 M. Farrand, *Records of the Federal Convention of 1787* 327 (1966) (*Farrand*). *See also* 2 *Farrand*, at 327, 389.[1] Consistent with its expansive language and underlying purpose, the provision has been interpreted as being "particularly directed against every kind of influence by foreign *governments* upon officers of the United States, based upon our historic policies as a nation." 24 Op. Att'y Gen. 116, 117 (1902) (emphasis in original). *See also* J. Story, *Commentaries on the Constitution of the United States* § 684 (Carolina Academic Press 1987) (1833 Abridgement) ("the provision is highly important, as it puts out of the power of any officer of the government to wear borrowed honours, which shall enhance his supposed importance abroad by a titular dignity at home"). By its terms, the prohibition is directed not just to payments of money of gifts from foreign governments, but also to the acceptance of an "office."

There seems little doubt that Mr. A occupies an "Office of Profit or Trust under [the United States]" as that phrase is used in the Emoluments Clause.[2] And the Emoluments Clause is plainly applicable where an official is offered the gift, title or office in his private capacity.[3] Moreover, as we understand the circumstances of the Commission's establishment and funding, it is clear that the invitation in this case came from the Austrian government, itself indisputably a "foreign state" under the Emoluments Clause.[4]

The only question as to which there appears to be any issue is whether acceptance of membership on the Commission would constitute acceptance of an "office" under the Emoluments Clause. We believe that it would.

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[1] Farrand reports Governor Randolph's explanation of the Emoluments Clause at the Virginia Convention as follows:

> [This] restriction restrains any persons in office from accepting of any present or emolument, title or office, from any foreign prince or state. . . . This restriction is provided to prevent corruption. All men have a natural inherent right of receiving emoluments from any one, unless they be restrained by the regulations of the community. An accident which actually happened, operated in producing the restriction. A box was presented to our ambassador by the king of our allies. It was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states I believe, that if at that moment, when we were in harmony with the king of France, we had supposed that he was corrupting our ambassador, it might have disturbed that confidence, and diminished that mutual friendship, which contributed to carry us through the war.

3 *Farrand* at 327.

[2] *See* 27 Op. Att'y Gen. 219 (1909) (postal clerk holds an office of profit or trust for Emoluments Clause purposes, because he "holds his appointment from a head of a Department . . . , receives for his services a fixed compensation from moneys appropriated for the purpose by Congress, . . . has regularly prescribed services to perform, and his duties are continuing and permanent, and not occasional and temporary"). *See also* "Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission," 10 Op. O.L.C. 93 (1986) (part-time staff consultant for NRC holds a position requiring his undivided loyalty to the United States).

[3] *Cf.* "Assumption by People's Republic of China of Expenses of U.S. Delegation," 2 Op. O.L.C. 345 (1978) (Emoluments Clause does not prohibit assumption by the People's Republic of China of the expenses of an official U.S. delegation).

[4] Even if it could be concluded that the invitation in this case had been extended by an international body, we believe the concerns expressed by the Framers in the Emoluments Clause would still be applicable. In this regard, we note that the Foreign Gifts and Decorations Act, by which Congress gave its express consent for officials to accept gifts from foreign countries under certain limited circumstances, includes within its definition of "foreign government" "any international or multinational organization whose membership is composed of any unit of foreign government." 5 U.S.C. § 7342(a)(2)(B)

Although we have found no case or other formal precedent directly on point, there are several Attorney General opinions that indicate that a United States government official's acceptance of membership, in a personal capacity, on an entity established and funded by a foreign government may violate the Emoluments Clause. In 13 Op. Att'y Gen. 537 (1871), Attorney General Akerman considered "whether an American minister to one foreign power can accept a diplomatic commission to the same power from another foreign power." He concluded that:

> Unquestionably, a minister of the United States abroad is not prohibited by the Constitution from rendering a friendly service to a foreign power, even that of negotiating a treaty for it, provided he does not become an officer of that power. But whatever difficulties may grow out of the vagueness with which this term is defined in the books, it is clear that the acceptance of a formal commission as minister plenipotentiary creates an official relation between the individual thus commissioned and the government which in this way accredits him as its representative.

Id. at 538. *See also* 6 Op. Att'y Gen. 409 (1854) (United States Marshal for Florida could not hold the "office" of Commercial Agent of France).

We are advised by the Legal Adviser's Office of the Department of State that it has construed the Emoluments Clause to prohibit a federal official from accepting, in a private capacity, appointment to a commission established by a foreign government. In 1983, the Legal Adviser informed a member of a Presidential advisory committee that his membership on a "bi-national" commission established by the Costa Rican government constituted acceptance of a foreign "office" prohibited by the Emoluments Clause, and advised him that he must resign.

As a general matter, we believe that a United States government official's membership on an entity established and funded by a foreign government raises serious issues under the Emoluments Clause. In this case, the facts lead us to conclude that Mr. A's membership on the Commission would create the kind of "official relation" between him and the Austrian government that the Framers of the Constitution wished to avoid, and that it therefore constitutes an "office" under the Emoluments Clause. Accordingly, we believe Mr. A is constitutionally prohibited from accepting the invitation to serve as a member of the Austrian Commission.[5]

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

[5] Our conclusion in this situation is reinforced by the circumstances surrounding the Commission's creation and its mandate. We do not, however, intend our conclusion respecting the applicability of the Emoluments Clause to suggest that Mr. A would be subjected to improper foreign influence, or otherwise to leave any negative inference respecting the integrity of the service he would render as a member of the Commission.

Application of the Davis-Bacon Act to Urban Development Projects that Receive Partial Federal Funding

Section 110 of the Housing and Community Development Act of 1974 requires that those engaged in construction work that is financed with federal funds (whether in whole or in part) receive wages at rates prevailing in the locality as determined by the Secretary of Labor under the Davis-Bacon Act. However, if the construction work is not financed with federal funds, the Davis-Bacon Act wage rates need not be paid, even if other aspects of the construction project, such as land, fixtures, or services, receive federal funds pursuant to the Act.

This question arose pursuant to a dispute between the Secretary of Labor and the Secretary of Housing and Urban Development in the course of exercising their respective authorities under the Act. The Office of Legal Counsel has jurisdiction to resolve the dispute pursuant to Executive Order No. 12146.

August 6, 1987

MEMORANDUM OPINION FOR THE SECRETARY,
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

This memorandum responds to your request for the opinion of the Attorney General on the proper interpretation of § 110 of the Housing and Community Development Act of 1974 (Act), 42 U.S.C. § 5310. The Attorney General has referred this matter to the Office of Legal Counsel for resolution.

I. Background

Title I of the Act authorizes the Secretary of Housing and Urban Development (HUD) to provide Community Development Block Grants (CDBG) and Urban Development Action Grants (UDAG) to States and localities for "the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." 42 U.S.C. § 5301(c). Section 110 of the Act requires that "[a]ll laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this chapter shall be paid wages at rates . . . determined by the Secretary of Labor in accordance with the Davis-Bacon Act." 42 U.S.C. § 5310.

In 1985, the Department of Labor took the view that § 110 requires payment of Davis-Bacon wages not only when UDAG and CDBG funds are used directly to pay for the activities commonly thought of as "construction" of a building, but also when those funds are used for other activities that are integrally and proximately related to that construction, even if no federal funds are expended directly for the construction work. The Department of Labor provided three examples of the application of this standard:

> For example, if UDAG or CDBG funds were used to acquire the land upon which construction was later to take place, that construction should be done with Davis-Bacon wages, even if all UDAG or CDBG dollars had been expended before the commencement of the direct construction activity. . . . Other such costs could include, for example, engineering and architectural fees, materials, and equipment or machinery to be installed as part of the building.

Letter to Robert A. Georgine, President, Building & Construction Trades Department, AFL-CIO from Susan R. Meisinger, Deputy Under Secretary for Employment, Department of Labor at 2 (July 31, 1985) (Labor Opinion).

HUD disputes this interpretation on the grounds that, in HUD's view, it would initiate a drastic departure from the consistent application of Davis-Bacon requirements under the Act. Accordingly, HUD requested that Labor reconsider the position taken in its July 31, 1985 letter. On July 21, 1987, the Secretary of Labor responded by withdrawing the "integrally and proximately related" test and stating that "the question must be whether the construction work is federally financed," and that "the mere use of federal funds to finance the purchase of land . . . does not trigger Davis-Bacon coverage under the statute." Letter to the Honorable Samuel R. Pierce, Jr., Secretary, Department of Housing and Urban Development, from the Honorable William E. Brock, Secretary, Department of Labor (July 21, 1987).

The Secretary of Labor's letter, however, reserved the question of "the application of Davis-Bacon requirements to projects on which UDAG/CDBG funds are used to purchase equipment installed as part of the project," and, apparently, the question of the application of Davis-Bacon requirements to non-federally funded construction work when federal funds are used to pay for "engineering and architectural fees." *Id.* After reviewing the Secretary of Labor's letter, the Secretary of HUD noted that the letter "does not resolve other issues . . . raised [in the Labor Opinion]. In particular, whether UDAG/CDBG financing of architectural and engineering fees and purchase of equipment would require prevailing wages on related private construction work is unanswered . . . . As your letter fails to resolve all the issues springing from the [Labor Opinion], I must continue to seek a comprehensive decision from the Attorney General." Letter to the Honorable William E. Brock, Secretary, Department of Labor, from the Honorable Samuel R. Pierce, Jr., Secretary, Department of Housing and Urban Development (July 28, 1987).

II. Discussion

A. Jurisdiction

Before turning to the substantive issues presented by your request, we address a threshold jurisdictional matter: whether the Attorney General, and hence this Office, has authority to render an opinion on the proper interpretation of the Housing and Community Development Act at the request of the Secretary of HUD. The Department of Labor has suggested that Reorganization Plan No. 14 of 1950, 15 Fed. Reg. 3176 (*reprinted in* 5 U.S.C. app. at 1050 (1982) *and in* 64 Stat. 1267 (1950)), precludes the Attorney General from rendering such an opinion. In its view, the Secretary of Labor has the exclusive authority to issue a ruling concerning the proper interpretation of the Davis-Bacon provisions of the Housing and Community Development Act. This view, however, misconstrues the Reorganization Plan as well as the authority and functions of the Attorney General and the Secretary of Housing and Urban Development.

Section 110 of the Act provides:

> All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. §§ 276a, 276a-5) . . . The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 276c of title 40.

42 U.S.C. § 5310. The Reorganization Plan, in turn, provides:

> In order to assure coordination of administration and consistency of enforcement of the labor standards provisions of each of the following Acts by the Federal agencies responsible for the administration thereof, the Secretary of Labor shall prescribe appropriate standards, regulations, and procedures, which shall be observed by these agencies . . . .

Reorganization Plan No. 14 of 1950, 15 Fed. Reg. 3176 (*reprinted in* 5 U.S.C. app. at 1050 (1982) *and in* 64 Stat. 1267 (1950)).

Labor argues that its interpretation of § 110 constitutes an appropriate standard, regulation, or procedure to enforce the labor standard provisions of the Act. But even assuming the validity of this argument, the Reorganization Plan speaks only to the respective functions of HUD and Labor in administering the Housing and Community Development Act. The Reorganization Plan does not preclude either the head of a department from seeking, or the Attorney General

from rendering, an opinion on a question of law arising in the administration of his department.

By law, "[t]he head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department." 28 U.S.C. § 512. The only limitation on the right of the head of an executive department to obtain an opinion of the Attorney General is that the question presented must be one that actually arises in the administration of his department. *See* 31 Op. Att'y Gen. 234 (1918); 31 Op. Att'y Gen. 127 (1917); 20 Op. Att'y Gen. 178 (1891). Thus, the initial inquiry is whether the question presented by the Secretary of HUD — whether the acquisition of land, fixtures, or architectural and engineering services with federal assistance requires a finding that "integrally and proximately related" construction work paid for entirely with non-federal funds must be deemed financed in whole or in part with federal assistance — is one "arising in the administration of his department" within the meaning of 28 U.S.C. § 512.

We think that it clearly is. The Secretary of HUD is charged with the administration of the Act. The interpretation given to § 110 determines the nature and contents of the contracts the Secretary must enter into with state and local recipients of UDAG and CDBG funds. As the Secretary stated in his letter of May 13, 1987, to the Attorney General:

> The need for a resolution of this dispute is even more urgent now than when I wrote you last October: the construction season has begun; our Urban Development Action Grant (UDAG) submissions are due in May and July; and the majority of our Community Development Block Grant (CDBG) submissions will be coming in the next two months.

Letter to the Honorable Edwin Meese III, Attorney General, from the Honorable Samuel R. Pierce, Jr., Secretary, Department of Housing and Urban Development (May 13, 1987). The Reorganization Plan confirms this conclusion. The Plan itself recognizes that although federal agencies must observe "appropriate standards, regulations, and procedures" prescribed by the Secretary of Labor, these agencies remain responsible for the administration of the underlying Acts. As the Message of the President accompanying the Reorganization Plan states: "The actual performance of enforcement activities . . . will remain the duty of the respective agencies awarding the contracts or providing the Federal assistance." 5 U.S.C. app. at 1050–51 (1982).

Our conclusion that the Secretary is entitled by law to the opinion of the Attorney General is consistent with the analysis and conclusion of Attorney General Levi in a situation virtually identical to this one. *See* 43 Op. Att'y Gen. No. 8 (Jan. 11, 1977). There, the Secretary of Commerce sought the opinion of the Attorney General concerning the meaning of the phrase "contractors or subcontractors" as used in § 109 of the Local Public Works Capital Development and Investment Act of 1976. That section, in language virtually identical to that of § 110, provides:

> All laborers and mechanics employed by contractors or subcontractors on projects assisted by the Secretary under this Act shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. §§ 276a-276a-5). . . . The Secretary of Labor shall have, with respect to the labor standards specified in this provision, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267; 5 U.S.C. §§ 133z-15), and section 2 of the Act of June 13, 1964, as amended (40 U.S.C. § 276c).

