OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

CONSISTING OF SELECTED MEMORANDUM OPINIONS
ADVISING THE

PRESIDENT OF THE UNITED STATES, THE ATTORNEY GENERAL

AND OTHER EXECUTIVE OFFICERS OF THE FEDERAL GOVERNMENT

IN RELATION TO

THEIR OFFICIAL DUTIES

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Attorneys General

Edwin Meese III

Richard L. Thornburgh

Assistant Attorneys General

Office of Legal Counsel

Charles J. Cooper

Douglas W. Kmiec

Deputy Assistant Attorneys General

Office of Legal Counsel

Samuel A. Alito, Jr.

Michael A. Carvin

Allan Gerson

Douglas W. Kmiec

John O. McGinnis

Carol A. Williams

OFFICE OF LEGAL COUNSEL

Attorney-Advisers

(1988)

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Bradford R. Clark
Paul P. Colborn
Douglas R. Cox
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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 eleven volumes of opinions published covered the years 1977 through 1987; the present volume covers 1988. The opinions included in Volume 12 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 1988 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 or the Department of Justice. 28 C.F.R. § 0.25.

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OPINION

OF THE

ATTORNEY GENERAL OF THE UNITED STATES

Deportation Proceedings of Joseph Patrick Thomas Doherty

The Attorney General reversed the decision of the Board of Immigration Appeals that there was insufficient evidence that the deportation of the respondent to the Republic of Ireland would be prejudicial to the interests of the United States, and remanded the case to the BIA for further proceedings.

June 9, 1988

In re: Joseph Patrick Thomas Doherty (A26–185–231)

IN DEPORTATION PROCEEDINGS

Under 8 U.S.C. § 1253(a), an alien is to be deported to a country designated by the alien if that country is willing to accept him "unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States." In this case, the Board of Immigration Appeals ("BIA") ruled that there was insufficient evidence that the deportation of respondent to the Republic of Ireland ("Ireland") was prejudicial to the interests of the United States and accordingly rejected the request of the Immigration and Naturalization Service ("INS") that respondent be deported to the United Kingdom of Great Britain and Northern Ireland ("the United Kingdom"). Pursuant to 8 C.F.R. § 3.1(h)(1)(iii), I granted the INS's request to review the decision of the BIA. For the reasons set forth below, I disapprove the BIA's decision and conclude that it would be prejudicial to the interests of the United States for respondent to be deported to Ireland and that he should be deported instead to the United Kingdom.

I.

Respondent is a citizen of both Ireland and the United Kingdom. He was convicted in the United Kingdom in 1981 of murder, attempted murder, and possession of firearms and ammunition with intent to endanger life or cause serious injury to property. These charges arose out of an incident in which respondent and other members of the Provisional Irish Republic Army ("PIRA") ambushed a British army convoy. One of the soldiers was killed during the attack. Prior to his sentencing, respondent escaped from prison and fled to Ireland and then to the United States, which he entered illegally in 1982.

Respondent was arrested by the INS in 1983. The United States, acting on behalf of the United Kingdom, instituted proceedings to extradite him to that coun-

try. The district court, however, held that his actions involving the ambush of the British army patrol and escape from prison fell within the political offenses exception to the extradition treaty between the United States and England, and thus denied the request for extradition. *In Re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984).

Respondent's deportation proceeding had been stayed during the pendency of the extradition litigation. When it resumed, respondent conceded his deportability at a hearing before the immigration judge on the basis of having entered without valid immigration documents, 8 U.S.C. §§ 1251(a)(1), 1182(a)(19), (20), and designated Ireland as the country to which he wished to be deported.[1] INS objected to Ireland as the country of deportation on the ground that deportation there would be prejudicial to the interests of the United States, and contended that he should instead be deported to the United Kingdom. In support of this contention it supplied the immigration judge with newspaper articles and speeches on the general issue of terrorism. Although INS was given a continuance of one week to produce further evidence to support its contention, it failed to submit any additional evidence.

On the basis of this record, the immigration judge held that respondent should be deported to the country he had designated, Ireland, as INS had failed to produce any evidence that deportation to Ireland would be prejudicial to the interests of the United States. INS appealed this decision to the BIA, arguing that respondent's deportation to Ireland would be prejudicial to the interests of the United States. On March 11, 1987, the BIA affirmed the decision of the immigration judge, stating:

> [W]e are unwilling to find that deportation to the Republic of Ireland would be prejudicial to the interests of the United States in the absence of clear evidence to support that conclusion. The Service was granted a continuance to allow it to secure evidence of such interest, but it has produced none.

BIA Decision of March 11, 1987 at 5 ("March Decision").

When it issued this opinion, the BIA was unaware that on March 4 INS had filed a Motion to Supplement the Record or to Remand for Further Proceedings Before the Immigration Judge ("Motion").[2] The Motion contained an affidavit from Associate Attorney General Trott, signed on February 19, 1987, stating that in his judgment the deportation of respondent to Ireland would be prejudicial to the interests of the United States.

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[1] INS had added several other grounds for deportation, 8 U.S.C. § 1182(a)(9), (10), (27), (28)(F)(ii). These charges deal with criminal conduct, either actual or potential. INS requested that it be allowed to prove these additional charges. The immigration judge declined, holding that since respondent had conceded deportability, there was no point in proving that he was deportable on additional grounds. This holding was affirmed by the BIA. BIA Decision of March 11, 1987 at 3.

[2] INS had filed the Motion with the BIA on March 5, but it was apparently lost or misfiled due to administrative error. BIA Decision of May 22, 1987 at 3.

After the BIA had issued its March Decision, the INS successfully moved the BIA to reopen the appeal for consideration of its Motion. The BIA declined, however, to remand the case to the immigration judge, holding that the affidavit did not constitute previously unavailable evidence as required by BIA's regulations, 8 C.F.R. §§ 3.2, 3.8. BIA Decision of May 22, 1987 at 3–5. In addition, the BIA stated that "the affidavit does not purport to be based upon evidence that respondent's deportation to the Republic of Ireland will be prejudicial to the United States' interests. Rather, it appears to be based only upon the . . . logical inference" that our allies would view respondent's deportation to Ireland as shielding a terrorist from punishment. *Id.* at 5.[3]

II.

Respondent was notified that the Attorney General would consider only whether respondent's deportation to Ireland would be prejudicial to the interests of the United States and whether, instead, he should be deported to the United Kingdom. Nonetheless, in his memorandum, respondent raises the issue of the Attorney General's authority to review the BIA's decision. Respondent appears to contend that the Attorney General lacks the power to overturn the BIA's decision, particularly if he were to do so after having considered Mr. Trott's affidavit. Given that respondent has raised the issue, it is appropriate, before turning to the merits, to address the scope of the Attorney General's decisionmaking authority in this case.

Section 1253(a), like most other provisions of the immigration law, vests the power to make determinations in the Attorney General personally.[4] That power includes the power to receive evidence, make findings of fact, and decide issues of law. The Attorney General has delegated his decisionmaking authority, in the first instance, to the BIA and the immigration judges.[5] They exercise "such discretion and authority conferred upon the Attorney General by [law] as is appropriate and necessary for the disposition" of the case. 8 C.F.R. §§ 3.1(d)(1), 236.1.

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[3] Counsel for respondent was notified that the Attorney General would be reviewing the decision of the BIA, and would determine whether the deportation of respondent to Ireland would be prejudicial to the interests of the United States and whether, instead, he should be deported to the United Kingdom. Counsel for respondent was given the opportunity to submit a memorandum addressing the question under review Counsel for respondent was also informed that the Attorney General would be considering Mr. Trott's affidavit in the course of his review of the BIA's decision, and thus that respondent might wish to respond to the facts and reasoning contained in that affidavit. Counsel for respondent filed a memorandum, as well as a shorter supplemental letter in response to a subsequent letter from INS setting out its views on the case. In my review, I have considered these filings made by counsel for respondent and INS, the record of the proceedings below, Mr. Trott's affidavit, the decision in the extradition proceedings cited in Mr. Trott's affidavit, and a letter from Michael M. Armacost, Undersecretary for Political Affairs at the Department of State, setting forth the Department of State's views regarding the interests of the United States in this case.

[4] *See generally* 8 U S.C § 1103.

[5] The BIA is entirely a creation of the Attorney General. *See Greene v INS*, 313 F.2d 148 (9th Cir.), *cert. denied*, 374 U S. 828 (1963). Immigration judges receive some of their powers and duties directly from Congress, 8 U.S C § 1252(b), and some by delegation from the Attorney General. *See Lopez-Telles v INS*, 564 F.2d 1302 (9th Cir 1977).

Thus, to the extent that the immigration judges or the BIA have authority to make determinations under section 1253(a), including the authority to receive evidence and make findings of fact, it is because they are exercising, by delegation, the Attorney General's authority.