The Secretary of Labor took the position that the phrase included state and local governments who performed construction work with their own work force. The Secretary of Commerce disagreed, contending that the terms "contractors or subcontractors" could refer only to those who contracted with laborers and mechanics to perform the work. The Attorney General rejected the Labor Department's claim that he was without authority to render the requested opinion, finding that "the Secretary of Commerce's administrative responsibility for implementation of the Local Public Works Act at least requires him to satisfy himself concerning any doubts he may have regarding the lawfulness of the Secretary of Labor's determination, and permits him to seek my advice for that purpose." 43 Op. Att'y Gen. No. 8, at 3. The opinion continued:

> This conclusion will be seen as particularly appropriate when it is recognized that, as will be discussed below, the present controversy does not involve a uniform interpretation which the Secretary of Labor seeks to apply to the Davis-Bacon Act and all related acts, but rather a special rule applicable to the Local Public Works Act. To the extent the outcome hinges upon the peculiar text or peculiar circumstances of that law, the policy considerations supporting an assertion of exclusive cognizance in the Secretary of Labor become less persuasive, and the issue becomes more appropriate for — if not resolution by the Secretary of Commerce — at least examination by the Attorney General at the Secretary's instance.

Id. at 3–4. This passage applies with equal force to the present request.

Executive Order No. 12146, concerning the resolution of interagency legal disputes, does not alter this conclusion. Executive Order No. 12146 provides in pertinent part:

> 1–401. Whenever two or more executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.

> 1–402. Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere.

Section 1–401 authorizes and encourages executive agencies to submit their legal disputes to the Attorney General. This provision applies not only to the executive departments, but also to all other agencies in the Executive Branch. Executive Order No. 12146 thus expands the authority of the Attorney General to render legal opinions beyond his statutory obligation to render opinions at the request of the heads of executive departments on questions of law arising in the administration of their departments. *See* 28 U.S.C. § 512.[1]

In addition, when the heads of the agencies serve at the pleasure of the President, § 1–402 *requires* the agencies to submit legal disputes they are unable to resolve to the Attorney General "except where there is specific statutory vesting of responsibility for a resolution elsewhere." Labor contends that the exception precludes resolution of the current dispute by the Attorney General. Even assuming, however, that Reorganization Plan No. 14 of 1950 — directing the Secretary of Labor to prescribe appropriate labor-related standards, regulations, and procedures — constitutes "specific statutory vesting of responsibility for a resolution" of the present dispute within the Secretary of Labor, the reorganization legislation in no sense affects the authority of the head of an executive department to seek, or the Attorney General to render, an opinion under 28 U.S.C. § 512 on questions of law that arise in the administration of his department. Rather, under the above assumption, Reorganization Plan No. 14 of 1950 at most would mean that § 1–402 of Executive Order No. 12146 does not *require* the Secretaries of HUD and Labor to submit this legal dispute to the Attorney General.

Thus, Executive Order No. 12146 is not fully apposite to the present request. Neither Reorganization Plan No. 14 of 1950 nor Executive Order No. 12146 purport in any way to preclude the head of an executive department from requesting the opinion of the Attorney General on questions of law arising in the administration of his department. Since 1789, it has been the duty of the Attorney General "to give his advice and opinion upon questions of law . . .

[1] Under 28 U.S.C. § 512, Attorneys General have felt constrained to decline requests for legal opinions from executive agencies not within one of the executive departments. *See, e.g.*, 37 Op. Att'y Gen. 488, 490 (1934) (declining to give an opinion at the request of the Reconstruction Finance Corporation on the ground that "the Attorney General is authorized to render opinions only upon the request of the President or the head of an executive department"); 20 Op. Att'y Gen. 312, 313 (1892) (stating that the "Civil Service Commission is not included within any of the great Departments of Government" and that "[u]ntil the Commission shall request the President, to whom they are directly responsible, to present the question of law arising in the discharge of their duties to the Attorney General, he is not called upon to give, and should not under the law give, his opinion"). With the promulgation of Executive Order No. 12146, the President has authorized all executive agencies to request the opinion of the Attorney General whenever a legal dispute arises between such agencies.

when requested by the heads of any of the departments, touching any matters that may concern their departments." Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93. Accordingly, by law, the heads of executive departments may require the opinion of the Attorney General, *regardless of whether a dispute exists on the question within the Executive Branch. See* 28 U.S.C. § 512. All that is required is that the question presented be one arising in the administration of the department whose head requests the opinion. Thus, even if HUD had never disagreed with Labor's interpretation of § 110 the Secretary of HUD would be entitled to request and receive the opinion of the Attorney General on that question. It goes without saying, therefore, that the Secretary of Labor's withdrawal of the Labor Department's prior interpretation of § 110 in no way relieves the Attorney General of his statutory authority — indeed, his responsibility — to provide the Secretary of HUD with his opinion.[2] The presence or absence of a contrary or consistent Labor Department interpretation is simply irrelevant to the Secretary's statutory right "to require the opinion of the Attorney General." 28 U.S.C. § 512. Because the Secretary of HUD has not withdrawn his request, the Attorney General's legal obligation is to render an opinion on the question presented.

Finally, the Attorney General's authority to give his opinion at the request of the Secretary is also confirmed by 28 U.S.C. § 516 and 5 U.S.C. § 3106. The former reserves generally to the Attorney General the conduct of all litigation in which the United States, an agency, or officer thereof is a party. The latter generally prohibits the head of an Executive department from employing an attorney for the conduct of litigation in which the United States, an agency, or an employee thereof is a party, requiring instead that the matter be referred to the Department of Justice. Both provisions admit of exceptions only when "otherwise authorized by law." Although Congress has established "a solicitor for the Department of Labor," 29 U.S.C. § 555, the solicitor has no general litigating authority; his authority is narrowly drawn, *see* 29 U.S.C. § 663 (representation of the Secretary of Labor in occupational safety and health litigation); 29 U.S.C. § 1852(b) (litigation for the protection of migrant and seasonal workers); 30 U.S.C. § 822 (representation of the Secretary of Labor in mine safety and health litigation), and nevertheless "subject to the direction and control of the Attorney General." *Id.* The Attorney General's authority to conduct litigation on behalf of the United States necessarily includes the exclusive and ultimate authority to determine the position of the United States on the proper interpretation of statutes before the courts. Thus, because this question of the proper interpretation of § 110 is the subject of pending litigation to which the Secretary of HUD is a party, *see Dairy Development Ltd.* v. *Pierce*, Civ. Action No. 86–1353–R (W.D. Okla.), the Attorney General has both the authority and the obligation to decide the question presented by the Secretary of HUD.

[2] *See* 2 Op. Att'y Gen. 311 (1830), in which Attorney General Berrien observed "that it is made my duty to give my opinion on all questions referred to me by the heads of departments 'touching any matters that may concern their departments.'" *Id.* at 311.

B. Substantive Issues

Section 110 of the Act provides:

> All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. § 276a, 276a-5): Provided, That this section shall apply to the rehabilitation of residential property only if such property is designed for residential use for eight or more families. The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 276c of title 40.

42 U.S.C. § 5310.

We adhere to the well-established principle that "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'n Fly, Inc.* v. *Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985); *see American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982); 2A N. Singer, *Sutherland's Statutory Construction* § 46.04 (4th ed. 1984). The operative language of § 110 is "construction work financed in whole or in part with assistance received under this chapter." 42 U.S.C. § 5310. The narrow question is whether the use of CDBG or UDAG funds to pay for the land, fixtures, or services — but not for the construction work — associated with a particular project means that the construction work is "financed in whole or in part with" such funds within the meaning of the Act. We think the language used in § 110 indicates that it is not.

Construction work that is part of a project receiving federal funds to pay for non-construction activities of the project is, of course, benefited indirectly by such funds because the federal funds reduce the total amount of nonfederal funds needed to finance the project. Nevertheless, the construction work itself is not financed with the federal funds that are used to pay for the project's other activities. The ordinary meaning of the verb, "finance," is "to raise or provide funds or capital for" or "to furnish with necessary funds." *Webster's Ninth New Collegiate Dictionary* 463 (1986). Because the funds used to finance the construction work are nonfederal, the only way to conclude that the statute applies is, in effect, to substitute "construction project" for "construction work." Such a construction, however, conflicts with both the statutory language and its history.

The language of § 110, requiring the payment of Davis-Bacon wages when "construction work" is financed with federal funds,[3] contrasts sharply with the broader, project-oriented approach of several other federal statutes. For example, the labor standards section of the Public Works and Economic Development Act of 1965 provides that "[a]ll laborers and mechanics employed by contractors or subcontractors on *projects* assisted by the Secretary under this chapter shall be paid [Davis-Bacon] wages." 42 U.S.C. § 3222 (emphasis added). Similarly, a 1974 amendment to the United States Housing Act of 1937 states that "[a]ll laborers and mechanics employed by contractors or subcontractors in housing or development *activities* assisted under this section shall be paid [Davis-Bacon] wages." 42 U.S.C. § 1440(g) (emphasis added).

The latter provision is particularly significant because it was enacted as part of the Housing and Community Development Act of 1974, *see* Pub. L. No. 93–383, § 802(g), 88 Stat. 633, 724, the same Act that contains the provision under consideration here. *See id.* § 110, 88 Stat. at 649. Sections 110 and 802(g) of the Act are identical in all material respects except that the former is triggered by federal funding of "construction work" and the latter by federal assistance to "housing or development activities." By its terms, § 802(g) requires more expansive Davis-Bacon coverage than § 110. Thus, the argument that § 110 requires the payment of Davis-Bacon wages whenever any activity associated with a particular project (such as the acquisition of land, fixtures, or architectural and engineering services) is financed with federal funds, even though the project's construction work is not, negates the distinction between the effect of the two provisions, in contravention of the clear and unambiguous language of the Act.

The conclusion that § 110 requires payment of Davis-Bacon wages only when construction work is financed with federal funds is also suggested by the history of the Act. The version of the Act considered initially by the Senate would have required the payment of prevailing wages to "[a]ll laborers and mechanics employed by contractors and subcontractors in the performance of *work on any construction project financed in whole or in part with funds received under this chapter.*" S. 3066, 93d Cong., 2d Sess. 314 (1974) (emphasis added). A "construction project" necessarily encompasses all activities needed in order to undertake and complete the project, most notably, the purchase of land, equipment, and raw materials, as well as actual construction. Thus, under the Senate bill, federal funding of any activity associated with a construction project would constitute partial federal financing of the project and trigger the requirement that prevailing wages be paid to all laborers and mechanics employed by contractors and subcontractors in the performance of work on the project. The report accompanying the Senate bill acknowledges the breadth of the Senate proposal, stating that the Senate bill would require the payment of prevailing wages "with respect to all multifamily housing projects

[3] *Accord* 49 U.S.C. app. § 1609(a) (requiring the payment of Davis-Bacon wages to "laborers and mechanics employed by contractors or subcontractors in the performance of *construction work* financed with the assistance of loans or grants under this chapter") (emphasis added).

. . . , health facilities, and land development projects." S. Rep. No. 693, 93d Cong., 2d Sess. 36 (1974).

The House bill, by contrast, would have required payment of prevailing wages to laborers and mechanics employed by contractors and subcontractors only "in the performance of *construction work financed in whole or in part with assistance received under this chapter.*" H.R. 15361, 93d Cong., 2d Sess. 110 (1974) (emphasis added). As discussed, construction work is merely one element of a construction project. The specific inquiry under the House provision, then, is whether federal funds are used to finance construction work. Whether federal funds are used to finance any other activity associated with the construction project is immaterial. The House Report reiterates the specific focus of the House provision, stating that the House bill would require the payment of prevailing wages to workers employed on "construction funded under this title." H.R. Rep. No. 1114, 93d Cong., 2d Sess. 55 (1974). Thus, whereas the Senate bill would have required payment of prevailing wages whenever federal funds were used to finance any part of a construction project (including construction work), the House bill would have required the payment of such wages only when the activity financed with federal funds was construction work.

With minor changes not relevant here, the Conference Committee adopted the labor standards provision of the House bill. As the Conference Report states, "[t]he conference report contains the House provision with a technical amendment." H.R. Conf. Rep. No. 1279, 93d Cong., 2d Sess. 133 (1974). As finally enacted, § 110 applied only to "construction work financed in whole or in part with grants received under this title."

We recognize that neither the Conference Report nor the floor debates contain an explanation of the conference decision to adopt the "construction work" language of the House bill instead of the "project" approach of the Senate bill.[4] This lack of legislative discussion hardly yields a conclusion that

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[4] The Conference Report explains:

> The Senate bill applied the prevailing wage requirements of the Davis-Bacon Act to residential construction involving 12 or more units and to rehabilitation involving 8 or more units The House amendment applied such requirements only to the construction of 8 or more units without reference to rehabilitation. The conference report contains the House provision with a technical amendment making it clear that the requirement applies only to rehabilitation, since construction of residential structures is not a permissible use of community development funds.

H.R. Conf. Rep. No. 1279, 93d Cong., 2d Sess. 133 (1974). Contrary to Labor's suggestion, this discussion does not necessarily reveal the *exclusive* reason for Congress' adoption of the House provision. The selection of the House provision was consistent with Congress' desire to carry forward the Davis-Bacon coverage of the Housing Act of 1949. Under the 1949 Act, Davis- Bacon wage requirements applied only to the "undertakings and activities of a local public agency in an urban renewal area." 42 U.S.C. § 1460 (1976). Thus, all privately undertaken construction and activity, even though part of a project receiving federal assistance, was exempt from Davis-Bacon requirements. Section 105 of the 1974 Act, delineating the activities eligible for CDBG funding, specifically includes "payment of the cost of completing a project funded under title I of the Housing Act of 1949 " 42 U.S.C. § 5305(a)(10). By choosing the labor standards provision of the House bill, Congress ensured that the use of CDBG funds to complete outstanding projects would not result in expanding Davis-Bacon coverage to the privately funded construction work associated with such projects because such work is not financed in whole or in part with federal funds. The Senate bill,

Continued

Congress intended Davis-Bacon coverage to be less restrictive than the choice of the House provision would suggest. Such an anomalous conclusion would ignore the best evidence of congressional intent — the language adopted. That language is clear, and evinces an unambiguous intent to require less Davis-Bacon coverage than the Senate bill.[5]

Because there have been numerous, inconsistent interpretations of § 110 to various activities in the past, we pause to consider several applications of § 110 in light of our interpretation of the Act. For example, HUD has previously agreed with Labor that the use of CDBG or UDAG funds to purchase equipment may require the payment of prevailing wages with respect to the installation of the equipment when such installation involves "more than an incidental amount" of construction work. *See* Letter to John S. Selig, Esq., Mitchell, Williams, Selig, Jackson & Turner, from Justin L. Logsdon, Assistant to the Secretary for Labor Relations, Department of Housing and Urban Development (Dec. 1, 1986) (advising that Davis-Bacon requirements do not apply to the installation of federally funded equipment where the cost of installation is only 1.5 percent of the cost of the equipment). Assuming that installation of equipment constitutes or requires "construction work,"[6] we believe that § 110 does not require the payment of prevailing wages with respect to installation where federal funds are provided exclusively for the purchase of equipment and not for its installation. Thus, to the extent that Labor and HUD have adopted a contrary interpretation of § 110, they have misconstrued the Act.