Although he has delegated his decisionmaking authority in the first instance to the immigration judges and the BIA, the Attorney General has retained the authority to review the decisions of the BIA pursuant to 8 C.F.R. § 3.1(h), and thus has retained final decisionmaking authority. *Id.* § 3.1(d)(2). The regulations setting out his review authority do not expressly or by implication circumscribe the Attorney General's statutory decisionmaking authority. Thus, when the Attorney General reviews a case pursuant to 8 C.F.R. § 3.1(h), he retains full authority to receive additional evidence and to make de novo factual determinations.[6]

Accordingly, there can be no doubt that the Attorney General has authority to consider evidence such as Mr. Trott's affidavit even though that evidence was not considered by the BIA or the immigration judge. Nor can there be any doubt that the Attorney General has authority to reach a decision different from that of the BIA. In any event, in this case respondent was notified that the Attorney General would consider Mr. Trott's affidavit and was given an opportunity to respond on the merits to the facts and reasoning contained in it, an opportunity which respondent has exercised.[7]

III.

Respondent's actions and his criminal convictions were established by the district court in the extradition proceeding. *In Re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984). Respondent did not contest the factual findings of the court; indeed, he testified at length as to the events giving rise to his criminal conviction. *Id.* at 272. Respondent's testimony and his criminal convictions as established in the extradition proceeding are summarized in the opinion of the district court:

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[6] Moreover, despite the contention of respondent, the regulations governing the BIA are not applicable to the Attorney General. Thus, even after having rendered a decision, if the Attorney General was presented with a motion to reconsider, or a motion to remand as the BIA was, he would not be governed by 8 C.F.R. §§ 3.2 and 3.8 in deciding that motion.

[7] On April 21, 1988, respondent filed a motion requesting that the Attorney General, and any individual to whom he might delegate decisionmaking authority, be rescued from an adjudicative role in these proceedings. Respondent does not allege any personal bias as the basis for this motion. Rather, in essence the motion is based on the allegation that the history of the extradition litigation and these deportation proceedings demonstrates that the Justice Department is persecuting respondent by advancing improper legal theories and denying him procedural rights. This does not appear to be, in fact, a "recusal" motion; rather, the motion appears to me to be a repetition of legal arguments that respondent has made in these proceedings and elsewhere.

In any event, respondent's allegation is without foundation. The Justice Department has in no way persecuted respondent by advancing improper legal theories or denying him procedural rights. In this connection, I would note that, in an interim review of these proceedings, the United States Court of Appeals for the Second Circuit has already rejected a number of the claims that respondent makes in this motion In particular, it held that it was "abundantly clear" that the INS had a reasonable basis for appealing the adverse decision of the immigration judge, and it also rejected the argument that the determination of the district court that respondent was not extraditable in some way precluded his deportation *Doherty v. Meese*, 808 F.2d 938, 942, 944 (2d Cir. 1986). Accordingly, respondent's motion is denied.

> Respondent Doherty was a member of the provisional Irish Republican Army ("PIRA"). On May 2, 1980, at the direction of the IRA, Doherty and three others embarked upon an operation "to engage and attack" a convoy of British soldiers.
>
> Doherty testified that he and his group took over a house at 371 Antrim Road in Belfast, and awaited a British Army convoy. Some three or four hours later, a car stopped in front of 371 Antrim Road and five men carrying machine guns emerged. These men, members of the Special Air Service of the British Army ("SAS"), and Doherty's group fired shots at each other.
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> In the exchange of gunfire Captain Herbert Richard Westmacott, a British army captain, was shot and killed. Doherty was arrested, charged with the murder, among other offenses, and held in the Crumlin Road prison pending trial. On June 10, 1981, after the trial was completed but before any decision by the Court, Doherty escaped from the prison along with seven others. He was convicted in absentia on June 12, 1981 of murder, attempted murder, illegal possession of firearms and ammunition, and belonging to the Irish Republican Army, a proscribed organization.

599 F. Supp. at 272 (citations to transcript omitted).[8]

The facts established in the extradition proceedings show that respondent killed a member of the British army. While the victim was a soldier rather than a civilian, the use of violence against a democratic society is unjustified irrespective of the identity of the victim. It is unjustified for the fundamental reason that in a democratic society the political system is available for peaceful redress of grievances. Given the availability of peaceful alternatives, there is no legitimate reason to resort to violence against any person whether or not that person has an official status within the State.[9]

The availability of such alternatives cannot be questioned here. While in some cases the question whether a society is democratic would be a difficult one, it is clear that the United Kingdom (of which Northern Ireland is a part) is a democratic society. Its citizens have fundamental political rights and are fully able to pursue their political goals through the electoral process.

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[8] Mr. Trott's affidavit states that respondent has committed certain additional crimes. Respondent states that he has not committed such crimes. I do not consider it necessary to resolve this factual dispute The record of the extradition proceeding establishes the fact that respondent has committed serious crimes. I base my decision on the facts established in the extradition proceedings, and do not consider it relevant whether or not respondent has committed additional crimes.

[9] This, of course, is not to say that the United States may not also condemn acts of violence in a non-democratic state. In particular, it is the policy of the United States to condemn acts of violence directed against non-combatants even by those who are otherwise legitimately seeking to oppose a non-democratic government.

It is the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment. The factual premise of Mr. Trott's affidavit is that this policy would be prejudiced if respondent were deported to Ireland because, while he could be prosecuted there for any crimes he committed in connection with his escape from prison, he could not be prosecuted there or extradited to the United Kingdom for murder or the other offenses he committed in connection with the ambush of the British army patrol. Trott affidavit at 4–5, ¶¶ 9, 11. This factual premise is challenged by respondent, who asserts that he would be subject to extradition from Ireland to the United Kingdom, apparently after having served any sentence Ireland would impose with respect to his escape from prison in the United Kingdom. Brief of Respondent-Appellee Joseph Patrick Thomas Doherty To The Attorney General at 24–25 (Jan. 8, 1988).

Respondent apparently bases his statement that he would be subject to extradition from Ireland to the United Kingdom on the Extradition Act recently promulgated in Ireland.[10] Assuming for purposes of this decision that Irish law supports respondent's contention, it would nonetheless be prejudicial to the interests of the United States for respondent to be deported to Ireland rather than the United Kingdom for two independent reasons. First, respondent has committed serious crimes in the United Kingdom and has received a prison sentence in the United Kingdom. As indicated above, it is the policy of the United States that those who commit acts of violence against a democratic state should receive swift and lawful punishment, and it is thus in the interests of the United States that respondent serve his sentence in the United Kingdom. Deporting respondent to Ireland would require the United Kingdom to invoke Irish law to secure respondent's return to the United Kingdom. It is in our interest that he be sent directly to the United Kingdom instead.

Second, Michael H. Armacost, the Undersecretary for Political Affairs at the Department of State, has communicated to me the views of the Department of State that a decision to deport respondent to Ireland rather than the United Kingdom would be injurious to our relations with the United Kingdom. Mr. Armacost states:

> We note in particular that the United Kingdom is the only State which has requested Doherty's extradition from the U.S., and that the denial of that request by our courts met with great disappointment. Additionally, Her Majesty's Government has repeatedly and vigorously expressed its desire that the United States effect Doherty's deportation to the United Kingdom; to our knowledge, no other State has made a competing request. Therefore, in our view, the government and people of the United King-

[10] I note that the affidavit of counsel attached to the Motion of Respondent to Reopen or Reconsider (Dec. 3, 1987), which, as discussed in the next section of this opinion, was referred to me by the BIA, states that the Extradition (European Convention on the Suppression of Terrorism) Act went into effect in Ireland on December 1, 1987, and that it changed the Irish law governing deportation such that respondent would now be subject to extradition from Ireland to the United Kingdom. Affidavit of Mary Boresz Pike (Dec. 3, 1987) at ¶¶ 25–27

dom would not welcome a decision by the Attorney General to deport Doherty elsewhere.

Moreover, the United Kingdom is the United States' closest partner in our counter-terrorism efforts. Failure to return Doherty to the United Kingdom could undermine HMG['s] confidence in the ability of the United States to cooperate in counter-terrorism efforts of special bilateral concern.

Finally, given the strength of British views on this issue, we believe that an Executive Branch determination not to deport Doherty to the U.K. might well prejudice broader aspects of our bilateral relationship beyond cooperation in counter-terrorism activities.