[4] (. . . continued)
by contrast, would have required the payment of prevailing wages for construction work exempt under the 1949 Act. This is so because construction work is part of a construction project, and the Senate bill would have required the payment of Davis-Bacon wages whenever "any construction project is financed in whole or in part with [federal] funds."

Moreover, we wish to stress that Congress need not express an intent that clear language means what it says. Indeed, legislative history tending to contradict the plain meaning of a statute is often discounted. Here, where we have no expression in the legislative history of a congressional intent contradicting the plain language of § 110, the statutory language necessarily controls.

[5] This conclusion is consistent with the subsequent amendments to the Act authorizing the Urban Development Action Grant program *See* 42 U.S.C. § 5318 The UDAG program authorizes grants to cities and urban areas experiencing severe economic distress to help stimulate economic development activity. *Id.* § 5318(a). Under the program, the Secretary (1) must determine that there is a strong probability that without the grant, the nonfederal investment in the project would not be made, *id.* § 5318(j), and (2) "assure that the amount of the grant is the least necessary to make the project feasible." *Id.* § 5318(k). Thus, the UDAG program is designed to encourage and leverage nonfederal investment in depressed urban areas. In fact, the average UDAG project has involved six nonfederal dollars for every dollar of UDAG funds. Significantly, Congress did not change the "construction work" focus of Section 110 in adding the UDAG program to the Act. This means that if UDAG funds are used exclusively to finance the non-construction work activities of a particular project (as they often are), Davis-Bacon wages need not be paid. A conclusion that Section 110 required the payment of prevailing wages under these circumstances would substantially impair the intended effect of the program. Because the program is designed to minimize the amount of federal funds necessary to cause a project to go forward, a requirement that Davis-Bacon wages be paid with respect to the entire project could significantly increase (conceivably in excess of the total federal investment) the amount of nonfederal funds needed for the project. Given the language of Section 110 and the general, although admittedly not wholly consistent, practice of HUD to require the payment of Davis-Bacon wages only when federal funds are used to finance construction work, it is reasonable to conclude that Congress added the UDAG program with this understanding in mind. A construction of Section 110 expanding its traditional scope, therefore, could significantly undermine the program in terms of its cost and effect.

[6] If in a given case installation does not entail construction work, then § 110 is inapplicable in any event.

Similarly, we agree with Labor's position that "UDAG or CDBG financing of certain 'soft costs' would not, in and of itself, trigger Davis-Bacon coverage for building construction when there was no direct UDAG or CDBG financing of the actual construction." Labor Opinion at 2. Labor gave as examples of such "soft costs" legal services and tenant allowances for purchasing furniture or obtaining business licenses. *See id.* In short, we do not believe that § 110 requires payment of Davis-Bacon wages when federal funds are used to pay for any activity other than construction work. So long as no part of the cost of construction work is paid for with UDAG or CDBG funds, § 110 does not apply.

Conclusion

Given the language of § 110 and Congress' contemporaneous rejection of alternative language that expressly would have required the payment of Davis-Bacon wages for all work associated with any "construction project," not just "construction work," we conclude that the Act requires the payment of prevailing wages only when federal funds are used to pay for construction work. The mere use of federal funds to acquire the land upon which that work is to take place does not constitute federal financing of the construction work.

Similarly, the use of federal funds either to purchase materials, equipment, machinery, or other fixtures installed during the construction work or to pay for the architectural and engineering services rendered prior to that work, does not trigger Davis-Bacon coverage when no federal funds are used to pay for the construction work itself.

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Constitutionality of Closing the Palestine Information Office, an Affiliate of the Palestine Liberation Organization

The federal government may, without violating the First Amendment or the Bill of Attainder Clause of the Constitution, order the Palestine Information Office in Washington to close. The political branches have broad authority to control the flow of funds into the United States, and may prevent all commerce between foreign and domestic entities, or cut off the supply of all noninformational material from a foreign country to a domestic entity.

Furthermore, neither foreign political entities, nor domestic organizations and individuals to the extent they profess an identity with such entities, have constitutional rights under the First Amendment. The First Amendment also permits restrictions on the speech and association rights of domestic organizations and individuals when they act pursuant to the direction and control of a foreign entity. The same restrictions on the expressive activities of domestic organizations and individuals are not permitted, however, outside the scope of such a relationship.

August 14, 1987

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

We have been asked to assess the constitutionality of various restrictions on the Palestine Liberation Organization (PLO) and groups associated with it. Specifically, we have been asked whether the State Department's exercise of its statutory authority under the Foreign Missions Act, 22 U.S.C. §§ 3401 *et seq.*, to "close" the Palestine Information Office (PIO) in Washington, D.C., would be constitutionally permissible. For the reasons discussed below, we believe that such action by the Secretary of State under the broad authority accorded him by the Foreign Missions Act over foreign missions would be a constitutionally permissible exercise of the political branches' authority over foreign relations.

We first explore the authority of the political branches to act against foreign political entities and their agents. Next, we apply that analysis to the specific case of the PIO. We then discuss the constitutionality of H.R. 2548 and S. 1203, the recently-introduced bills which would prohibit the expenditure of funds provided by the PLO, or the maintenance of an office "at the behest or direction of, or with funds provided by" the PLO. These restrictions would also apply to monies or direction provided by any of the PLO's "constituent groups," its "successors," and its "agents."

In sum, we believe that restrictions on the speech of foreign political entities are permissible, as such entities do not have constitutional rights. Similarly,

restrictions on the speech of domestic organizations and individuals professing an identity with such foreign entities are permissible, as they assume the constitutional non-status of the foreign entity with which they profess an identity. Difficulties arise with respect to those organizations or entities which do not profess an identity with a foreign political entity, but which nonetheless serve its interests. We believe that restrictions on the speech of such organizations and on American citizens are permissible if the latter are acting pursuant to the direction and control of the foreign entity. Furthermore, restrictions on the ability of domestic organizations and citizens to form such a relationship or which tend to inhibit the formation of a relationship with a foreign entity are constitutional. We believe, however, that restrictions on the expressive activities of American citizens outside the scope of such a relationship with a foreign entity are impermissible under the First Amendment.

I. General Principles

The fundamental focus of First Amendment analysis in this context must be on *who* is asserting the right of speech or of political association. As we understand the facts, the PIO professes an identity with the PLO, maintaining that it is the "voice" of the PLO in the United States. The PIO, we also understand, is staffed by foreign nationals and American citizens. Accordingly, there are three different juridical entities whose First Amendment rights are potentially affected by the proposed action. First, there is the PLO itself. Second, there is the PIO, an organization that professes an identity with, and perhaps derives its legal status from, the PLO. Finally, there are the American citizens and foreign nationals who staff the PIO. Thus, before assessing the speech or associational rights at issue, we must inquire whether and to what extent these entities possess First Amendment rights.

With respect to foreign sovereigns and states, it is clear that they exist outside the constitutional compact and have no rights or responsibilities under it. Rather, their legal rights and duties are exclusively governed by treaties, international law, and other agreements binding coequal sovereigns in the international arena. Because the PLO purports to be an independent sovereign entity, we have little difficulty concluding that it falls into this category.

Real or juridical "persons" not United States citizens possess some constitutional rights while on American soil. Nevertheless, they may constitutionally be expelled from the United States for exercising these rights, including the rights of political association or speech, at least if the expulsion is pursuant to a legitimate foreign policy objective. Accordingly, even if the PIO is viewed as having a juridical identity distinct from the PLO — or if the PLO is viewed as a foreign entity without sovereign status — it may nonetheless be banned from American soil for any bona fide foreign policy reason. The same is true of a foreign national.

American citizens obviously have the full protection of the First Amendment and may neither be denied the right to political expression nor expelled because

they have engaged in such expression. However, a citizen's First Amendment rights must be examined in light of his interaction with a foreign government. Specifically, it must be determined, in view of this relationship, whose speech is actually at issue: that of the citizen or of the foreign entity.

For the reasons discussed more fully below, we believe that because the political branches may deny foreign governments all First Amendment rights, they may restrict the expressive activities of citizens speaking pursuant to the direction and control of — that is, as agents of — the PLO and/or foreclose ties indicative of such an agency relationship. So long as the scope of the prohibition on speech does not exceed the contours of the speaker's relationship with the foreign government — thereby infringing on the citizen's independent right to espouse beliefs in support of foreign powers — we believe it would survive constitutional scrutiny. Although such restrictions would implicate the citizen's ability to gather information and associate with foreign governments, we believe this limitation would be justified as an incidental effect of the United States's necessary and inherent power to preclude foreign encroachment. Finally, we conclude that the United States political branches may prevent all commerce between foreign and domestic entities, and may cut off the supply of all noninformational material from a foreign entity to a domestic entity.

We will examine each of these questions in turn and then apply them to the specific issues before us.

A. Foreign States

As noted, the starting point of our analysis is that the PLO itself, as a foreign political entity, has no constitutional rights. This conclusion flows inexorably from the nature of foreign sovereigns and their interaction with the United States as a foreign, co-equal sovereign. The United States, as a nation among nations, is neither subject, nor sovereign, but one among equals. *See United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 315–18 (1936); *The Chinese Exclusion Case*, 130 U.S. 581, 604–06 (1889); *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812). The authors of the Constitution allocated the powers to wage war and conduct diplomacy among the political branches of the national government, but they did not believe that the existence of such powers depended on a direct grant in the Constitution.[1] Such powers are an inherent and necessary attribute of independent sovereignty and the Framers did not intend to diminish this preexisting authority.

As this Office previously stated in connection with proposed legislation to conduct electronic surveillance of foreign agents:

> It was understood by the Framers that the United States, as an entity, derived its power to conduct foreign relations not from its domestic instrument of government but from its status in inter-

[1] *See* 1 M. Farrand, *Records of the Federal Convention*, 19, 25 (E. Randolph), 316 (J. Madison), 323 (R. King) (1937 ed.); *The Federalist* No. 15, at 156 (A. Hamilton), No. 42, at 302–03 (J. Madison) (John Harvard Library ed. 1961).

> national law as an independent state. Rather than conferring on the United States the power to wage war and conduct diplomacy, the authors of the Constitution understood that they were only allocating those unquestioned powers among the branches of the national government and providing sufficient domestic powers to make them effective. Consistent with this understanding, the Supreme Court has held from the earliest times to the present that the United States as an entity possesses the full powers of a sovereign nation not by grant under the Constitution but under international law.

Letter to Edward P. Boland, Chairman, House Permanent Select Comm. on Intelligence from John M. Harmon, Assistant Attorney General, Office of Legal Counsel (Apr. 18, 1978) (Harmon Letter), *reprinted in Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, H.R. 5632 before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 95th Cong., 2d Sess. 23 (1978). *See also Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972); *Fong Yue Ting* v. *United States*, 149 U.S. 698 (1893); *The Chinese Exclusion Case*, 130 U.S. 581; *The Schooner Exchange*, 11 U.S. (7 Cranch) 116; *Penhallow* v. *Doane's Administrator*, 3 U.S. (3 Dall.) 54, 80–81 (Paterson, J.).

As a direct result of that sovereignty, the United States interacts with foreign states not within the constitutional system, but as a juridical equal, on the level of international law and diplomacy. Thus, Chief Justice Marshall spoke of the "perfect equality and absolute independence of sovereigns" as tied to the fact that "[o]ne sovereign [is] in no respect amenable to another." *The Schooner Exchange*, 11 U.S. (7 Cranch) at 137. And because no sovereign is "amenable," or subject to the other, "the rights and duties of the United States and foreign sovereignties *vis-a-vis* one another derive not from the domestic law of either, but from the mutual agreements contained in treaties and the consensus known as customary international law." Harmon Letter, *supra*, at 5. Simply put, a foreign political entity such as the PLO, "lies outside the structure of the union." *Principality of Monaco* v. *Mississippi*, 292 U.S. 313, 330 (1934). It "[has taken] no general obligation to abide by the constitutional norms to which the federal government and the several states are subject, nor are there any effective means to place [it] on parity with the United States or the states for purposes of enforcement of particular norms." Damrosch, *Foreign States and the Constitution*, 73 Va. L. Rev. 483, 522 (1987) (Damrosch).[2]

[2] This conclusion — that foreign states have no constitutional rights — is supported by those scholars who have addressed the issue and a number of prior opinions by this Office. *See, e.g.*, Damrosch, *supra*, 73 Va. L. Rev. at 519–23; L. Henkin, *Foreign Affairs and the Constitution* 254 (1972) (foreign governments and foreign diplomats in their official capacity "have no constitutional rights, and there are no constitutional obstacles, say, to tapping wires of foreign embassies"); Presidential Authority to Settle the Iranian Crisis, 4A Op. O.L.C. 248, 260 n 9 (1980) ("A foreign nation, however, unlike a foreign national, does not have rights under the Fifth Amendment."); 5 *Intelligence Activities — The National Security Agency and Fourth Amendment Rights: Hearings on S. Res. 21 Before the Senate Select Committee to Study Governmental*

Continued

The oft-mentioned "plenary" authority of the federal political branches is a natural attribute of such sovereignty. *See, e.g., Buttfield* v. *Stranahan*, 192 U.S. 470, 492–93 (1904); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. at 320. All matters of international concern fall within federal power. *Missouri* v. *Holland*, 252 U.S. 416, 432–35 (1920) (foreign affairs power allows federal government to regulate by treaty even subjects traditionally falling within state jurisdiction). The converse of this power is judicial reluctance to set aside actions affecting foreign relations taken by the political branches. The judiciary has recognized the need for the United States to "speak with one voice" with respect to foreign nations. As Justice Jackson stated in *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948):

> It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret . . . . [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither the aptitude, facilities, nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Thus, United States courts will not even take cognizance of a constitutional (or other) claim by a foreign political entity unless the Executive recognizes it. *See United States* v. *Pink*, 315 U.S. 203 (1942). The "established rule" is one of "complete deference to the executive branch" in its determination whether to grant a government access to United States courts. *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308, 319–20 (1978). Accordingly, the political branches may deny foreign entities as such all constitutional rights and preclude them from obtaining access to United States courts.