I certainly agree with the State Department that a decision to deport respondent to Ireland rather than the United Kingdom would be injurious to our relations with the United Kingdom.[11]

For the foregoing reasons, I conclude that deportation of respondent to Ireland would be prejudicial to the interests of the United States and that he should be deported instead to the United Kingdom. Accordingly, I disapprove the decision of the BIA affirming the order of the immigration judge that respondent be deported to Ireland rather than the United Kingdom.[12]

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[11] Respondent points to the fact that he was held unextraditable under the United States-United Kingdom Extradition Treaty Brief of Respondent-Appellee at 3–4. Deportation proceedings such as these, however, are independent from, and governed by a different standard than, extradition proceedings. *Doherty v. Meese*, 808 F.2d 938, 944 (2d Cir. 1986). Application of the extradition treaty involves an interpretation of the reciprocal legal obligations created by that treaty; the application of 8 U.S.C. § 1253(a) involves a determination of the interests of the United States — potentially a much broader inquiry Thus, the fact that respondent's actions were held to fall within the political offenses exception to the then applicable extradition treaty between the United States and the United Kingdom does not preclude a finding that it would be prejudicial to the interests of the United States for respondent to be deported to Ireland.

Respondent also asserts that he has a substantive right to be deported to the country he designates, and that denial of that right would violate his constitutional right to due process and equal protection Brief of Respondent-Appellee at 18–23. This latter claim is based on his assertion that he is the first alien whose country of designation has been rejected Respondent is, of course, correct that 8 U S.C. § 1253(a) authorizes an alien to designate a country of deportation, but he fails to acknowledge that the statutory authorization is subject to the authority of the Attorney General to reject the designated country. Nor has he been singled out unconstitutionally. In the analogous area of decisions whether or not to exercise prosecutorial discretion, a decision to prosecute is only unconstitutional if it is based on a characteristic such as race or religion *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Wayte v. United States*, 470 U.S. 598, 608 (1985). Respondent does not assert that he has been singled out based on such a characteristic, nor would there be any grounds for him to do so.

[12] My decision on the merits is based on the evidence and reasoning set forth in Part III of this opinion. I express no opinion regarding the BIA's decision, pursuant to 8 C.F.R. §§ 3.2 and 3.8, to deny INS's Motion to Supplement the Record or to Remand for Further Proceedings Before the Immigration Judge I do, however, disapprove of the BIA's statement that Mr. Trott's affidavit consisted solely of "logical inferences" and thus was not "evidence." BIA Decision of May 12, 1987 at 5. The judgment under 8 U.S.C. § 1253(a) whether an alien's designation of a country of deportation would be prejudicial to the interest of the United States "must be based on an analysis of the impact of a particular deportation on United States' interests viewed as a whole by a politically responsible official " *Doherty v Meese*, 808 F.2d at 943. Such an analysis is likely to take the form of an affidavit such as Mr. Trott's. Indeed, it is difficult to see what other kind of evidence could be offered. Certainly, the INS

IV.

On December 3, 1987, respondent filed a motion with the BIA requesting an order reopening the deportation proceedings, and remanding the case to the immigration judge for a hearing on respondent's claims for asylum, withholding of deportation, and for redesignation of country of deportation. It appears that respondent's arguments are twofold: first, that the enactment of the Extradition Act in Ireland has changed the facts upon which he based his earlier concession of deportability and his waiver of other legal claims; and second, that because the prolongation of the administrative proceedings prevented him from being deported to Ireland prior to the entry into force of this law, he should be allowed now to revoke his earlier concession and waiver.

On February 2, 1988, the BIA issued a per curiam opinion referring respondent's motion to the Attorney General. BIA decision of February 2, 1988 at 2. In its decision, the BIA stated it was taking this action because it was unclear whether it had authority to consider the motion while an appeal was pending before the Attorney General. Accordingly, the decision referred the motion to the Attorney General "for such action as he deems appropriate." *Id.*

I have concluded that it is appropriate to remand this motion to the BIA for its decision. I express no opinion as to how the BIA should decide the motion, or as to how the immigration judge or the BIA should make any subsequent determinations in the event that all or part of that motion were to be granted. In light of the length of time that the respondent's deportation proceedings have already consumed, however, I do recommend that the BIA give priority on its docket to this motion to the extent that, in the BIA's judgment, this can be done consistent with any applicable procedural rules and the reasonable requirements of the parties.

V.

For the foregoing reasons, the decision of the BIA is disapproved, and the case is remanded to the BIA for proceedings consistent with this opinion.

EDWIN MEESE III
Attorney General

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[12] (. . . continued)

should not be required, for instance, to offer the affidavits of foreign government officials stating what the official position of their governments would be regarding a particular deportation, and stating whether they will lessen their cooperation with the United States as a result of the deportation proceeding.

Finally, I approve of the decision of the BIA that the immigration judge, in the circumstances of this case, did not abuse his discretion in refusing to let the INS prove additional charges. This refusal in no way impaired the INS's ability to establish that it would be prejudicial to the interests of the United States for respondent to be deported to Ireland. As the BIA stated: "Deportability and designation of the country for deportation are separate and distinct issues." March Decision at 5. Once deportability is established on any ground, as it was here, the INS can proceed to establish its objections to the country of designation under 8 U.S.C. § 1253(a). Of course even in circumstances similar to those here, the INS must be given the opportunity to prove when necessary additional *facts* that are relevant to its objection to a country of designation, but that need not be done by proving additional grounds of deportability.

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Applicability of the Federal Advisory Committee Act to Presidential Task Force on Market Mechanisms

The Presidential Task Force on Market Mechanisms is exempt from the requirements of the Federal Advisory Committee Act.

January 5, 1988

MEMORANDUM OPINION FOR THE
SENIOR ASSOCIATE COUNSEL TO THE PRESIDENT

Introduction and Summary

This memorandum updates our submission to you of October 29, 1987, in which we concluded that a proposed commission charged with studying volatility in securities markets would be exempt from the requirements of the Federal Advisory Committee Act ("FACA"). You have requested that we update our memorandum in light of the specific provisions of Executive Order No. 12614, issued November 5, 1987, which set forth the purpose and functions of the Presidential Task Force on Market Mechanisms (the "Task Force"). Specifically, you have asked whether the Task Force would be exempt from the requirements imposed by FACA, in light of 5 U.S.C. app. § 4(b), which provides that FACA does not apply to advisory committees "established or utilized by" the Federal Reserve System.

Our analysis is based on the following description of the Task Force contained in Executive Order No. 12614:

(1) The Task Force "shall be composed of five persons appointed by the President," one of whom has been designated as chairman;

(2) the Task Force "shall review relevant analyses of the current and long-term financial condition of the Nation's securities markets, identify problems that may threaten the short-term liquidity or long-term solvency of such markets, and analyze potential solutions to such problems that will both assure the continued smooth functioning of free, fair, and competitive securities markets and maintain investor confidence in such markets;"

(3) the Task Force "shall provide appropriate recommendations to the President, to the Secretary of the Treasury, and to the Chairman of the Board of Governors of the Federal Reserve System;" and

(4) "to the extent permitted by law and subject to the availability of funds therefor, the Executive Office of the President and

the Department of the Treasury shall provide the Task Force with such administrative services, funds, facilities, staff, and other support service as may be necessary for the performance of its functions."

Given the composition, purpose, and functions of the Task Force as described in the Executive Order, and based upon our understanding that its recommendations to the Federal Reserve System would deal with matters within the scope of the Federal Reserve System's responsibilities, we conclude that the Task Force is exempt from FACA.

Analysis

We begin, of course, with an examination of the language of the statute itself.[1] FACA generally applies "to each advisory committee," except to the extent that any Act of Congress specifies to the contrary. 5 U.S.C. app. § 4(a). This general rule is, however, subject to an express limitation in FACA itself. Section 4(b) of FACA, 5 U.S.C. app. § 4(b), states that "[n]othing in this Act shall be construed to apply to any advisory committee established or utilized by (1) the Central Intelligence Agency; or (2) the Federal Reserve System." It follows that an "advisory committee" that is either "established or utilized by" the Federal Reserve System (or the Central Intelligence Agency) is exempt from FACA's requirements.

Since the Task Force is an "advisory committee"[2] established by the President, the key question is whether it is "utilized by" the Federal Reserve System. Inasmuch as the Task Force will report to the chairman of the Federal Reserve Board on matters within the Federal Reserve System's responsibilities (margin requirements, broker loans, and the stability of the banking system), the Task Force is "utilized by" the Federal Reserve System, within the plain meaning of that term.[3] Thus, the Task Force appears to be exempt from FACA's requirements. Moreover, the fact that the Task Force also reports to the Secretary of the Treasury and the President in no way alters this conclusion. FACA does not require that, in order to be exempt, an advisory committee must be utilized *solely* by the Federal Reserve System (or the Central Intelligence Agency). The words of the

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[1] *See, e g., Touche Ross & Co v. Redington*, 442 U S. 560, 568 (1979); *Greyhound Corp v Mt. Hood Stages, Inc*, 437 U.S 322, 330 (1978).

[2] FACA states, in pertinent part, that an "advisory committee" is "any committee, board, commission, council, . . . or any . . . subgroup thereof . . . which is (A) established by statute or reorganization plan, or (B) established or utilized by the President, or (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government." 5 U.S.C. app. § 3(2). The Task Force, which is established by the President and charged with making recommendations to the Chairman of the Federal Reserve System (as well as to the Secretary of the Treasury and the President), clearly appears to qualify as an "advisory committee" within the meaning of FACA.

[3] Regulations promulgated pursuant to FACA state that an advisory committee is "utilized" by a federal agency if it is used "as a preferred source from which to obtain advice or recommendations on a specific issue or policy within the scope of [federal officials'] responsibilities." 41 C F.R. § 101–6.1003 (1987). The Task Force clearly meets this description with respect to the Federal Reserve System.

statutory exemption therefore cover those advisory committees, such as the Task Force, that are utilized by the Federal Reserve System *and* other governmental entities.[4]

The limited legislative history bearing upon section 4(b) in no way undermines the conclusion, drawn from that provision's plain language, that section 4(b) exempts the Task Force from FACA's requirements. That legislative history emphasized Congress' concern with protecting the confidentiality of the deliberations carried out by groups advising the Federal Reserve Board, given the possible negative implications for our financial system should those deliberations become public knowledge.[5] This policy concern applies fully to the deliberations of the Task Force. The impact of securities market volatility on the broker-age and banking systems — an issue that the Task Force is charged with studying — has significant implications for financial stability.[6]

Conclusion

For the foregoing reasons, we conclude that, provided the Task Force is utilized in the manner described above, it is exempt from the requirements of FACA.

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

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[4] Nor are general requirements of FACA circumvented by giving full scope to the statutory exception contained in section 4(b) Because advisory committees must address issues relevant to the Federal Reserve System or the Central Intelligence Agency to come with the ambit of this exception, only a relatively few committees will qualify for the exception

[5] The clause that became section 4(b) was originally introduced as an amendment by Senator Javits, during the floor debate that preceded passage of the Senate version of FACA. That preliminary version of section 4(b) stated that "the provisions of this act [FACA] shall not apply to any advisory committee established for or utilized by the Federal Reserve System." 118 Cong. Rec. 30,273 (1972). (The final version of section 4(b), which also made reference to the Central Intelligence Agency, was adopted by the joint House-Senate Conference Committee on FACA.) Senator Javits introduced the amendment in order to shield the "Federal Reserve Advisory Council" ("FAC") from FACA's strictures According to Senator Javits, "everyone knows the speculation, financial, and otherwise, which goes on around the world respecting the Federal Reserve System's operations. In order to have an advisory council at all, which would be very useful to them, they simply have to ask to be exempted from the provisions of this bill." *Id* Senator Javits cited a letter from Arthur F. Burns, Chairman of the Federal Reserve Board, which stressed that the draft FACA provisions regarding public disclosure of FAC proceedings could "prove troublesome. Since the FAC's discussions cover a number of subjects such as monetary policy, the international payments system, and liquidity conditions in the banking system, premature publication of views candidly expressed at FAC meetings could prove harmful Discussion at these meetings is now full and frank and would be seriously inhibited if the meetings were open to the public . . or even if minutes of the meetings were published . . . ." *Id.* Consistent with the concerns identified by Senator Javits and Chairman Burns, Senator Metcalf added that "there are important considerations in [FACA] that are clearly not involved and should not be a part of the considerations as to the Federal Reserve Board. . . . [M]any of the propositions that are analyzed by the [Federal Reserve] [B]oard need to have secrecy of consideration and secrecy as to their activities." *Id*

[6] Finally, there is no suggestion in the legislative history that the rationale underlying the FACA exemption would be undermined if a group advising the Federal Reserve Board also were directed to advise another federal agency, such as the Department of the Treasury.

Applicability of 18 U.S.C. §§ 212 and 213 to FDIC Examiners' Obtaining of Credit Cards From State-Chartered FDIC-Insured Nonmember Banks

Proposed FDIC regulations allowing FDIC examiners to obtain credit cards from insured state nonmember banks (subject to the condition that those examiners are not authorized to examine the banks that have issued the cards) are consistent with the provisions of 18 U.S.C. §§ 212 and 213, prohibiting loans between a bank examiner and banks which that examiner examines, or has the authority to examine.

January 12, 1988

MEMORANDUM FOR THE EXECUTIVE SECRETARY
FEDERAL DEPOSIT INSURANCE CORPORATION

This memorandum responds to your letter of September 14, 1987, as revised, requesting our views on proposed Federal Deposit Insurance Corporation ("FDIC") regulations that would authorize FDIC examiners to obtain credit cards from certain state-chartered FDIC-insured banks that are not members of the Federal Reserve System ("insured state nonmember banks"). Specifically, you asked whether the proposed regulations would be consistent with the provisions of 18 U.S.C. §§ 212 and 213, prohibiting loans between a bank examiner and banks which that examiner examines, or has the authority to examine. Subsequently, by letter dated December 11, 1987, FDIC Special Counsel F. Douglas Birdzell transmitted a revised version of the proposed regulations. Our analysis is based on those revised regulations. For the reasons set forth below, we conclude that the proposed regulations would not run afoul of the prohibitions found in 18 U.S.C. §§ 212 and 213.

Analysis

At issue is the scope of the prohibitions contained in 18 U.S.C. §§ 212 and 213. Section 212 prohibits an officer, director, or employee of a bank which is a member of the Federal Reserve System or insured by the FDIC from making a loan to an examiner who "examines or has authority to examine" the bank. Section 213 complements section 212 by prohibiting a bank examiner from accept-

ing a loan from "any bank, corporation, association or organization examined by him or from any person connected therewith."[1]

The rule against examiner borrowing embodied in sections 212 and 213 was first promulgated as section 22 of the Federal Reserve Act of 1913, 38 Stat. 251, 272, and was intended to "proscribe certain financial transactions which could lead to a bank examiner carrying out his duties with less than total, unbiased objectivity." *United States v. Bristol*, 473 F.2d 439, 442 (5th Cir. 1973). *See also* H.R. Rep. No. 69, 63d Cong., 1st Sess. (1913). There is no provision in the statute or its legislative history that evinces a congressional intent to exempt any particular type of credit relationship, and the rule against examiner borrowing found in sections 212 and 213 has been applied to prohibit credit advanced through credit cards, as well as through direct loans.[2] Since both credit cards and direct loans have as their essential attribute the extension of credit,[3] we also take the position that sections 212 and 213 apply to credit cards issued by banks.

Current FDIC regulations prohibit FDIC examiners from "accept[ing] or becom[ing] obligated on any extension of credit, including credit extended through the use of a credit card," from an insured nonmember bank. 12 C.F.R. § 336.16 (1987) ("section 336.16"). We understand that this prohibition generally does not encompass credit extended by member banks of the Federal Reserve System, since member banks normally are examined by Federal Reserve System (in the

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[1] Sections 212 and 213 provide in relevant part as follows:

Sec. 212. Offer of loan or gratuity to bank examiner

Whoever, being an officer, director or employee of a bank which is a member of the Federal Reserve System or the deposits of which are insured by the Federal Deposit Insurance Corporation, or of any land bank, Federal land bank association or other institution subject to examination by a farm credit examiner, or of any small business investment company, makes or grants any loan or gratuity, to any examiner or assistant examiner who examines or has authority to examine such bank, corporation, or institution, shall be fined . or imprisoned . . . or both . . . .

Sec. 213. Acceptance of loan or gratuity by bank examiner

Whoever, being an examiner or assistant examiner of member banks of the Federal Reserve System or banks the deposits of which are insured by the Federal Deposit Insurance Corporation, or a farm credit examiner or examiner of National Agricultural Credit Corporations, or an examiner of small business investment companies, accepts a loan or gratuity from any bank, corporation, association or organization examined by him or from any person connected herewith shall be fined . . . or imprisoned . . . or both . . . .

[2] Prior interpretations by the Office of Legal Counsel have presumed that sections 212 and 213 apply to credit extended through credit cards. *See* Memorandum for Hoyle L. Robinson, Executive Secretary, FDIC, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re Proposed Amendments to Regulations of FDIC Relating to Bank Loans to Examiners* (July 10, 1980); *Federal Reserve Board Policy on Bank Examiner Borrowing*, 6 Op. O.L.C 509 (1982).