B. Foreign Nationals and Juridical "Persons"

For reasons analogous to those set forth above, the Supreme Court has repeatedly emphasized that the power to exclude or to deport foreign nationals is "inherent in sovereignty, necessary for maintaining normal international

[2] (. . . continued)

Operations with Respect to Intelligence Activities, 94th Cong., 1st Sess. 66, 74 (1975) (statement of Attorney General Edward H. Levi) ("The Fourth Amendment guards the right of the people and it can be urged that it was not meant to apply to foreign nations, their agents and collaborators.") (Levi Testimony).

We do not mean to suggest that courts of the United States have not entertained suits by foreign nations. Several cases of statutory interpretation and occasional dicta support the notion that foreign sovereigns should be treated the same as other juridical persons. *See, e.g., Pfizer Inc.* v *Government of India*, 434 U.S. 308 (1978) (interpreting "person" in § 4 of the Clayton Act to include foreign states). Such cases have only arisen, however, in the absence of an explicit directive from the political branches.

relations and defending the country against foreign encroachments and dangers — a power to be exercised exclusively by the political branches of government." *Mandel*, 408 U.S. at 765 (quoting with approval Brief of the United States). "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909). *Accord Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977); *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976); *Shaughnessy* v. *United States ex rel. Mezi*, 345 U.S. 206 (1953); *Fong Yue Ting* v. *United States*, 149 U.S. 698 (1893). As the Court has noted, "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power and maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588–89 (1952). *See also Galvan* v. *Press*, 347 U.S. 522, 531 (1954) ("that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government").

Pursuant to this sweeping power over immigration and naturalization, "Congress regularly makes rules that would be unacceptable if applied to citizens." *Fiallo*, 430 U.S. at 792 (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 80 (1976)). Specifically, Congress may exclude aliens on the basis of criteria that would clearly be proscribed in the domestic arena, such as political beliefs, sex, and illegitimacy. *See, e.g., Kleindeinst* v. *Mandel*, 408 U.S. 753; *Fiallo* v. *Bell*, 430 U.S. 787. Congress has equally broad authority to deport resident aliens on the basis of political beliefs or affiliation, and may even do so on the basis of conduct that wholly antedated the relevant prohibitory regulation. *See, e.g., Galvan*, 347 U.S. 522 (upholding deportation of resident alien for former membership in communist party); *Harisiades*, 342 U.S. 580 (same). At most, courts will review the congressional policy choice to determine whether it is supported by a "facially legitimate and bona fide reason." *Fiallo*, 430 U.S. at 795 (quoting *Mandel*, 408 U.S. at 770). If such a reason exists, "the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interest of those who seek some communication with the applicant." *Mandel*, 408 U.S. at 770.

In short, the basic rationale underlying this doctrine is the "accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self preservation, to forbid the entrance of foreigners within its domain, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." *Ekiu* v. *United States*, 142 U.S. 651, 659 (1892). Accordingly, deportation is not viewed as "punishment," but merely withdrawal of the privilege of remaining in the United States. *See Bugajewitz* v. *Adams*, 228 U.S. 585, 591 (1913).[3]

[3] That aliens may be deported based upon behavior that would be constitutionally protected if undertaken

Continued

We can discern no principled basis for concluding that Congress has less authority with respect to fictional juridical persons, such as foreign corporations or organizations. Because physical removal of these fictional entities from the country is obviously impossible, the equivalent of deportation of individuals would be a cessation of organizational activities and/or expulsion of corporate assets.

C. United States Citizens

American citizens, of course, are subject to the full protection of the First Amendment and other constitutional provisions. There are two aspects to a citizen's First Amendment interests in this context. First, citizens have the right to engage in political or other expressive activity, collectively or on an individual basis. Moreover, they have an interest in receiving information from or having contact with foreign nationals or other entities.

The question remains, however, whether one has a constitutional right to act as an agent or official representative of a foreign government. Citizens, collectively or individually, have a right to engage in whatever political speech they desire, including speech in support of, or directly derived from, the teachings of a foreign power hostile to the United States. In our view, however, there is no First Amendment right to speak *as* a foreign government. That is, the political branches, pursuant to their extraordinarily broad foreign affairs authority, may forbid an individual from establishing a formal agency relationship with a hostile foreign power or, looked at another way, forbid him from speaking as the personification of a foreign power.

Of course, this direct prohibition against speech may not extend beyond the scope of the agency relationship. To the extent that a citizen speaks his own mind, rather than serves as the voice of his foreign principal, his speech is fully protected by the guarantees of the First Amendment.

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[3] (. . . continued)
by citizens does not mean that aliens are wholly without constitutional rights while in this country In fact, it is well settled that certain constitutional protections do extend to aliens. For example, the Supreme Court has stated that "[f]reedom of speech and of press is accorded aliens residing in this country." *Bridges* v. *Wixon*, 326 U.S. 135, 148 (1945) (citing *Bridges* v. *California*, 314 U.S. 252 (1941)). In fact, "the Court has treated certain restrictions on aliens with 'heightened judicial solicitude.'" *Foley* v. *Connelie*, 435 U.S. 291, 294 (1978) (quoting *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971)). Nevertheless, the Supreme Court has also recently upheld a New York statute requiring state troopers to be United States citizens, *Foley* v. *Connelie*, 435 U.S. 291 (1978), a State's refusal to employ as elementary and secondary school teachers aliens eligible for United States citizenship who failed to seek naturalization, *Ambach* v. *Norwick*, 441 U.S. 68 (1979), and a California statute prohibiting aliens from becoming "peace officers," *Cabell* v. *Chavez-Salido*, 454 U.S. 432 (1982). In distinguishing these restrictions from those "on lawfully resident aliens that primarily affect economic interests," which are subject to "heightened judicial scrutiny," the Supreme Court has concluded that "strict scrutiny is out of place when the restriction primarily serves a political function " *Id.* at 439. In any event, we need not resolve the difficult question of precisely when restrictions may be placed on an alien's rights greater than those placed on citizens. We deal here only with the expulsion of foreign entities, which is plainly permissible under *Harisiades* and *Galvan*. For purposes of this analysis, therefore, we assume that aliens are entitled to the First Amendment protections of freedom of speech and of association so long as they remain in this country. Accordingly, during the discussion set forth above, "citizens" should be understood to mean permanent resident aliens as well.

We do not believe however, that the citizen-agent may transfer these rights to his foreign principal. We so conclude for two reasons. First, a contrary conclusion would render the political branches plenary and necessary authority to preserve national sovereignty largely chimerical. Second, a prohibition which extends only to an individual's ability to speak *as* a foreign sovereign, but does not otherwise in any way impede his ability to express his ideas, does no discernible harm to the First Amendment rights of the speaker.

Foreign powers, like all other organizations with a juridical status separate and distinct from their members and employers, can obviously act only through individuals. If the political branches were foreclosed from taking any action against a foreign sovereign solely because it conducted its operations through American citizens or through alter ego domestic organizations, the federal government would be utterly disabled from exercising its clear sovereign power to expel a foreign presence from United States soil.

Although there is a paucity of case law on this specific question, we believe the political branches' inherent authority to preclude foreign encroachments necessarily carries with it a residual authority to treat citizen-agents as instrumentalities of a foreign government or sever the official ties that bind them. We should think, for example, that if the federal government has severed diplomatic relations with a foreign nation and expelled its diplomats, then that government could not continue its operations by having American citizens hold themselves out as the nation's "embassy." As Justice Frankfurter said, "[m]eans for effective resistance against foreign incursion — whether in the form of organizations which function, in some technical sense, as 'agents' of a foreign power, or in the form of organizations which, by complete dedication and obedience to foreign directives, make themselves the instruments of a foreign power — may not be denied to the national legislature." *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 96 (1961) (footnote omitted). Indeed, the Court in that case went so far as to say that to find a constitutional bar to registration and disclosure requirements of foreign-dominated groups would "make a travesty of [the First] Amendment and the great ends for the well-being of our democracy that it serves." *Id.* at 89.

For similar reasons, this Office has previously concluded that the "official conversations on diplomatic premises" of foreign nationals or American citizens employed by a foreign mission were not subject to the protections of the Fourth Amendment's prohibition against unreasonable searches or seizures. Harmon Letter, *supra*, at 8. We there stated: "[A] state can only act through its employees. It is therefore inherent in the acquisition of the foreign state's communications that the privacy of the individuals speaking them be invaded." *Id.* Similarly, in 1975 Attorney General Levi testified that because the preamble of the Constitution refers to "We the People," it could "be urged that it was not meant to apply to foreign nations, their agents and collaborators. Its application may at least take account of that difference" and therefore justify a finding that any such search was reasonable. Levi Testimony, *supra*, at 74. By analogy, a citizen's statements in his capacity as an official representative of a

foreign power would not be protected "speech" within the meaning of the First Amendment.

Moreover, a prohibition running only against speaking as the official voice of a foreign power or foreign political entity would not seem to affect adversely the speaker's right as an individual to freedom of speech. Such persons or organizations remain free to advocate support for the foreign regime and to advocate its teachings and philosophy. The exclusive disability imposed is the citizen's "right" to speak as a representative of a foreign government — to characterize his words as those of a foreign sovereign.

It is difficult to discern how this restriction could significantly affect the content or persuasiveness of the speaker's message. To be sure, it is conceivable in some circumstances that speaking in the name of a foreign sovereign would enhance the visibility and audience of the agent. But this does not strike us as an advantage protected by the Constitution, because, by definition, it is one derived from the existence of an entity without First Amendment rights. If the only reason people are listening is because the agent is speaking in the name of a foreign principal, then it follows that the prohibition against the agency relationship does not impede the *agent's* ability to contribute to the marketplace of ideas; it only affects negatively his master's unprotected voice. Simply put, we do not think the citizen-agent can have it both ways. He may not claim the right to enhance his speech by stepping into the shoes of a foreign power without accepting the constitutional disabilities that flow from this foreign status.

It is important to emphasize that this sort of restriction is not premised on the content of the political beliefs or views espoused by the speaker, but on the speaker's relationship with a foreign government. The Supreme Court has recognized and attached significance to this distinction in analogous contexts. For example, in the *Communist Party* case, the Supreme Court emphatically rejected the assertion that it was permitting the imposition of burdens against "any group which pursues unpopular political objectives or which expresses an unpopular political ideology." 367 U.S. at 104. As the Court put it:

> Nothing which we decide here remotely carries such an implication. The Subversive Activities Control Act applies only to *foreign-dominated* organizations which work primarily to advance the objectives of a world movement controlled by the government of a *foreign* country. . . . It applies only to organizations directed, dominated, or controlled by a *particular foreign* country.

Id. (emphasis in original). Similarly, in *Zemel* v. *Rusk*, 381 U.S. 1 (1965) and *Regan* v. *Wald*, 468 U.S. 222 (1984), the Supreme Court upheld restrictions on travel by American citizens to Cuba. In both cases, the court distinguished prior cases invalidating international travel restrictions on Communist Party members on the ground that the Communist Party restrictions were based on political belief and affiliation, while the restriction on travel to Cuba was based

on the current policy of the United States toward Cuba's government. *See Zemel*, 381 U.S. at 13; *Wald*, 468 U.S. at 241. *Cf. Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964); *Kent* v. *Dulles*, 357 U.S. 116 (1958). In short, the fact that ideological differences often motivate the political branches to take adverse action against a foreign nation does not mean that restrictions on United States citizens vis-a-vis that government are "content-based" for First Amendment purposes.[4]

Such non-content-based restrictions furthering foreign policy objectives would, at most, be scrutinized under the test for "incidental" restrictions on speech employed by the Supreme Court in *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). In that case, the Court established four requirements necessary to sustain government action not intended to suppress speech but having some effect on speech as a by-product of the government action. One must assess: (1) whether the restriction is within the constitutional power of the government; (2) whether it furthers an important or substantial interest; (3) whether the governmental interest is unrelated to the suppression of free expression; and (4) whether the incidental restriction on alleged First Amendment freedoms is any greater than is essential to the furtherance of that interest.[5] In two later cases, the Court apparently added a fifth criterion: that there be available alternative means of communication. *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young* v. *American Mini-Theatres Inc.*, 427 U.S. 50 (1976). As explained below, restrictions on an agency relationship with a foreign government — ranging from outright prohibition of the relationship to those restrictions which tend to inhibit its formation — meet

[4] Restrictions on the physical presence of a foreign sovereign in the United States do have the collateral consequence of limiting somewhat the ability of citizens directly to receive information and ideas from that sovereign. The Supreme Court in *Mandel* held that such a limitation is sufficient to trigger a First Amendment inquiry. However, as noted, the finding that the reason for the restriction was facially legitimate and *bona fide* obviates the need for further consideration or balancing of the citizen's First Amendment interest. *See Mandel*, 408 U.S. at 770. Again, *Zemel* and *Wald* add further support outside the specific immigration context. Both cases held that Congress' decision to foreclose travel to a foreign country for a weighty foreign policy interest, to which the courts will give substantial deference, is sufficient to justify the diminished information-gathering ability resulting from the travel ban. As the *Zemel* court put it:

> There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion on the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak in public does not carry with it the unrestrained right to gather information.

381 U.S. at 16–17. We think this principle would apply with at least equal force in this context; we can perceive no distinction between preventing Americans from traveling abroad to exchange information with foreigners and preventing foreigners from traveling here to exchange information with Americans.

[5] This test was used by this Office in analyzing the proposed closure of the Rhodesia Information Office. *See* Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel at 5–8 (Dec. 13, 1977) (Harmon Memorandum). The *O'Brien* test was also applied in a series of lower court decisions which upheld restrictions on the importation of publications and films under the Trading with the Enemy Act, a situation similar to that presented here. *See Teague* v. *Regional Comm'r of Customs*, 404 F.2d 441, 445 (2d Cir. 1968), *cert. denied*, 394 U.S. 977 (1969), *American Documentary Files, Inc.* v. *Secretary of the Treasury*, 344 F. Supp 703 (S.D.N.Y. 1972). *Cf. Welch* v. *Kennedy*, 319 F. Supp. 945 (D D.C. 1970). A similar conclusion was reached by the Third Circuit in *Veterans & Reservists for Peace in Vietnam* v. *Regional Comm'r of Customs*, 459 F.2d 676 (3d Cir.), *cert. denied*, 409 U.S. 933 (1972).

each of these criteria. This is certainly true of a regulation mandating the closure of offices maintained at the direction of the PLO, which is, in fact, a less restrictive alternative to a complete prohibition of the relationship:

1. Plainly, a decision to prohibit a relationship with — or to close an office directed and controlled by — a hostile foreign entity is within the constitutional foreign affairs power of government.