[3] Consistent with this observation, we note that 15 U.S.C § 1602 (which contains definitions applicable to federal consumer credit cost disclosure statutes) defines "credit card" as "any card, plate, coupon book or other credit device *existing for the purpose of obtaining money*, property, labor, or services *on credit*." 15 U.S.C. § 1602(k) (emphasis added). Furthermore, 12 U.S.C. § 1901 (which contains definitions applicable to federal credit control statutes) defines "loan" as "*any type of credit*, including credit extended in connection with a credit sale." 12 U.S.C. § 1901(j) (emphasis added).

case of state member banks) or Comptroller of the Currency (in the case of federally-chartered national banks) examiners—not by FDIC examiners.[4]

The proposed revision of section 336.16 would prohibit FDIC examiners from "becom[ing] obligated on any extension of credit, including credit extended through the use of a credit card, from an insured state nonmember bank," subject to two exceptions: (1) an examiner could, with the prior written consent of his or her supervisor, "apply for and obtain credit cards issued by insured state nonmember banks located *outside* of his or her region of official assignment," subject to the condition that he or she would "be disqualified from participating in any examination function regarding th[ose] credit card issuer[s]"; and (2) an examiner could, at the discretion of his or her supervisor (to meet local examination needs), receive credit cards or lines of credit from insured limited service state nonmember banks, including limited service banks located within his or her region of official assignment, subject to the condition that he or she would "be disqualified from participating in any examination function regarding th[ose] creditor[s]." The revised section 336.16 also would specify that if a change in an examiner's assignment or bank structure resulted in an examiner's becoming obligated on an extension of credit secured through a credit card issued by an insured state nonmember bank (category (1)), the credit card would have to be cancelled and any outstanding balance paid according to the card's terms, without renegotiation. For as long as an outstanding balance remained, that examiner would be disqualified from participating in any examination of the creditor bank. Finally, the revised section 336.16 would provide that in the case of a credit card or line of credit obtained from an insured limited service state nonmember bank (category (2)) located within an examiner's region of official assignment, that examiner would have to request the approval of his or her supervisor to retain the credit card or line of credit.[5]

It is our opinion that the proposed revision of section 336.16 does not run afoul of the statutory prohibitions found in sections 212 and 213. Under the terms of the proposed revision, FDIC examiners clearly do not examine—and are not authorized to examine—banks to which they are obligated for a credit card, line of

[4] *See* 12 U.S.C. § 481 (providing for the examination of national banks by Comptroller of the Currency examiners); 12 U.S.C. § 485 (providing for the examination of member banks by Federal Reserve examiners); 12 U S C. § 1820(b) (providing for the examination of insured state nonmember banks by FDIC examiners). 12 U.S C. § 1820(b) also authorizes the FDIC to examine state member banks and national banks, "whenever in the judgment of the [FDIC's] Board of Directors such special examination is necessary to determine the condition of any such bank for insurance purposes." The current version of section 336.16 accommodates such "special purpose" examinations, consistent with the statutory prohibitions of section 212 and 213, by prohibiting credit extension relationships between "assessment auditor[s]" charged with auditing banks "for deposit insurance assessment purposes" and the banks that are being audited Because the latter category of audited banks is not defined restrictively, it encompasses state member banks and national banks as well as state nonmember banks.

[5] We understand, of course, that even if he or she received such approval, the disqualification against participation in an examination (category (2)) would remain in effect.

credit, or direct loan.[6] The requirement that an FDIC examiner receive supervisory approval before obtaining any extension of credit from an insured state nonmember bank—and that such approval be conditioned upon disqualification from examination of the bank in question—ensures adherence to the prohibitions of sections 212 and 213. Furthermore, the proposed revision contains a prophylactic measure that prevents examiner reassignments or bank structural changes from accidentally placing examiners in the position of being authorized to examine (or actually examining) banks to which they are indebted. In short, the revised section 336.16 is fully in line with the standards set forth in sections 212 and 213.

Conclusion

For the foregoing reasons, we conclude that proposed FDIC regulations allowing FDIC examiners to obtain credit cards from insured state nonmember banks (subject to the condition that those examiners are not authorized to examine the banks that have issued the cards) are consistent with the provisions of 18 U.S.C. §§ 212 and 213, prohibiting loans between a bank examiner and banks which that examiner examines, or has the authority to examine.

JOHN O. MCGINNIS
Deputy Assistant Attorney General
Office of Legal Counsel

[6] The FDIC's power to promulgate regulations specifying categories of banks that particular FDIC examiners are not authorized to examine would appear to flow naturally from 12 U.S.C. § 1819, which, inter alia, authorizes the FDIC "[t]o prescribe by its Board of Directors such rules and regulations as it may deem necessary to carry out the provisions of this chapter or of any other law which it has the responsibility of administering or enforcing." Inasmuch as the proposed section 336.16 enables the FDIC to "administer" its examination responsibilities (set forth in 12 U.S.C. § 1820(b)) in an efficient yet lawful manner, we believe that it is covered by the plain terms of 12 U S.C. § 1819.

Representation of the United States Sentencing Commission in Litigation

The Attorney General may, consistent with 28 U.S.C. § 516, permit the United States Sentencing Commission to independently present as amicus curiae its views respecting its status and authority to a court in litigation where it has been named as a party defendant.

The Justice Department remains responsible for conducting the litigation, for representing the Sentencing Commission as a party defendant, and for exercising its own independent judgment as to the position of the United States on the merits of the issues involved.

If the Sentencing Commission chooses independently to present its views in court, it may do so only through individuals properly appointed as officers of the United States pursuant to the Appointments Clause of the Constitution.

Although any counsel appointed to present the Sentencing Commission's position would be subject to the criminal conflict of interest laws, the consequences of coverage can be mitigated somewhat for temporary or part-time employees in the executive branch by their appointment as "special government employees" under 18 U.S.C. § 202(a). Because this designation is not available for judicial branch appointees, the Sentencing Commission may wish to ask the Attorney General to appoint as a special government employee any private counsel retained by it to represent its views in court.

January 15, 1988

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

You have asked for our views on whether the United States Sentencing Commission may represent itself in court, through its own staff attorneys or through specially appointed counsel, in litigation involving a challenge to its authority to promulgate guidelines on sentencing. For reasons discussed more fully below, we believe that the Department may permit the Commission to present its views independently in litigation where it has been named as a party defendant. This Department, however, remains responsible for representing the interests of the United States in any such litigation.

I. Statutory Authority and Responsibility of the Department of Justice to Represent Government Agencies in Litigation

It has been the consistent and longstanding position of this Department that, absent a clear legislative directive to the contrary, the Attorney General has plenary statutory authority and responsibility for all litigation, civil and criminal, to which the United States, its agencies, or departments, are parties. *See generally The Attorney General's Role as Chief Litigator for the United States*, 6 Op. O.L.C.

47 (1982). The Supreme Court has concurred in this interpretation of the statutory scheme. *See United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457–58 (1868). *See also* Griffin B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 Fordham L. Rev. 1049 (1978). The Attorney General's authority over the government's litigation was first recognized in the act creating the Department of Justice, Act of June 22, 1870, ch. 150, 16 Stat. 162 (1870). It is now primarily codified in section 516 of title 28, which reserves "the conduct of litigation" involving the United States and its agencies and officers to the Attorney General and the Department of Justice, "[e]xcept as otherwise authorized by law."[1] In addition, section 3106 of title 5 prohibits executive and military departments from employing outside counsel "for the conduct of litigation" unless Congress has provided otherwise, requiring instead that the matter be referred to the Department of Justice.[2] Because of the strong policies favoring concentration of control over the government's litigation,[3] the "otherwise authorized by law" exception to section 516 has been narrowly construed to permit agencies to conduct litigation independent of the Department of Justice only where statutes explicitly so provide. *See Kern River Co. v. United States*, 257 U.S. 147, 155 (1921); *Marshall v. Gibson's Products, Inc.*, 584 F.2d 668, 676 n.11 (5th Cir. 1978); 21 Op. Att'y Gen. 195 (1895).

Over the years, Congress has enacted a number of exceptions to the Attorney General's exclusive authority to conduct the government's litigation in the lower federal courts. *See* Bell, *supra*, at 1057. In some cases, the grant of independent litigating authority is plain, in others less so;[4] in still others, an agency's ability to represent the government in court by its own counsel is made subject to the

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[1] Section 516 provides:

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

See also 28 U.S.C. § 519, which provides that, "[e]xcept as otherwise authorized by law, the Attorney General shall supervise all litigation in which the United States, an agency, or officer thereof is a party."

[2] Section 3106 has been construed by this Office to preclude payments by executive agencies to non-governmental attorneys for advisory functions in connection with litigation, as well as litigating functions. *See* Letter for Martin R. Hoffman, General Counsel, Department of the Navy, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel (Mar 26, 1975)

[3] As reflected in the congressional debates at the time the Department of Justice was created, concentration of litigating authority in the Attorney General is intended to ensure the presentation of uniform positions on important legal issues, to facilitate presidential control over executive branch policies implicated in litigation, to provide for greater objectivity in the handling of cases by attorneys who are not themselves affected litigants, to allow the selection of test cases which would present the government's position in the best possible light, and to permit more efficient handling of appellate and Supreme Court litigation. It is also intended to eliminate the need for highly-paid outside counsel when government-trained attorneys could perform the same function. *See* Cong. Globe, 41st Cong., 2d Sess., pt. IV, 3035–39, 3065–66 (1870). *See generally* Bell, *supra*; Sewall Key, *The Legal Work of the Federal Government*, 25 Va. L. Rev. 165 (1938).

[4] Some courts have regarded general "sue and be sued" clauses, or formulations such as "bring a civil action," or "invoke the aid of a court" as insufficient to confer independent litigating authority. *See, e.g., ICC v. Southern Railway*, 543 F.2d 534 (5th Cir. 1976); *FTC v. Guignon*, 390 F.2d 323 (8th Cir. 1968)

direction and control of the Attorney General.[5] However, where Congress has not given an agency any authority to litigate through its own attorneys, the Attorney General may not transfer or delegate to it his own litigating power, through a memorandum of understanding or otherwise. *See Litigating Authority of the Office of Federal Inspector, Alaska Natural Gas Transportation System*, 4 Op. O.L.C. 820 (1980). While attorneys employed by agencies that have no litigating authority may assist Department of Justice attorneys in connection with litigation involving their agency, their role is restricted to so-called "agency counsel" functions. They may appear in court or otherwise carry out duties reserved to "officers of the Department of Justice" under section 516 only if they are given special appointments in the Department of Justice. *See Assignment of Army Lawyers to the Department of Justice*, 10 Op O.L.C. 115 (1986); Memorandum for William P. Tyson, Director, Executive Office for United States Attorneys, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of 10 U.S.C. § 973(b) to JAG Officers Assigned to Prosecute Petty Offenses Committed on Military Reservations* (May 17, 1983). In a word, section 516 requires that, absent statutory direction to the contrary, the Attorney General be the representative of the United States government in court.

Supreme Court litigation is a special case. Even where Congress has given agencies authority independent of the Attorney General to litigate in the lower courts, 28 U.S.C. § 518(a) gives the Attorney General exclusive power to represent the interests of the United States and its agencies in the Supreme Court. Section 518(a) provides that the Attorney General and the Solicitor General shall conduct and argue all suits and appeals in the Supreme Court, "[e]xcept when the Attorney General in a particular case directs otherwise." In allowing the Attorney General to "direct otherwise," section 518 does not appear to compel the same exclusivity of representation in the Supreme Court that section 516 compels for litigation in the lower courts. And on occasion the Attorney General has elected, in the exercise of his discretionary authority under section 518(a), to permit an agency to file a brief in the Supreme Court in its own name rather than have the Solicitor General represent it. In a very few cases the Attorney General has allowed an agency to make legal arguments in the Supreme Court that were inconsistent with the position asserted by the Department of Justice in the same case. Where the agency has its own litigating authority, this has been done by permitting the filing of a separate brief.[6] Where the agency does not, the only ve-

[5] Such statutes provide the framework for "Memoranda of Understanding" which apportion litigation responsibilities between the Department and agencies. *See generally* Paul McGrath, United States Department of Justice, Civil Division, Compendium of Departments and Agencies with Authority to Represent Themselves in Litigation (1982).

[6] *Compare* Brief for the Attorney General as Appellee and for the United States as Amicus Curiae in *Buckley v. Valeo*, 424 U.S. 1 (1976), *with* Brief for the Federal Election Commission in the same case. *See also* the discussion of the statutory provisions governing suits to set aside orders of the Interstate Commerce Commission, and the frequent resulting inconsistency in the government's Supreme Court presentations, in Robert L. Stern, *'Inconsistency' in Government Litigation*, 64 Harv. L. Rev. 759, 760–64 (1951).

hicle apparently considered appropriate for an expression of its views is the Department of Justice's brief.[7]

II. The Attorney General's Statutory Authority To Litigate on Behalf of Entities Outside the Executive Branch

The Attorney General's authority and responsibility under 28 U.S.C. § 516 to represent the interests of the United States and its agencies in litigation extends to representation of governmental entities and officials outside the executive branch. *See, e.g., Miller v. Johnson*, 541 F. Supp. 1165, 1172 (D.D.C. 1982) (section 516 "reserves to" the Attorney General the representation of judges and other court officials sued in their official capacities, as well as "the District Court which is an agency of the United States"). *See also Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51 (D.D.C. 1973) ("[W]hile [section 516] does not require a congressional litigant to be represented by the Justice Department, it does deny such a litigant the right to sue as the United States . . . ."). In cases where a court or one of its officials or related organizational entities is sued in its official capacity, and is in need of legal representation, the Department of Justice generally provides it.[8]

Even where the matter at issue in litigation involves the exercise by a court of some inherent Article III power, the Attorney General is the proper representative of judicial branch entities in court. *See Young v. United States ex rel. Vuitton*, 481 U.S. 787, 801 (1987) ("[A] court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied."). This conclusion respecting the Attorney General's authority under section 516 was the premise of a 1973 Comptroller General opinion that authorized the use of judicial appropriations to

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[7] *See, e.g.*, Brief for the United States in *TVA v. Hill*, 437 U.S. 153 (1978) (appendix filed by the Secretary of the Interior, by authorization of the Attorney General, representing the separate views of the Department of the Interior), Brief in Opposition to Certiorari in *Transamerica Co. v Federal Reserve Bd.*, 340 U.S. 883 (1950) at 24–30 (views of the Treasury Department); Brief for the Department of Justice in *Railroad Retirement Bd v. Duquesne Warehouse Co.*, 326 U.S. 446 (1946) at 20–21, 84–86 (views of the Social Security Board). There have been a few rare occasions where the Attorney General has, in the exercise of his discretion, allowed two government agencies with opposing views to fight the matter out without making any presentation himself to the court, even where both agencies do not have independent litigating authority in the lower courts. *See, e.g., ICC v Inland Waterways Corp.*, 319 U.S. 671, 683 (1943) (ICC v. Secretary of Agriculture); *North Carolina v. United States*, 325 U.S. 507 (1945) (ICC v. OPA); *Meredith v Thralls*, 144 F.2d 473, *cert. denied*, 323 U.S. 758 (1944) (SEC v. RFC) *See Stern, supra*, 64 Harv. L. Rev. at 768 ("[T]he Department may feel obligated to advise the Court as to the position which, in its opinion, is correct, but may also feel loath to preclude presentation of the opposing view. If that position has been publicly stated, it will inevitably be brought to the Court's attention by one party or another, and the Court may well desire to have the position of the agency concerned stated officially.").

[8] *See, e.g., Armster v United States District Court*, 792 F. 2d 1423 (9th Cir. 1986) (U.S. Attorney represented defendant district courts in suit challenging suspension of civil jury trials); *In re Fidelity Mortgage Investors*, 690 F.2d 35 (2d Cir. 1982), *cert denied*, 462 U.S. 1106 (1983) (U.S Attorney represented defendant Administrative Office of the United States Courts in suit challenging award of referees' fees under Bankruptcy Act); *Duplantier v United States*, 606 F 2d 654 (5th Cir. 1979), *cert denied*, 449 U.S 1076 (1981) (Department of Justice represented defendant Judicial Ethics Committee in suit by judges challenging financial disclosure filing requirements of Ethics in Government Act) *See also Hastings v Judicial Conference*, 829 F 2d 91 (D D C 1987), *cert. denied*, 485 U.S. 1014 (1988) (Judicial Conference and the Chief Justice represented by Department of Justice, Judicial Council for the Eleventh Circuit represented by private counsel, in suit challenging judicial disciplinary proceeding under 28 U.S.C. § 372).

pay private counsel where the Department of Justice had declined to provide representation to judges sued in their official capacity. *See* 53 Comp. Gen. 301, discussed *infra*. The assumption that section 516 generally obligates the Attorney General to represent judicial branch entities in court is also apparent in the history and interpretation of 28 U.S.C. § 463, the statute that conditions the authority of certain judicial branch entities and officials to pay private counsel upon the "unavailability" of Department of Justice representation. *See* S. Rep. No. 275, 97th Cong., 1st Sess. 16 (1981) ("[T]he Attorney General is responsible [under section 516] for providing the services of an attorney to a judge sued in his official capacity."); Letter for Honorable William W. Wilkins, Jr., Chairman, United States Sentencing Commission, from William R. Burchill, General Counsel, Administrative Office for United States Courts (Dec. 3, 1987) ("Burchill letter") ("[W]e believe that the Sentencing Commission, like the Administrative Office, is an agency of the United States within the meaning of [section 516].").