2. The action furthers an important interest of the United States government. In the specific case of the PLO, it "was directly responsible for the murder of an American citizen on the Achille Lauro cruiseliner in 1985," S. 1203, 100th Cong., 1st Sess. (1987); it has taken credit for and been implicated in the murders of dozens of United States citizens, including that of a United States ambassador overseas; and it has violated numerous international laws as expressed in several international conventions, *see, e.g.*, Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (New York Convention), Dec. 12, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532 (*quoted in Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 806–07 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985)). It is vital for the United States, as a world leader in the fight against terrorism, to be able to deny to the PLO access to its shores, and to give force to the Executive's decision not to recognize it.

3. The governmental interest here is not directed at suppressing free speech. Prohibiting a citizen from serving as the agent of a foreign government effectuates the President's decision not to recognize a foreign political entity, as does closing the offices of the PLO or those of its agents. In the specific case of the PLO, the purpose of the closure is to discourage terrorism and international lawlessness. What is at stake here is "the very delicate, plenary and exclusive power of the President" in the field of international relations," *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), which includes the constitutional authority and responsibility to recognize, or not to recognize, the representatives of a foreign state or regime, *see United States* v. *Pink*, 315 U.S. 203, 229 (1942). Again, with respect to the PLO, if other offices of the PLO or its agents were present in the United States, including offices that do not engage in expressive activity, they would similarly be closed. Thus, the closing of the PLO's offices — or those of its principals or partners — is only incidental to the fulfillment of the President's decision not to recognize the PLO and of the purposes that decision is intended to achieve. Also, the restriction on speech is not great — speech *of the PLO* is prohibited, but speech *of others* favoring the PLO or advancing the PLO's interests is not.

4. Whatever incidental restriction is imposed on alleged First Amendment freedoms in prohibiting agency relationships, or in closing the PLO's offices, or those of its agents, is no more than the minimum necessary to carry out the President's decision with respect to foreign political entities such as the PLO. Neither Congress nor the President could act to expel a foreign political entity

from the United States if such an entity could continue to direct the actions of agents here or if the closing of that foreign entity's office were forbidden. The essence of a presence is an office. So long as the PLO and its agents have agents and offices here, the President's decision to expel the PLO as a sign of nonrecognition is not fully executed.

5. Finally, in assessing the available alternative means of communication, it is important to note what these kinds of restrictions on an agency relationship with a foreign political entity does *not* do. In the case of the proposed closure, it does not prevent anyone in the United States from engaging in "independent advocacy" of the Palestinian cause, raising money from the public, or using personal funds in any amount for this purpose. This includes Palestinians in the United States (although they could not, of course, be supported by funds transferred in violation of any legislation which prohibited such a funds transfer). *Cf. Buckley* v. *Valeo*, 424 U.S. 1, 47–54 (1976). Prohibiting a citizen from acting as an agent or closing a foreign entity's office would not place our government in the role of censor or as an inspector or appraiser of ideas. *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965).

In sum, with respect to closure of the PIO, the availability of alternative means for communication minimizes the possibility that Americans will not be able to communicate the point of view of the PLO. The same can be said about the termination of an agency relationship with any foreign political entity. These alternatives serve to demonstrate that the restrictions are no greater than necessary and that the government's purpose is plainly not to curtail the free flow of ideas and open debate of issues of national importance. *See Pell* v. *Procunier*, 417 U.S. 817, 824–28 (1974). *Cf. Kleindienst* v. *Mandel*, 408 U.S. at 765. The PLO may freely mail material to the United States, provide interviews to the American and world press, place political advertising, and use any means of communication other than offices or agents supported by funds in a manner that would violate the proposed restriction.

Accordingly, we believe that the First Amendment permits the federal government to prevent a direct agency relationship between a foreign sovereign and domestic organizations or persons. We are constrained, however, to add several important caveats to avoid any misunderstanding of this general statement.

First, and perhaps most important, we must emphasize the distinction between prohibiting an agency relationship and attaching unrelated burdens on the basis of that agency relationship. The Court has struck down a variety of schemes which directly punish or withhold privileges or benefits of citizenship because of membership in a political organization. For example, the Court invalidated blanket restrictions on the right of citizens to travel abroad and to be employed in a defense facility where the statute "sweeps indiscriminately across all types of association with Communist action groups, without regard to the quality and degree of membership." *United States* v. *Robel*, 389 U.S. 258, 262 (1967); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 506–07 (1964). These cases reflect the now well-established rule that punishing or restricting a citizen's freedom solely on the basis of association with a group is impermis-

sible unless it is shown that "the group itself possessed unlawful goals and . . . the individual held a specific intent to further those illegal aims." *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982).

Because somewhat analogous, albeit not identical, First Amendment interests are implicated in the context of association with foreign governments, it might well be argued that establishing such penalties because of association with a foreign sovereign constitutes similar imposition of "guilt by association." On the other hand, the Court has upheld the imposition of regulations on organizations "substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement . . . and . . . operat[ing] primarily to advance [its] objectives." *Communist Party*, 367 U.S. at 8. We note, however, that the regulations at issue in *Communist Party* largely related to registration and disclosure of membership lists, which are not generally perceived as particularly severe infringements on the freedom of association or speech.

More important for present purposes, it must again be emphasized that the restrictions at issue in *Robel*, *Aptheker*, and *Communist Party* are different in degree and kind from a prohibition directed precisely and only at the act of representation itself. In those cases, the government used the fact of an agency relationship to burden the organization directly, or its members' pursuit of important activities unrelated to participation in the association. In contrast, a policy preventing a formal agency relationship between foreign and domestic entities runs only to representation, it does not burden speech as such.

Citizens affected by the regulation remain entirely free to associate with like-minded citizens, unburdened by regulations and uninhibited in their ability to express their views. The only impediment to First Amendment interests is the prohibition on the domestic organization's official representation of a foreign power. For the reasons discussed previously, we do not view such a facial decoupling as a serious infringement on the freedoms to speak or to associate. Thus a regulation prohibiting, for example, a public relations firm from officially representing a foreign government would pass constitutional muster, while a regulation restricting the firm's other business dealings because of its representation of the foreign entity might well not.

Our second important caveat is that unless the domestic organization officially acknowledges or professes an identity with the foreign power, it is difficult to define with any precision whether and under what circumstances there is a nexus sufficient to treat a domestic organization as legally indistinguishable from a foreign power, with the attendant constitutional disabilities. Such definitional problems are particularly acute with respect to single-purpose organizations, as opposed to individuals or firms which represent a number of different clients. First, there is no bright-line test analogous to citizenship to distinguish American from foreign corporations or associations. Second, unlike individuals, many organizations exist for only one purpose and are defined by that purpose. That is, organizations whose sole purpose is to act on behalf of or advance the interests of a foreign government have no life

outside that relationship. Thus, while it is quite possible readily to differentiate between an individual's or, say, a law firm's official and other activities, it is not possible to do so with respect to a single-purpose organization. A ban on acting as an agent of a foreign power is a ban on the existence of such a single-purpose organization determined to be an agent even if this determination is made in the face of its contrary assertions. Thus, discerning the nationality of a single-purpose organization presents distinct conceptual difficulties, and a finding of an agency relationship with respect to such organizations has particularly serious consequences.[6] Although this question is not raised by the proposed closure of the PIO, it is raised by the proposed legislation, which prohibits maintaining offices for or receiving funds from, the PLO's agents.

Various Supreme Court cases dealing with Communist Party membership provide the most direct guidance. As noted above, *Robel* and *Aptheker* invalidated penalties imposed on unknowing party members who did not have a specific intent to further the Party's unlawful aims. Similarly, in *Bridges* v. *Wixon*, 326 U.S. 135 (1945), the Supreme Court refused to allow the deporta-

[6] This does not mean, of course, that the courts are foreclosed from making such an inquiry. A person or association which does not openly profess an identity with, or hold itself out as the voice of, a foreign sovereign may nonetheless be treated as such against its wishes. Supreme Court precedent strongly indicates that the United States need not accept a domestic organization's statements regarding its relationship with a foreign government at face value, but may look behind this to determine whether an agency relationship in fact exists. As previously indicated, the Supreme Court gave effect to Congress' definition of the Communist Party as an organization "substantially directed, dominated or controlled" by a foreign power even though the Party itself vigorously resisted any such designation. *See Communist Party*, 367 U.S. at 8–9. Moreover, in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983), the Court found that a Cuban bank which the Cuban government had established as a separate juridical entity should nonetheless not be treated as such, despite the international law principle that a foreign sovereign's determination concerning the separate legal status of its institutions is presumptively valid. *Id.* at 623–28. Concluding that Cuba could not "reap the benefits of our courts while avoiding the obligations of international law," *id.* at 634, the Court declined to "adhere blindly to the corporate form when doing so would cause . . . an injustice." *Id.* at 632. The Court found that the bank's corporate form could not be "interposed to defeat legislative policies." *Id.* at 630. "To hold otherwise would permit governments to avoid the requirements of international law simply by creating juridical entities whenever the need arises." *Id.* at 633. *Cf. National City Bank* v. *Republic of China*, 348 U S. 356, 360, 362 (1955) ("we have a foreign government invoking our law, like any other litigant, but it wants our law free from the claims of justice").

Thus, the Supreme Court did not give dispositive effect to the views of the Cuban government or the bank concerning the bank's juridical status, but "pierced the corporate veil" to determine the actual relationship between the Cuban government and the bank. Because the Court decided the case solely on the basis of international law and equity, without any specific congressional guidance, it follows *a fortiori* that the courts need not give preclusive effect to a foreign sovereign's characterizations of its institution's legal status where Congress or the Executive has expressed a contrary view. The political branches' view of the status of foreign entities are given substantial deference by the courts. *Cf. Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945) ("it is therefore not for the courts . . . to allow immunity on new grounds which the government has not seen fit to recognize"); *Baker* v. *Carr*, 369 U.S. 186, 216, 217 (1962). In this regard, we note that congressional statutes treat distinct juridical entities as foreign states or agents pursuant to definitions relating to the extent of the foreign sovereign's financial or other control over the entity. *See, e.g.*, Foreign Agents Registration Act, 22 U.S.C. §§ 611–620; Foreign Intelligence Surveillance Act, 18 U.S.C. §§ 2511, 2518, 2519, 50 U.S.C. §§ 1801–1811; Trading with the Enemy Act, 50 U.S.C. app §§ 1–44; International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1706; Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(b)(2).

We therefore conclude that the federal government may treat citizens or domestic organizations as instrumentalities of foreign sovereigns even when the citizen or domestic organization disavows such status. Nonetheless, for First Amendment purposes, the circumstances in which this "piercing the veil" approach would be appropriate would be quite limited and are most difficult to describe in the abstract.

tion of an alien who was not proven to be a "member" of the Communist Party and who did not meet the nonexclusive statutory definition of "affiliation." Narrowly defining the statute and the concept of "affiliation," the *Bridges* Court said:

> Whether intermittent or repeated, the act or acts tending to prove "affiliation" must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with its unlawful activities. The act or acts must evidence a working alliance to bring the program to fruition.

326 U.S. at 144–45. Although this line of cases is not directly on point, it may be argued by analogy that if "mere cooperation in the lawful activities" of an organization with unlawful aims is not sufficient to vest an individual member with liability for those proscribed purposes, then a person's or organization's mere cooperation with a foreign power is not sufficient to establish a representative or agency relationship for First Amendment purposes. Rather, there must be a "specific intent" or "working alliance to bring the [foreign power's] program to fruition."

In the *Communist Party* case, as previously noted, the Court upheld restrictions on domestic organizations "substantially directed, dominated, or controlled by" a particular foreign government or organization. There the Court focused on whether such domination could exist only if the foreign government had the "power, in the event of noncompliance, effectively to enforce obedience to its will." 367 U.S. at 36. The Court concluded that this level of domination was not necessary so long as there existed a "relationship in which one entity so much holds ascendancy over another that it is predictably certain that the latter will comply with the directions expressed by the former solely by virtue of that relationship, and without reference to the nature and content of the directions." *Id.* at 38.

The Court upheld the Subversive Activity Board's findings that such a relationship exists between the Communist Party and foreign Communist powers on the basis of the eight factors set forth in the legislation. Among these factors were: (i) the extent to which an organization's policies were formulated and carried out and its activities performed to effectuate the policies of the foreign enemy; (ii) the extent to which its views did not deviate from those of such foreign entities; (iii) the extent to which it received financial or other aid, directly or indirectly from or at the direction of a foreign power; (iv) the extent to which it sent members or representatives to any foreign country for instruction or training in the foreign power's principles; (v) the extent to which it reported to the foreign power; (vi) the extent to which its principal leaders or a substantial number of its members were subject to a recognized or disciplinary power of such foreign entity or its representative; and (vii) the extent to which its principal leaders or a substantial number of its members considered the allegiance they owed to the United States as subordinate to their obligations to a foreign entity. *See* 367 U.S. at 13–14.

As noted, the Court held that the relationship between the Communist Party and foreign powers was sufficient to justify registration and disclosure requirements that would be constitutionally impermissible with respect to domestic political organizations in the absence of such a relationship.

We also stress that any finding of an agency relationship which is based primarily on the similarity between the speech and political activities of the domestic and foreign entities would be constitutionally unsound. The basic rationale for this conclusion is that restrictions on the speech of domestic organizations may be premised on a relationship with a foreign government, but not on the content of the organization's speech. Accordingly, finding an agency relationship on the basis of the content of a domestic group's speech would render this analysis wholly circular and ensnare within its ambit purely domestic groups exercising their First Amendment right to speak in support of foreign entities. Accordingly, similarity of speech cannot be used as a significant or primary indicium of agency.

So long as an organization does not profess an identity with a foreign entity, we believe it would be very difficult to establish an agency relationship sufficient to justify restrictions on expressive activities allegedly within the scope of that relationship absent a direct financial or contractual relationship. We do not believe that such a nexus could be established by virtue of a comparison between the speech of the domestic and foreign entities. Beyond this, any agency analysis would necessarily be a fact-specific inquiry concerning similarity of personnel between the two organizations, whether compliance with the foreign sovereign is voluntary, the nature and extent of contacts between the two organizations, and so forth.

In sum, we believe it is constitutionally permissible to treat domestic agents of foreign governments as unprotected by the Constitution and to sever formal non-speech links between the foreign and domestic entities, but that it is impermissible to restrict the expressive or other activities of American citizens unrelated to their association with a foreign government. We will now apply these general principles to the specific legislation before us.

II. Application of General Principles

As noted above, the first step in the First Amendment analysis is to identify the party asserting the right of speech or of political association. The PLO is a foreign sovereign or political entity for constitutional purposes. Although the United States chooses not to recognize the PLO as such, the PLO nonetheless interacts with the United States as a foreign political entity within the structure of international law.

The PLO has been accorded observer status at the United Nations, G.A. Res. 3237, 29 U.N. GAOR, 29th Sess., Supp. No. 31, at 4, U.N. Doc. A/9631 (1974). It is reported to have diplomatic relations with approximately one hundred countries throughout the world. *See* Kassim, *The Palestine Liberation Organization's Claim To Status: A Juridical Analysis Under International*

Law, 9 Denv. J. Int'l L. & Pol. 1, 2–3 (1980). It considers itself a "state" for the purposes of international law, and it claims privileges and immunities generally extended only to a sovereign nation and its representatives.

Although the United States does not afford diplomatic status to the PLO, it accords to the members of the PLO Observer Mission certain privileges relating to entry into and residence in the United States, as well as transit to the United Nations, by virtue of the Headquarters Agreement between the United States and the United Nations. 21 U.S.T. 1416. These privileges would otherwise be denied to these individuals under the so-called Solarz Amendment. *See* 22 U.S.C. § 2691(c). In addition, the PLO claims that it is entitled to even greater privileges and immunities than are accorded under the Headquarters Agreement, although the United States has consistently resisted these claims. The PLO plainly views itself as a foreign sovereign in its relationship to the United States, not "amenable" to United States sovereignty. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 137. As a foreign political entity, the PLO does not itself enjoy constitutional protection.[7]

Whether the PIO is a foreign political entity for purposes of constitutional standing is more problematic. It might plausibly be asserted that the PIO is a juridical entity separate and distinct from the PLO, and is thus not a foreign political entity as such. We need not definitively resolve this issue since the PIO is, at most, a *foreign* juridical person and/or professes an official identity with the PLO. If it is a foreign "person," it is subject to expulsion for any *bona fide* foreign policy reason, regardless of whether that reason is premised on political activities. In any event, because it maintains and professes an identity with the PLO, the same rules governing the United States' legal relationship with the PLO apply to the PIO.

Accordingly, it is immaterial whether the PIO (or the PLO itself) is considered a foreign state or a foreign person, or whether it is viewed as an official representative and voice of the United States of the PLO; in either event, it may be expelled from American soil consistent with the Constitution. Cutting off foreign funding and prohibiting the maintenance of an office are ways in which this permissible goal may be accomplished.

In fact, we have previously so concluded in a virtually identical context. In 1977, this Office concluded that a proposed executive order to close the Rhodesian Information Office (RIO) was constitutional. Harmon Memorandum, *supra*, at 2. There, as here, the United States did not recognize as a legitimate sovereign the government maintaining the office. The order closing

[7] It would be anomalous if the Executive's decision to withhold recognition from a foreign political entity — with respect to which it has complete discretion — invested that entity with rights greater than those enjoyed by friendly sovereigns present in the United States. It is clear, for example, that the PLO would not be recognized by American courts as a juridical entity capable of bringing a constitutional claim. *United States* v. *Pink*, 315 U.S. 203, 229 (1942) Neither will the argument that the PLO is not a sovereign nation bring it within the constitutional fold. The PLO cannot have it both ways: it is either a foreign political entity claiming aspects of sovereignty interacting with the United States within the structure of international law, or it is a purely domestic organization, subject to the sovereignty of the United States and all of its laws, with no diplomatic status.

the RIO was pursuant to a program of international sanctions in which the United States had participated for twelve years. The United States viewed the government as an "illegal racist minority regime." 77 Dep't St. Bull. 64 (1977) (*quoted in* Harmon Memorandum, *supra*, at 2–3). Plainly, the United States did not regard Rhodesia as a "co-equal" sovereign, and had no formal diplomatic relations with Rhodesia. Nevertheless, interpreting *Mandel*, this Office concluded that any limits placed on the information-gathering abilities of citizens were indistinguishable from that involved in *Mandel* and were therefore permissible. We stated:

> A fair reading of that decision suggests that in a case such as the present one involving a foreign affairs power where Congress has conferred discretion on the Executive, a showing that the reason for the action is facially legitimate and bona fide would conclude the matter. Clearly as we have shown, that is the case here.

Harmon Memorandum, *supra*, at 4. The reason justifying closure in that case — that the United States was obligated as a matter of international law to implement United Nations Resolution 409 imposing mandatory sanctions on the government in Southern Rhodesia — was certainly no more legitimate than the reasons here. The PLO is an avowed terrorist organization. It is a declared policy of the United States that terrorism presents a serious danger to civil order. That policy has been embodied in a wide array of legislation. For example, Congress has asserted jurisdiction over terrorist attacks against United States aircraft, 18 U.S.C. § 32, and against American citizens abroad, 18 U.S.C. § 2331. The President is authorized to provide special assistance to other parties to combat terrorism, 22 U.S.C. § 2349aa-2, to ban imports to and exports from Libya, 22 U.S.C. § 2349aa-8, or any other country supporting terrorism, 22 U.S.C. § 2349aa-9. The closing of offices maintained at the direction of the PLO would further serve this important policy.

The Harmon Memorandum also analyzed the closing of the RIO with respect to the constitutional rights of United States citizens. Applying the *O'Brien* test, this Office concluded that closing the information office of a foreign entity is a valid exercise of government power. *See also* "The President's Authority to Take Certain Actions Relating to Communications from Iran (Dec. 27, 1979)," 4A Op. O.L.C. 153, 158 (1980) (opining that the United States probably could sever "all telephonic, postal, communication satellite, and microwave links" with Iran in connection with the hostage crisis).

We conclude therefore that, whatever standard of analysis is adopted, the proposed closure does not violate the First Amendment.

III. An Analysis of S. 1203 and H.R. 2587

H.R. 2587 and S. 1203 each contain three basic prohibitions. They make unlawful, "if the purpose is to further the interests of the Palestine Liberation

Organization or any of its constituent groups . . . or any agent thereof": (1) the receipt of "anything of value, except informational materials," from the PLO, its constituent groups or agents; (2) the expenditure of any such funds; (3) the establishment or maintenance of an office in the United States "at the behest or direction of or with funds provided by" the PLO, its constituent groups or agents. H.R. 2587, § 3, 100th Cong., 1st Sess. (1987). Section 4 of H.R. 2587 and of S. 1203 states that "the Attorney General shall take the necessary steps and institute the necessary legal action to effectuate the policies and provisions of this section."

As an initial matter, we believe that requiring the Executive Branch to take legal action against offices connected with the PLO may well unconstitutionally infringe on the President's right to receive ambassadors, and therefore recommend against the enactment of this legislation. The right to decide whether to accord to the PLO diplomatic status and what that diplomatic status should be is encompassed within the right of the President to receive ambassadors. U.S. Const. art. II, § 3. This power is textually committed to the Executive alone. *See Baker* v. *Carr*, 369 U.S. 186, 212–13 (1962); *Jones* v. *United States*, 137 U.S. 202, 213 (1890). Under the proposed bills, the President may, as a practical matter, establish diplomatic relations with the PLO only if he certifies to the President *pro tempore* of the Senate and to the Speaker of the House that the PLO, and "its constituent groups, and all successors and agents of the PLO groups, no longer practice or support terrorist actions anywhere in the world." In our view, attaching such conditions to the Executive's absolute power to receive ambassadors constitutes a serious infringement on the President's recognition authority. This problem is seriously exacerbated by the provision directing that the Attorney General "*shall*" take necessary legal action to enforce the bill's prohibitions.

To be constitutional, therefore, two changes would have to be made to the proposed legislation. First, § 5(b) of each bill should be changed so that it would permit the establishment of any PLO diplomatic premises the President, for whatever reason, elects to recognize formally.[8] Next, the section *requiring* the Attorney General to take the steps necessary to effectuate the policies of the bill, must be changed to *authorize* him to take such steps. With that preface, we now turn to a discussion of the specific provisions of the bills and their validity under the First Amendment.

A. Restriction of PLO Funds

We have little doubt that the political branches may prohibit the flow of funds into the United States. This choice to "accommodat[e] the exigencies of self-preservation and the values of liberty," *Communist Party*, 367 U.S. at 96, is within the authority of the political branches. This Office reached that

[8] This change would have the salutary effects of excepting the PLO Observer Mission to the United Nations and precluding the need to repeal this legislation in the event United States policy changes regarding diplomatic recognition of the PLO.

conclusion in assessing the constitutionality of the imposition of mandatory sanctions on Rhodesia, *see* Harmon Memorandum, *supra*, at 3, and has assumed the constitutionality of the International Emergency Economic Powers Act, 50 U.S.C. §§ 170–176, which gives the President the power to regulate direct investment, *see* "Legality of Certain Non-Military Action Against Iran," 4A Op. O.L.C. 223, 223–24 (1980). *See also Nielsen* v. *Secretary of the Treasury*, 424 F.2d 833 (D.C. Cir. 1970) (upholding constitutionality of predecessor act); *Pike* v. *United States*, 340 F.2d 487 (9th Cir. 1965) (upholding constitutionality of predecessor act). Congress has often acted to freeze or seize foreign state property. For example, the Trading with the Enemy Act, 50 U.S.C. app. §§ 1–44, has been used to block assets of, and prevent funds transfers to, adversaries including North Korea and North Vietnam. Cuban assets frozen in response to Castro's nationalization program are still blocked. *See* Cuban Assets Control Regulations, 31 C.F.R. § 515 (1986). Economic sanctions have been imposed against numerous countries, including the Soviet Union, *see* 15 C.F.R. § 385.2 (1986), Libya, *see* 15 C.F.R. § 385.7 (1986), South Africa, *see* Exec. Order No. 12532, 3 C.F.R. 387 (1985); Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99–440, 100 Stat. 1086 (1986), and Nicaragua, *see* Nicaragua Trade Control Regulations, 31 C.F.R. § 540 (1986). The Supreme Court has upheld restrictions on the contributions of funds intended for use to finance exercise of the right of freedom of expression in far more sensitive areas. *Buckley* v. *Valeo*, 424 U.S. 1, 29 (1976). Here, where any impingement on speech is plainly incidental to the prohibition of funds transfers — a nonspeech activity — the restrictions on the receipt of PLO funds is surely constitutional.[9]

B. First Amendment Concerns

However, the prohibition against opening or maintaining an office "at the behest or direction of" the PLO clearly has a broader reach than proposed restrictions applying only to the PIO as currently constituted or its constituent groups. Accordingly, we must determine whether opening such an office is an act of agency for the PLO or whether the bill otherwise survives constitutional scrutiny.

The language of the proposed bills may not be sufficiently precise to reach only agents of the PLO. This inquiry turns in large part on how one defines the meaning of "at the behest . . . of" and the prohibition of maintaining an office for, and receiving funds from, agents of the PLO. As discussed above, the more attenuated the nexus between a foreign power and the domestic citizen or organization, the more constitutionally suspect the restriction.

Given the importance of the concept of agency to our analysis and to the proposed legislation, we turn to a description of the circumstances in which a

[9] We assume as a matter of logic that a permissible restriction on the receipt of funds necessarily makes permissible a prohibition of the expenditure of those same funds. The latter merely serves to implement the former.

domestic organization or person is accorded the constitutional nonstatus of the foreign power for all purposes or, alternatively, the circumstances in which there are sufficient links between the foreign and domestic entities to justify some less intrusive restrictions on the domestic actor. We also set forth various formulations of agency to determine which might best be added to the legislation to cure any potential vagueness or overbreadth problems.

The myriad of formulations used to define an agency relationship "carries meaning only as a situation in human relationships which arises and takes shape in different modes and patterns in the context of different circumstances." *Communist Party*, 367 U.S. at 37. Moreover, any such attempt at a regulatory definition should be as narrow and as precise as feasible in order to enhance its constitutional viability. For, as a general rule, "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). Although the general rule is tempered in the foreign affairs field by the Court's oft-repeated admonition that regulations in this area may sweep with a broader brush and that distinctions "need not be as 'carefully tuned to alternative considerations,'"[10] it nonetheless remains true that precision in regulation is an important virtue when First Amendment interests are implicated.

Activities at the extremes are easy to classify. Plainly, First Amendment protection extends to all the expressive activities of the United States citizen who, without ever having contact with a PLO, forms an organization called "Friends of the PLO," finances it entirely without PLO funds, and writes or distributes literature spreading the teachings of the PLO. It is equally clear that an official diplomatic agent is "identified completely with the foreign state" so that "his communications, like his acts, are treated as if they were those of the sending state." Harmon Letter, *supra*, at 7. Although the PLO is not recognized by the United States and thus has no agents with official diplomatic status, by analogy we think it clear that if a member of the PLO addresses the United Nations on behalf of the PLO, his "speech" is not protected by the Constitution. His speech is protected solely by the agreement between the United States and the United Nations, which is the reason and the condition for the PLO's official presence in the United States.

In between these two extremes lies a constitutional gray area. Consideration of other formulations used to describe various agency relationships may shed some light on where a line may properly be drawn. The Restatement of Agency defines an "agent" as a "fiduciary relation [with the principal] which results from a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control." *Restatement (Second) of Agency*, § 1 (1958). We think that this definition would withstand constitutional scrutiny, because the requirement of manifest consent to the principal's control may fairly be said to cloak the agent with the constitutional non-status of his foreign

[10] *Fiallo*, 430 U.S. at 799 n.8 (quoting *Trimble* v. *Gordon*, 430 U.S. 762, 772 (1977)).

principal. We also think that the definition of an "agent of a foreign power" contained in the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801(b), would be constitutionally defensible. "Agent of a foreign power" is there defined as:

> (1) Any person other than a United States person, who —
>
> (A) acts in the United States as an officer or employee of a foreign power, or as a member of a [group engaged in international terrorism or activities in preparation therefor];
>
> (B) acts for or on behalf of a foreign power which engaged in clandestine intelligence activities of the United States . . . or when such a person knowingly aids or abets any person in the conduct of such activities . . . .

50 U.S.C. § 1801(b).

In contrast, we believe the definition of an agent used under the Foreign Agents Registration Act probably sweeps too broadly to impose restrictions other than registration requirements. In that Act, an agent is defined, *inter alia*, as "any person who acts as a representative . . . or . . . in any other capacity at the request of . . . a foreign principal . . . [and who] engages in political activities within the United States for or in the interest of such foreign principal[s] . . . ." 22 U.S.C. § 611(c)(1) (Foreign Agents Registration Act of 1938, as amended). Courts are apt to require as narrow and restrictive a definition of agency as possible to limit the potential infringement on citizens' First Amendment rights.