Thus, section 516's mandate extends to the representation of governmental agencies and officials outside the executive branch. However, the Attorney General's exclusive representational authority is subject to two exceptions in this connection. First, in the unique context of contempt prosecutions, the Supreme Court has ruled that separation of powers concerns may preclude the Attorney General from asserting exclusive authority to represent the judicial branch. In *Young*, the Supreme Court held that a court must be free to employ private counsel to prosecute contempts if the Attorney General declines to do so. *See* 481 U.S. at 801 ("If the judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself if that branch declined prosecution.").[9]

Second, 28 U.S.C. § 463 contemplates that the Attorney General may voluntarily relinquish his responsibility to represent judicial entities in certain circumstances.[10] Section 463 is a statutory codification of the 1973 Comptroller

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[9] Ordinarily, the Attorney General will accommodate a request from a court to prosecute a contempt. *See* Brief for the United States as Amicus Curiae in *United States v Providence Journal Company*, 485 U.S. 693 (1988) at 1 n.1 (the fact that the United States has an interest in the underlying litigation does not disqualify a government attorney from prosecuting a criminal contempt). If the Department is disqualified, or if it declines to prosecute in the exercise of its prosecutorial discretion, the court has inherent Article III authority to appoint a private attorney to vindicate its authority. *See Young v. United States ex rel. Vuitton*, 481 U.S. 787 (1987). Where a court exercises this inherent Article III power, the prosecution takes place entirely outside the representational framework established by section 516. In addition, the Solicitor General has recently taken the position (with which we agree) that in such cases the Attorney General's authority under section 518 does not to extend to proceedings in the Supreme Court arising out of the contempt prosecution. *See* Brief for the United States as Amicus Curiae in *United States v. Providence Journal Co.*, *supra*, at 2 n.2 ("In light of the decision in *Young*, we believe that section 518 is best read as referring to cases in which the United States is 'interested' by virtue of the constitutional and statutory responsibilities of the Executive Branch," as opposed to "proceedings that are wholly internal to the Judicial Branch as an ancillary aspect of its powers under Article III.").

[10] This provision, couched in terms of authority to expend the judiciary's appropriation, provides:

> Whenever a Chief Justice, justice, judge, officer, or employee of any United States court is sued in his official capacity, or is otherwise required to defend acts taken or omissions made in his official capacity, and the services of an attorney for the Government are not reasonably available pursuant to chapter 31 of this title, the Director of the Administrative Office of theUnited States Courts may pay the costs of his defense. The Director shall prescribe regulations for such payments subject to the approval of the Judicial Conference of the United States.

General opinion, previously mentioned, that approved the use of the Judiciary's "miscellaneous" appropriation to pay litigation costs, including attorneys fees, where the Department of Justice had declined to provide representation to judges and court employees sued in their official capacity. *See* 53 Comp. Gen. 301 (1973).[11]

Consistent with the theory underlying section 463, the Department has in the past not objected to the retention by courts of private counsel to defend themselves in mandamus actions where the Department is disabled by reason of a conflict of interest from undertaking the representation, *see Will v. United States*, 389 U.S. 90 (1967) (mandamus action by United States resisting district court's discovery order), or is unwilling to do so for some other reason.[12] And, in *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970), the Attorney General, in the exercise of his discretion under 28 U.S.C. § 518(a), allowed a judicial agency to present its own views in the Supreme Court.[13] In that case, the Attorney General permitted a judicial council to present its own defense in a mandamus action in the Supreme Court challenging its authority to discipline a district court judge. In the initial stages of this litigation, the Solicitor General represented the judicial council. Later, however, when the judicial council and the

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[11] The Comptroller General's decision was based in part upon the awkwardness created by "having the Attorney General, an official of the executive branch of the Government, determine whether and to what extent members of institutions of a coordinate branch of the Government, the judiciary, are to be represented in litigation in which they are named as defendants or respondents." 53 Comp. Gen. at 305. Section 463 thus recognizes and gives effect to the separation of powers concerns that would be raised if the Attorney General were disabled by reason of a conflict of interest from representing judicial defendants, and unwilling at the same time to allow them to defend themselves.

[12] In a letter to the Director, Administrative Office of the United States Courts dated January 31, 1973, the Attorney General stated that "the Department cannot furnish [legal] representation to a judicial officer in a situation where the Department's interests collide with those of the judicial officer, such as in a mandamus action instituted against a judge by the Department " 53 Comp. Gen. 301, 303 (1973). In addition, the Attorney General advised:

> In our view, when no personal relief is sought against the judicial officer, such officer is no more in need of a personal defense than he would be if an appeal were taken from any of his appealable rulings. Nor is there any impropriety in counsel for one of the private litigants representing the judicial officer, as if he were defending an appeal from the officer's ruling.

Id.

[13] In the more recent litigation involving the Eleventh Circuit Judicial Council's investigation of Judge Alcee Hastings, the Department of Justice has represented the Judicial Conference, the Chief Justice, and the United States, while the judicial council and its investigating committee have been represented by private counsel. *See Hastings v Judicial Conference*, 829 F.2d 91 (D.C. Cir. 1987), *cert denied*, 485 U.S. 1014 (1988). In the early stages of this litigation, the Department also represented the judicial council, but after receiving the report of its investigating committee that entity chose instead to be represented by the committee's counsel, John Doar. While the court of appeals upheld the investigating committee's authority to subpoena grand jury records independent of the Attorney General, *see In re Petition to Inspect and Copy Grand Jury Materials*, 735 F 2d 1261 (11th Cir.), *cert denied*, 469 U.S. 884 (1984) ("Congress certainly never intended a judicial investigating committee [investigating charges of judicial misconduct] to be beholden to the Attorney General for permission to seek the information it needs."), the issue of the council's authority to employ private counsel to conduct litigation in the face of section 516 has not been raised or addressed by the court in this litigation. We doubt whether, in the circumstances of the Hastings litigation, the council has authority to represent itself through its own privately retained counsel since there appears to be no reason why the Attorney General is disabled from representing the judicial counsel along with the other judicial defendants. And, as will be discussed more fully in Part IV of this memorandum, serious constitutional questions are raised by allowing a judicial branch entity to represent itself in court through counsel that has not been appointed by the Attorney General.

Solicitor General were unable to reconcile their views on the merits, they filed separate briefs in the Supreme Court.[14] In sum, section 516 imposes a general prohibition against the Attorney General's delegating his own authority to conduct the government's litigation to other government agencies, including judicial branch agencies. The only recognized exceptions to this prohibition are cases where the Attorney General has declined to prosecute a criminal contempt, and where he is disabled from representing a judicial defendant because of a conflict of interest.

III. Statutory Authority of the Sentencing Commission to Represent Itself in Litigation

We turn now to the question of the Sentencing Commission's authority to represent itself as a named defendant in litigation challenging the constitutionality of its guidelines.

The statute authorizing the establishment of the Commission and defining its authorities does not refer to the conduct of litigation or to any other authority (such as administrative enforcement power) from which one might reasonably infer that Congress intended the Commission to appear in court through its own counsel. Nor does the Commission's current appropriation statute contain any provision suggesting that it may use its funds to litigate independent of the Department. *See* Pub. L. No. 99–500, 100 Stat. 1783–63 (1986). The Sentencing Commission does not fall within section 463 because it is not a "chief justice, justice, judge, officer or employee of any United States court." And the unique "doctrine of necessity" exemption for contempt prosecutions created in *Young* obviously does not obtain here. The Department is willing and able to represent the Commission and, in any event, there is no constitutional "necessity" that might authorize the Commission to conduct its own defense if the Department declined to do so. In the absence of any such authority, under principles generally applicable to the conduct of litigation by government agencies, we would ordinarily be constrained to conclude that the Commission may not appear in court by its own counsel, but must be represented by the Department of Justice. This is because, as a statutory matter, the Attorney General may not delegate to the Commission or otherwise allow the Commission to assume his own authority under section 516 to conduct litigation in the name of the United States. It is our understanding, however, that the Department has no intention of abdicating to the Com-

[14] Charles Alan Wright filed a brief and argued on behalf of the Judicial Council that its acts were purely administrative in nature and could not be reviewed in an original proceeding in the Supreme Court. 398 U.S. at 83. The Solicitor General filed an amicus brief arguing that the Judicial Council had acted as a judicial tribunal, and that the case, therefore, fell within the Supreme Court's appellate jurisdiction. *Id* at 83–84. The Supreme Court did not decide the jurisdictional issue, holding instead that Judge Chandler had not succeeded in establishing his entitlement to a mandamus remedy. *Id* at 89.

mission any of its own responsibility under section 516 to represent the interests of the United States—including those of the Commission as a party defendant—in this litigation. And it is also our understanding that the Commission has in no sense proposed that the Department should do so. All that the Commission seeks is assurance from the Department that it will not move to strike whatever presentation the Commission may independently wish to make to the court in an amicus curiae capacity on the issue of its own constitutional status and authority. Such an independent amicus presentation would not require the Department to relinquish any of its control over the conduct of the litigation, which is all that section 516 itself requires. Under these circumstances, we believe the Attorney General may, consistent with section 516, permit the Commission to present its own views to the court. Ordinarily, of course, the Department would object to any presentation by an executive agency in court of a position in opposition to that of the Department, whether or not the agency had statutory litigating authority independent of the Department, on grounds that disputes between executive agencies should be settled not by a court but within the executive branch. *See* Memorandum for J. Paul McGrath, Assistant Attorney General, Civil Division, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Amicus Curiae Role of the Small Business Administration's Chief Counsel for Advocacy Under the Regulatory Flexibility Act* (May 17, 1983). This objection is grounded in the same policy considerations that underlie section 516 itself, *see supra* note 3, though it is also animated by the constitutional concern that disputes between executive agencies are constitutionally subject only to the direction and control of the President, not the courts. *See* Memorandum for F. Henry Habicht, Assistant Attorney General, Land and Natural Resources Division, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: Response to Rep. Dingell on EPA's Ability to Sue Other Federal Agencies* (Dec. 4, 1985); Memorandum for Michael Egan, Associate Attorney General, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: EPA Litigation Against Government Agencies* (June 23, 1978).[15]

Despite the force of these policy concerns, the Attorney General has in a number of situations permitted an agency to express in court views that differed from those presented by the Department. *See supra* note 7. The constitutional issues involved in this case go to the Commission's validity under separation of powers principles. Moreover, these issues also raise questions of the extent to which the Commission is subject to the direction and control of the President. Under these very special circumstances, we believe that the Attorney General would be justified in permitting the Commission to present its own views to the court.