Thus, if "behest" is read to mean "at the request of" the PLO, the legislation probably sweeps within its ambit action taken outside of an agency relationship. Voluntarily acquiescing in a single request by Yasir Arafat to open or maintain an office is not sufficient to establish that one is thereby acting as his agent; it may be "mere cooperation" with the PLO. "Behest" may be read far more narrowly, however, thus minimizing such over-breadth problems. *Webster's Third International Dictionary* defines "behest" as "a command; a mandate; an injunction." The *American Heritage Dictionary*, however, defines behest as *both* "[a]n order or authoritative command" and "a request or bidding."

It is thus unclear whether the bill imposes a prohibition that embraces the acts of citizens who are not PLO agents or reaches only those persons who, by virtue of their agency relationship with the PLO, have adopted its constitutional nonstatus. This definitional ambiguity is of obvious significance. Commands are generally given by a principal to an agent; requests are made by one co-equal party to another. Acceding to an "order" or "authoritative command" of the PLO to open an office could thus naturally be viewed as an act of agency, while acquiescing in a request should not be so viewed.[11]

[11] For this reason we would have serious doubts about any proposed bill that, for example, would prohibit speech or the dissemination of information "at the behest of the PLO." Of course, neither H.R. 2587 nor S. 1203 imposes such a direct prohibition on expressive activity. Rather, they restrict only the maintenance of an

Continued

Accordingly, we believe that the safer course would be to change the language of H.R. 2587 and S. 1203 to eliminate the phrase "at the behest of" and to draft the bill focusing only on those acting at the "direction" and/or "control" of the PLO. As noted above, this language has been deemed acceptable by the Supreme Court in the past in the *Communist Party* case. It avoids the problem of including within the statute's restrictions the kind of conduct considered to be constitutionally-protected "affiliation." Alternatively, if the phrase "at the behest of" is to be included in the bill, the legislative history should indicate as clearly as possible that the more restrictive definition of "behest" is the one intended for use in applying the statute.

C. Bill of Attainder

Finally, that the PLO is named in the bill does not make it unconstitutional as a bill of attainder, for it is not "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 468 (1977). As noted above, the Bill of Attainder clause of the Constitution does not apply to the PLO. Furthermore, with respect to American citizens, these bills do not satisfy any of the three requirements that make a bill of attainder: (i) they lack the requisite specification for affected persons; (ii) they are not a legislatively-imposed punishment; and (iii) punishment is not being imposed without a judicial trial. *Selective Service System* v. *Minnesota Public Interest Research Group*, 468 U.S. 841, 847 (1984).

First, the statutes do not use past activity as "'a point of reference for the ascertainment of particular persons ineluctably designated by the legislature' for punishment." *Id.* (quoting *Communist Party*, 367 U.S. at 87). Congress' purpose here is to discourage terrorism and to give effect to the Executive's decision not to recognize the PLO. The acts would apply only to those who contravene their prohibitions; any individual can avoid their application simply by not engaging in the forbidden activities.

Next, even if the specificity element is deemed satisfied, the bills do not implicate the Bill of Attainder clause because they do not "inflict forbidden

[11] (. . . continued)
office at the PLO's behest. Thus, we believe the bills might nonetheless withstand constitutional scrutiny. Maintaining an office, while perhaps an important symbolic action, is not a restriction on speech *per se*. The incidental restriction on speech seems necessary to a legitimate foreign policy goal, and the restriction does not prevent the flow of information about the PLO to American citizens. For example, the PLO and its agents may provide interviews to the press, issue press releases, place political advertising, and so forth. *See United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). Of course the PLO's citizen-friends, acting in their individual capacities, may continue to communicate information as they choose.

Nor do the bills unduly restrict the associational rights of American citizens. *Zemel* v. *Rusk*, 381 U.S. 1 (1965) and *Regan* v. *Wald*, 468 U.S. 222 (1984), establish that the right to associate with foreign entities is by no means absolute. *See Kleindienst* v. *Mandel*, 408 U.S. 753 (1972). The restriction on the maintenance of an office — like the restrictions on travel by American citizens to Cuba — furthers important foreign policy objectives of the United States. Each is based on the current policy of the United States towards that foreign entity with which association is restricted. The restriction is incidental to the achievements of important foreign policy goals and is narrowly drawn.

punishment," *Selective Service*, 468 U.S. at 852. The sanction is merely forbidding the maintenance of an office on behalf of, and the receipt or expenditure of funds from the PLO. Citizens "'carry the keys of their prison in their own pockets,'" *Id.* at 853 (quoting *Shillitani* v. *United States*, 384 U.S. 364, 368 (1966)). The bill serves important nonpunitive goals: to combat worldwide terrorism and deter the PLO's illegal activities.[12] Forbidding the PLO to be represented here is "plainly a rational means," *id.*, towards accomplishing the congressional goal of deterring the PLO's terrorist activities. Congress seeks not to punish, but to promote compliance with international law. No punishment has been imposed without a judicial trial. No one is punished by the statute automatically — the Attorney General must bring an action to enforce the statute in court.

The *Communist Party* case supports this conclusion that the bills are not bills of attainder. There, the bill was aimed at the Communist Party as an identifiable entity. 367 U.S. at 82. The Court held that the "Act is not a bill of attainder," for "[i]t attaches not to specified organizations but to described activities in which an organization may or may not engage." 367 U.S. at 86. Domestic organizations supporting the PLO are simply prohibited from maintaining an office on its behalf or at its direction and from receiving money from it. Forbearance from such activities will insulate the group or individual from prosecution. In enacting either of these bills, Congress would be making a legislative finding to regulate activity "potentially dangerous to the national interest." *Id.* at 88. They are not bills of attainder.

Conclusion

The PLO *qua* PLO, as a foreign entity, has no constitutional rights. Nor do those individuals and organizations who act at the direction and control of the PLO, even if engaged in otherwise constitutionally protected activities, so long as they act in their capacity as agents of the PLO. Although the determination of when and whether an individual or group is acting as the agent of a foreign entity is a difficult one, a restriction can be narrowly drawn to limit the application of the restriction to United States citizens only insofar as they are acting as the PLO's agents. H.R. 2587 and S. 1203, to the extent that they might require the closing of the PIO, therefore, are constitutional so long as the PIO either is itself a foreign entity or is an agent of the PLO, acting at its direction and control. Broad restrictions on the receipt of funds in the United States from the PLO or its agents are in any event constitutional.

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Office of Legal Counsel

[12] In this context, it is worth noting that the bill would continue in effect only until such time as the President certifies that the PLO no longer practices or supports terrorism. H.R. 2587, § 5; S. 1203, § 5.

Trade Act Restrictions on the Extension of Most-Favored-Nation Rights

A trade agreement negotiated with Canada to be implemented pursuant to the "fast track" authority provided by the Trade Act of 1974, as amended, is subject to § 102(b)(3) of the 1974 Act, 19 U.S.C. § 2112(b)(3). That section prohibits the extension to other countries of any trade benefits received by a country under a "fast track" agreement if such agreement provides for a reduction or elimination of any duty imposed by the United States. As a matter of domestic law, this prohibition was intended to, and does, impair the automatic operation of most-favored-nation clauses in various treaties to which the United States is a party. The impairment caused by § 2112(b)(3) can be reduced in this instance by simultaneously concluding an agreement with Canada addressing non-duty benefits and a separate agreement addressing duty reductions. Section 2112(b)(3) would prevent only the benefits given to Canada under the latter agreement from being extended to third countries enjoying applicable most-favored-nation rights. Furthermore, any legislation implementing the trade agreement with Canada would not operate to repeal the operation of § 2112(b)(3) in this case unless Congress expressly provided to that effect in the legislation. Finally, the United States' international obligations with respect to most-favored-nation agreements have force even if such agreements were concluded after enactment of § 2112(b)(3).

August 31, 1987

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

I. Introduction

This memorandum responds to your request for our views on certain legal issues that may arise upon the conclusion of a U.S./Canadian trade agreement (Agreement) which the Administration is presently negotiating in the expectation of submitting it to Congress for implementation under special "fast track" authority provided by the Trade Act of 1974, as amended. Specifically, your Office has asked whether § 102(b)(3) of the Trade Act, 19 U.S.C. § 2112(b)(3), which applies to agreements negotiated under "fast track" authority, restricts as a matter of domestic law the extension of trade benefits received by Canada under the Agreement to other foreign nations which have most favored nation rights (MFNs) under Friendship, Commerce, and Navigation, Treaties (FCNs) or other bilateral agreements.[1] By operation of applicable MFN clauses in

[1] The President, of course, has independent authority to negotiate free trade agreements as an aspect of his plenary power to conduct foreign affairs. *See generally, United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 319 (1936). This independent authority may not be restricted in any way. Accordingly, the President may conclude the Agreement under his own independent authority and avoid entirely the restrictions imposed by § 2112. Congress may, however, agree, as it has under § 2112, to consider legislation implementing an agreement on an expedited basis only on the condition that the President comply with certain requirements that are otherwise constitutional.

such agreements the United States may be obligated under international law to extend benefits received by Canada under the Agreement to certain third countries. If § 2112(b)(3) frustrates the operation of any such MFN clauses, you have asked whether legislation implementing the Agreement could be deemed to repeal these restrictions insofar as they affect the Agreement. Finally, you have asked whether MFN clauses in agreements which were concluded *after* the enactment of § 2112(b)(3) into our domestic law require the extension of trade benefits included in agreements negotiated under § 2112(b)(3). We have concluded that 19 U.S.C. § 2112(b)(3) does prohibit the automatic extension to third countries of trade benefits received by Canada under the Agreement, but only if the Agreement provides for the elimination or reduction of any duty imposed by the United States. In other words, if the Agreement were to provide Canada solely with benefits other than tariff or duty reductions, the United States would be at liberty to comply with any international obligation that requires it to extend to a third country by operation of treaty the trade benefits Canada received.[2] On the other hand, if the Agreement eliminated or reduced a United States duty, the United States would not be able to comply with applicable MFN clauses by automatically extending to third countries benefits granted to Canada. Moreover, we believe that if the Agreement were to reduce United States duties, § 2112(b)(3) would frustrate the automatic extension of any benefits, regardless of whether the trade benefit to be extended is itself a reduction of a duty or a benefit unrelated to duty reduction.

Second, we have concluded that the legislation implementing the Agreement cannot be viewed as an implicit repeal of § 2112(b)(3)'s prohibition on the automatic extension to third countries of benefits provided to Canada under the Agreement. Accordingly, in order to permit the extension of these benefits to third countries Congress must explicitly provide for the extension.

Finally, we believe that the international obligations of the United States under treaties concluded after enactment of § 2112(b)(3) into domestic law are not modified by § 2112(b)(3)'s prohibition on the automatic extension of MFN rights, unless the text of the treaty or its negotiating history indicates that the foreign signatory agreed that trade benefits included in agreements negotiated under § 2112(b)(3) did not have to be extended under applicable MFN clauses.

II. Analysis

A. Most Favored Nation Rights under Existing Treaties

Certain Friendship, Commerce and Navigation Treaties or other bilateral treaties entered into by the United States which accord most favored nation

[2] Consequently, in order to reduce the number of international obligations that § 2112(b)(3)'s prohibition may cause to be impaired, the United States may wish to conclude one agreement with Canada addressing non-duty trade benefits and a separate agreement addressing duty reductions. Only benefits granted under the latter agreement would be subject to § 2112(b)(3).

rights to foreign countries require the United States to extend to such countries the benefits Canada might receive under a U.S./Canadian trade agreement. Although we have not had the opportunity to consider closely each individual treaty currently in force which grants MFNs to foreign countries and have had to rely on the views of the State Department concerning the scope of such treaties,[3] we have nevertheless reviewed a representative sample of FCNs which grant unconditional MFN rights and concur in the State Department's judgment that certain treaties would, by their terms,[4] obligate the United States to grant their signatories the same trade benefits the United States might accord to Canada. Therefore, assuming that at least some treaties would impose this obligation under international law, and that some United States treaty partners could request equal treatment, our principal focus here has been to determine to what extent Congress under domestic law has precluded United States compliance with these international obligations.[5]

B. Trade Act of 1974

Under 19 U.S.C. § 2112 (§ 102 of the Trade Act), Congress has provided the President with authority to receive special consideration of free trade agreements he negotiates, but has circumscribed this authority through a variety of restrictions. If the President uses this authority to negotiate an agreement, legislation implementing the agreement will be put on a "fast track" and

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[3] *See* State Department Memorandum, "Impact on U.S. Friendship, Commerce and Navigation Treaties." The State Department is of the view that the scope of some treaties granting MFN rights by their terms would not grant a foreign state all the benefits of a trade agreement with Canada. *See* State Department Memorandum at 1–2. For example, the standard FCN treaty provides an exception for "goods" if the agreement relating to goods is permitted by the General Agreement on Tariffs and Trade and if the FCN treaty partner consults with the other. *Id.* at 1. In the few treaties where such exception is not made (those with Saudi Arabia, Yemen, Liberia, Iraq, El Salvador, Honduras, Costa Rica and Bolivia) trade with the signatories is said to be small. *Id.* More complicated is the situation for services and investment. Both our FCN treaties with major trading partners (*e.g.* Germany, Japan, Italy, Netherlands, Israel and Korea) and Bilateral Investment Treaties (which have been signed with ten countries, but not yet ratified) evidently accord fairly unconditional MFN rights. *Id.* at 3–4. In addition, the United States has entered into various Organization for Economic Co-Operation and Development "Undertakings With Regard to Capital Movements" and "Undertakings With Regard to Current Invisible Operations" which also are said to grant broad MFN obligations in services and investment. *Id.* at 4.

[4] The State Department Memorandum states:

> [T]he standard FCN imposes a sweeping MFN obligation with respect to the right of alien nationals or companies to:
>
> (a) establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business;
>
> (b) organize companies under the general company laws of such other Party, and to acquire majority interests in the companies of such other Party;
>
> (c) control and manage enterprises which they have established or acquired; and
>
> (d) engage in all types of commercial, industrial, financial and other activity for gain (services) within the territory of each Party.

Id. at 2–3. Moreover, the standard FCN provides that "'nationals and companies of either party . . . shall in any event be accorded most-favored-nation treatment with reference to the matters treated in the present Article.'" *Id.*

[5] Congress can, of course, by statute override and nullify the domestic effect of any treaty obligations the United States might have. *See generally Whitney* v. *Robertson*, 124 U.S. 190 (1888).

receive expedited consideration for congressional approval. *See generally* 19 U.S.C. § 2191.[6] This grant of authority includes both the power to conclude bilateral agreements which do not result in the reduction of duties or tariffs and the authority to conclude bilateral agreements making reductions in duties. Section 2112, however, imposes a variety of additional requirements when the President is engaged in the negotiation of an agreement that reduces duties.[7]

Moreover, Congress has prohibited any trade benefit included in a treaty that reduces a duty of the United States from being extended to third countries simply by operation of MFN clauses in a treaty between the United States and the third country. Section 2112(b)(3) provides:

> Notwithstanding any other provision of law, no trade benefit shall be extended to any country by reason of the extension of

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[6] Under the fast track authority, the President negotiates the trade agreements and notifies Congress ninety days before they are to take effect of his intention to enter into the agreements. After consultation with certain congressional committees, the trade agreements may be signed and together with a draft implementing bill and a statement of proposed administrative actions are submitted to Congress. Once in Congress, the bill is entitled to expedited consideration. For example, the bill can be automatically discharged from committee evaluation to allow consideration by the full House or Senate after 45 days. No amendments may be attached to the bill, and there is imposed a time limit on debate in both the House and Senate The proposed legislation must be acted upon by Congress within approximately sixty legislative days. 19 U.S.C. §§ 2112, 2191 (1982).

It should be noted that the present statutory scheme denies the "fast track" option to the President if "the Committee on Finance of the Senate or the Committee on Ways and Means of the House of Representatives disapproved of the negotiation of such agreement." 19 U.S.C. § 2112(b)(4)(B)(ii)(II). This provision is unconstitutional. Congressional committees may not exercise legislative power by making decisions that have "the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch." *INS* v. *Chadha*, 462 U.S. 919, 952 (1983).

We believe, however, a strong argument can be made that § 2111(b)(4)(B)(ii)(II) is severable under the reasoning of *Alaska Airlines* v. *Brock*, 480 U.S. 678 (1987). The general rule concerning severability is that "unless it is evident that the Legislature would not have enacted those provisions which are within its powers, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law." *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (per curiam) (quoting *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U.S. 210–234 (1932)). In *Alaska Airlines*, the Court applied this general rule to hold that an unconstitutional legislative veto provision was severable from the Airlines Deregulation Act of 1978. 480 U.S. at 684–97. The Court reasoned that Congress would have enacted the statute even without the objectionable provision. *Id.* at 697.

It appears to us that the "fast track" authority like the legislative veto considered in *Alaska Airlines*, is not so controversial that Congress would have been unwilling to make the delegation without it. Moreover, the detailed requirements imposed on the President in other parts of the statute, *see, e.g.* 19 U.S.C. § 2112(b)(4)(A), suggest that the legislative veto provision is not crucial. 480 U.S. at 688 (detailed requirements imposed on Executive Branch indicated that veto provision could affect only relatively insignificant actions by Secretary of Transportation). Finally, nothing in the legislative history of § 2112 suggests that Congress was particularly concerned about the Congressional disapproval mechanism. *See* 480 U S. at 691 (Congress' scant attention to legislative veto suggests that Act would have been passed in its absence). Thus, it is our view that a court would find § 2112(b)(4)(B)(ii)(II) severable.

[7] These procedures are described in 19 U.S.C. § 2112(b)(4)(A):

> Notwithstanding paragraph (2) [limiting authority to negotiate a tariff reduction agreement with Israel], a trade agreement that provides for the elimination or reduction of any duty imposed by the United States may be entered into under paragraph (1) with any country other than Israel if —
>
> (i) such country requested the negotiation of such an agreement, and
>
> (ii) the President, at least 60 days prior to the date notice is provided under subsection (e) (1) of this section —
>
> (I) provides written notice of such negotiations to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives, and
>
> (II) consults with such committees regarding the negotiations of such agreement.

> any trade benefit to another country under a *trade agreement entered into under paragraph (1) with such other country that provides for the elimination or reduction of any duty imposed by the United States.*

19 U.S.C. § 2112(b)(3) (emphasis added.) Congress appears to have intended that this section frustrate the automatic operation of MFN clauses in FCN treaties. *See* H.R. Rep. No. 1092, 98th Cong., 1st Sess. 16 (1984) (subsection precludes any possibility, as a matter of domestic law, of extension through court decision or executive action of trade benefits to other countries pursuant to any existing treaties or executive agreements without further congressional approval).

It is also clear that Congress intended § 2112(b)(3), as presently formulated, to apply *only* to trade agreements that reduce United States duties, because prior to a technical correction made in 1985 to the Trade Act, § 2112(b)(3) applied to all trade agreements negotiated under the "fast track" authority.[8] The change made in 1985 purposely limits the scope of § 2112(b)(3) to a trade agreement negotiated under the authority of the Trade Act "that provides for the elimination or reduction of any duty imposed by the United States." Pub. L. No. 99–47, 99 Stat. 82 (1985).[9]

Accordingly, we are of the opinion that under § 2112 trade benefits that Canada may receive under an agreement that does not reduce United States duties can be extended to countries with appropriate MFN clauses under FCN treaties by operation of those treaties and without additional congressional approval. We also believe that in order to reduce the number of international obligations which the § 2112(b)(3)'s prohibition may cause to be impaired the United States may simultaneously conclude an agreement with Canada addressing non-duty trade benefits and a separate agreement addressing duty reductions.[10] Section 2112(b)(3) would prevent only the benefits given to

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[8] Section 2112(b)(3) then provided:

> Notwithstanding any other provision of law, no trade benefit shall be extended to any country by reason of the extension of any trade benefit to another country under a trade agreement entered into under paragraph (1) with such other country.

[9] The House Ways and Means Committee report concerning the technical correction makes the purpose of the change clear beyond doubt:

> Section 8 [of H.R. 2268, a bill to implement the free trade agreement with the United States and Israel] makes five technical corrections to the Trade and Tariff Act of 1984 and to the Trade Act of 1974 related to the authorization and administration of the [U.S./Israel] Agreement.
>
> * * *
>
> Paragraph (1) of subsection (b) amends section [2112(b)] of the Trade Act of 1974 as added by section [2112(b)(3)] of the Trade and Tariff Act of 1984, to clarify that the prohibition on extension of any trade benefit under a trade agreement being extended to any other country applies to trade agreements providing for the elimination or reduction of any U.S. duty, as opposed to agreements on nontariff barriers.

H.R. Rep. No. 64, 99th Cong., 1st Sess. 18–19 (1985). *See also* S. Rep. No. 55, 99th Cong., 1st Sess. 10 (1985).

[10] Of course, insofar as the non-duty and duty agreements were related to one another (*e.g.* through provisions which treat a breach of one agreement as equivalent to the breach of the other), it would be more difficult to argue that the agreements were separate. As long as the agreements, however, are not textually integrated and are submitted to Congress for separate consideration and implementation, we believe that the agreements are to be considered as separate for the purposes of § 2112(b)(3).

Canada under the latter agreement from being extended to third countries under applicable MFN clauses.

On the other hand, § 2112(b)(3) by its express terms prohibits trade benefits that Canada receives under an agreement reducing United States duties from being extended by operation of treaty to those who hold MFN rights under FCN treaties or other agreements. Moreover, we have concluded that the term "trade benefits" encompasses both benefits in the form of duty reductions and trade benefits that are unrelated to duty reductions. First, § 2112(b)(3) uses the term "duty" as well as "trade benefit." It is an axiom of statutory construction that different terms, particularly technical terms, in a statute are to be given different meanings unless the context indicates otherwise. *See e.g.*, *Ocasio* v. *Bureau of Crimes Correction Division of Workers Compensation*, 408 So. 2d 751, 753 (Fla. Dist. Ct. App. 1982). Moreover, it is clear from the conference report on the 1984 amendments to the Trade Act that Congress enacted § 2112(b)(3) to prevent certain U.S. treaties from being interpreted "to extend automatically to [an]other party, by virtue of most-favored-nation provisions, any tariff or *other trade benefit*." H.R. Rep. 1156, 98th Cong., 1st Sess. at 152 (emphasis added).[11]

You have also asked whether future legislation implementing a U.S./Canadian trade agreement could be viewed as repealing, *pro tanto*, § 2112(b)(3)'s prohibition on the extension of MFN benefits by the operation of treaty on the ground that the implementing legislation was enacted by Congress subsequent to § 2112(b)(3). In the absence of explicit language repealing the § 2112(b)(3)'s prohibition, we believe that the mere passage of implementing legislation would leave the prohibition intact. Section 2112(b)(3) specifically contemplates that the limitation on extending MFN rights would apply despite the conclusion of a treaty that reduced United States duties unless Congress specifically approved the extension.[12] Accordingly, it is not possible to view legislation implementing a U.S./Canadian tariff reduction trade agreement as *pro tanto* repealing § 2112(b)(3)'s limitation.

The final question you have asked concerns the status of any bilateral trade agreements containing MFN rights entered into after enactment of § 2112(b)(3) in 1984. You have asked whether the fact that § 2112(b)(3) existed at the time such an agreement was concluded would be deemed to release the United States from obligations under the agreement that are inconsistent with that provision. We believe that the United States could not successfully argue that the existence of § 2112(b)(3) under its domestic law modified its obligation under an agreement concluded after its enactment unless the text of the agreement or its negotiating history demonstrate that the foreign signatory agreed that the obligation should be so modified. It is a fundamental principle of the

[11] There is no doubt that the words "trade benefit" include benefits related to both goods and services because the term "international trade" is defined in the statute as including:

(A) trade in both goods and services and

(B) foreign direct investment by the United States persons, especially if such investment has implications for trade in goods and services.

19 U.S.C. § 2111(g).

[12] *See* H.R. Rep. No. 1092, 98th Cong., 1st Sess., at 16.

interpretation of international agreements that, with exceptions not relevant here, "a party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty." Article 27 of the Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf. 39/27, May 23, 1969 (Vienna Convention) (signed by the United States April 24, 1970 and awaiting ratification by the Senate).[13] A contrary rule would make it extremely difficult, if not impossible, for one nation to ascertain the treaty obligations that another undertakes.[14]

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[13] Although we have not yet ratified the Convention on the Law of Treaties, we believe that the Convention generally reflects the international customary law which would be applied to international agreements.

Further support for our view may be found in Article 46 of the Vienna Convention:

> 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

We do not believe that § 2112 would be considered an "internal law of fundamental importance," as this term is reserved for provisions of constitutional law.

[14] *See* Browline, *Principles of Public International Law* 610–11 (3d ed. 1979).

Reappointment of United States Parole Commissioners

A statute providing for the automatic extension of the term of a Presidential appointee unconstitutionally interferes with the President's authority under the Appointments Clause.

November 2, 1987

MEMORANDUM OPINION FOR AN ASSOCIATE DEPUTY ATTORNEY GENERAL

This responds to your request for this Office's opinion as to whether, under § 235(b)(2) of Pub. L. No. 98–473, 98 Stat. 1837, 2032 (1984), the terms of the United States Parole Commissioners who are on duty as of November 1, 1987, will automatically be extended for a five-year period without the necessity of new Presidential appointments. More specifically, you inquired as to whether the term of office for one of the Commissioners which expires at the close of business November 1, 1987, will automatically extend through November 1, 1992. For the reasons discussed below, we have concluded that § 235(b)(2) is unconstitutional, but that it is in the President's discretion to allow the Commissioner to continue service as a Commissioner as a holdover appointee.

Section 235(b)(2) of Pub. L. No. 98–473, the Sentencing Reform Act of 1984 (Act), provides that the term of office of a United States Parole Commissioner who is in office on the effective date of the Act is extended to the end of the five-year period after the effective date. Section 235(b)(2) thus purports to extend to November 1, 1992 the terms of office for those Commissioners in office on November 1, 1987.

The President has the sole authority to appoint members of the Parole Commission. The Appointments Clause of the Constitution, art. II, § 2, cl. 2, provides that "Officers of the United States" must be appointed by the President by and with the advice and consent of the Senate. The methods of appointment set forth in the Appointments Clause are exclusive; officers of the United States therefore cannot be appointed by Congress, or by congressional officers. *Buckley* v. *Valeo*, 424 U.S. 1, 124–41 (1976). Persons who "exercis[e] significant authority pursuant to the laws of the United States" or who perform "a significant governmental duty . . . pursuant to the laws of the United States" are officers of the United States, *id.* at 126, 141, and therefore must be appointed pursuant to the Appointments Clause. This Office has consistently found that the Parole Commissioners are purely Executive officers charged by

Congress with the exercise of administrative discretion.[1] Accordingly, the Parole Commissioners must be appointed by the President in accordance with the Appointments Clause.

We find that § 235(b)(2) is an unconstitutional interference with the President's appointment power. By extending the term of office for incumbent Commissioners appointed by the President for a fixed term, the Congress will effectively reappoint those Commissioners to new terms. Because the authority to appoint members of Parole Commissioners lies exclusively in the President, § 235(b)(2) is an unconstitutional encroachment by Congress on that authority.

The constitutional problems with § 235(b)(2), however, do not preclude Commissioner Batjer from continuing to serve past the expiration date of his current appointment. We note that 18 U.S.C. § 4202 provides that upon the expiration of a term of office of a Commissioner, the Commissioner shall continue to act until a successor has been appointed and qualified, except that no Commissioner may serve in excess of twelve years. Under this provision, the Commissioner can serve on a holdover basis unless and until the President appoints a successor who is confirmed by the Senate.[2]

In sum, we recommend that if the President wishes to have the Commissioner continue to serve as a member of the United States Parole Commission, the Commissioner should be treated as a holdover appointee. This course of action will preserve the Executive Branch position on the unconstitutionality of congressional reappointment provisions such as § 235(b)(2) and, at the same time, allow the President's choice for the Commissioner position to continue serving in that position without renomination.

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[1] *See* Memorandum for the Associate Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel (Jan. 13, 1982); Memorandum for the Associate Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel (Aug. 11, 1981).

[2] Section 235(b)(2) is operative "[n]otwithstanding the provisions of § 4202 of Title 18," the section that creates the Parole Commission and establishes its structure, including the holdover mechanism. This language is properly read to suspend operation of § 4202 only to the extent that such suspension is necessary to give effect to the extended terms of office for incumbent commissioners. Accordingly, if § 235(b)(2) is unconstitutional, 18 U.S.C. § 4202, including its holdover provision, would remain operative. Indeed § 235(b)(1)(A), which is clearly severable from § 235(b)(2), expressly extends the operation of § 4202.