[15] The fact that two or more executive agencies may present differing views on legal issues in court papers does not raise any problem of justiciability where there are other nongovernmental parties to the controversy who are themselves truly adverse to the government. *Cf. United States v ICC*, 337 U S. 426 (1949). And, this is not a case where one executive agency is opposing another in court under authority of a statutory directive. *Compare United States v. Connecticut Nat'l Bank*, 418 U S 656 (1974) While Congress could not constitutionally deprive the President of his authority to resolve legal disputes among executive agencies, there is no constitutional reason why the President in his discretion may not authorize executive agencies to present their differing views to a court for possible resolution.

IV. Constitutional Status of Persons Litigating on Behalf of the Commission and Applicability to them of the Conflict of Interest Laws

If the Commission chooses to present its views to the court, it could do so through its General Counsel or through private retained counsel. Depending upon the role assumed by such private counsel in the litigation, they may have to be appointed as officers of the United States and take the requisite oath of office. Representation in court of government entities— *whether executive or judicial*— is a function that can constitutionally be performed only by officers of the United States appointed in accordance with the Appointments Clause. *See Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (the function of "conducting civil litigation in the courts of the United States for vindicating public rights . . . may be discharged only by persons who are 'Officers of the United States' within the language of [the Appointments Clause]."). While the question is not squarely answered by *Buckley*, we have taken the position that, as a general matter, a government agency cannot constitutionally delegate to a private party responsibility for the conduct of litigation in the name of the United States or one of its agencies. *See* Memorandum for the Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel (May 20, 1983) (authority to conduct government's debt collection litigation may not constitutionally be delegated to private lawyers). By the same token, we believe that an agency may not constitutionally entrust to a private party the formulation and presentation of its views on its own authority to a court. Such a responsibility can only be carried out by an official of the government who has been appointed in accordance with the Appointments Clause.[16]

Because we believe that the Sentencing Commission is an executive branch agency,[17] we also believe that the Commission can constitutionally appoint pri-

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[16] We have taken the position that private counsel may be retained under contract without government appointments to perform certain litigating functions in connection with government debt collection, so long as they are "closely supervised and controlled" by government officials, and so long as "all final decisionmaking authority remained with duly appointed officers." *See* Memorandum for Richard K. Willard, Assistant Attorney General, Civil Division, from Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel, *Re H.R. 4659, The Omnibus Debt Collection and Credit Management Act of 1986* (June 13, 1986). We have also emphasized that "a mere patina of supervision having no real substance would be insufficient to render lawful the delegation of executive functions to a private individual." *See* Memorandum for Phillip D. Brady, Acting Assistant Attorney General, Office of Legislative and Intergovernmental Affairs, from Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, *Re Procurement Fraud Act of 1985* at 3 (Mar. 29, 1985). In this context, where the Commission intends to present arguments that will address the issue of its own governmental authority, we believe that all briefs and other court filings by the Commission must be signed by an officer of the United States. Moreover, it would probably be necessary that the individual who makes an oral presentation to the court be an appointed officer of the United States. On the other hand, there is no constitutional reason why private counsel may not be retained under contract to assist in the preparation of the Commission's court filings.

[17] Notwithstanding its statutory description as "an independent commission in the judicial branch," the Sentencing Commission must as a constitutional matter be regarded as within the executive branch because it performs an executive function (or, more precisely, a legislative function that can be delegated only to an executive agency). *See* Memorandum for Judge William W. Wilkins, Jr., Chairman, United States Sentencing Commission, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel (Jan. 8, 1987). *See also* Lewis J. Liman, *Constitutional Infirmities of the United States Sentencing Commission*, 96 Yale L.J. 1363, 1375 (1987) ("[T]o claim that the Commission is in the judiciary rather than the executive branch is simply not colorable.").

vate counsel and charge them with the performance of Article II litigating functions that are reserved under the Constitution to "officers of the United States."[18] Alternatively, the Commission could ask the Attorney General to appoint one of the Commission's own staff attorneys or private counsel as a special departmental attorney under 28 U.S.C. § 515(a), and to direct these individuals to present to the court the position favored by the Commission.[19]

If the Sentencing Commission is correct in its view of the law, and the Commission is ultimately held to be a judicial branch entity, it would have no power under the Appointments Clause to appoint counsel to exercise Article II litigating functions.[20] In this event, only the Attorney General would have authority to appoint counsel to represent the Commission in court. Accordingly, to insure against the consequences of its prevailing on the merits of this issue, the Commission may wish to ask the Attorney General to issue a parallel Department of Justice appointment to any attorney it wishes to have litigate in its name.[21] The Commission should consider this course of action not only for private counsel it may wish to employ, but also for its own General Counsel and any of his staff who perform litigating functions that, under the Constitution, can only be performed by officers of the United States.

Counsel appointed to present to the court the Commission's position would be subject to the criminal conflict of interest laws that apply to all government officers and employees. *See* 18 U.S.C. §§ 201–211. The consequences of this for attorneys otherwise engaged in private practice may be substantial, and include curtailment of private representations before government agencies, *see* 18 U.S.C. § 205, and a prohibition against sharing in any fees generated from such representations. *See* 18 U.S.C. § 203. These consequences may be mitigated somewhat for temporary or part-time employees in the *executive* or *legislative* branch by their appointment as "special government employees" under 18 U.S.C.

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[18] The Commission's constitutional power under the Appointments Clause of Article II to appoint an "inferior officer" of the United States would derive from its status as a "Department."

[19] This would be a desirable course if the Commission had some concern about the extent of its own authority to appear in court through its own counsel. And we see no reason why, in these circumstances, the Attorney General should not authorize the filing of separate briefs taking inconsistent positions on the merits, even if both would be signed by attorneys holding departmental appointments. There is precedent for such a course in the two briefs filed by the Department in *Buckley v Valeo*, which took different positions on the substantive legal issues involved in that case. *Compare* Brief for the Attorney General as Appellee and for the United States as Amicus Curiae *with* Brief for the Attorney General and the Federal Election Commission. The Federal Election Commission also filed a separate brief in this case *See supra* note 6. Both of the Department's briefs were signed by Attorney General Levi and Solicitor General Bork, though each was also signed by different members of the Solicitor General's staff. In addition, in the recent litigation involving the validity of the Attorney General's regulatory appointment of the independent counsel under 28 C.F.R. pt. 600, both the Attorney General and the independent counsel defended the validity of the appointments but made conflicting arguments on their implications. *See* Briefs filed by the Independent Counsel as Appellee and by the United States as Amicus Curiae, as well as the decision of the Court of Appeals in *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987) at 56 n.31.

[20] Indeed, it would have no power of appointment under that Clause at all, since it cannot by any stretch of the imagination be regarded as a "court of law."

[21] This is a course of action we have taken for several of the independent counsel appointed by the court under 28 U.S.C. § 593 to ensure their work against the possibility of a finding of unconstitutionality in pending litigation. *See* 28 C.F.R. pt. 600, 52 Fed. Reg. 7270 (Mar. 10, 1987).

§ 202(a).[22] However, the special designation under section 202(a) is not available for judicial branch appointees, so that they are subject to the full force of sections 203 and 205 during any period of government service, no matter how brief.

If the Commission is an executive agency, any attorney employed by the Commission on a temporary or part-time basis to litigate in its behalf could be appointed as a special government employee. 18 U.S.C. § 202(a). Such appointees would be barred from performing private representations only in matters pending before the agency in which they hold their appointment—either the Commission itself or this Department, or both, depending upon which agency appointed them, as discussed above.

For the following reasons, the Commission may wish in any event to ask the Attorney General to appoint any private counsel retained by it to represent its views in court. If the Commission is ultimately held to be a "judicial branch" entity, all of its employees, whether full-time or temporary, would be subject to the full force of the conflict of interest laws, since there is no provision in those laws for appointing "special government employees" in the judicial branch. Since the Commission would also in this event be unable constitutionally to conduct litigation through its own appointees, there may be no purpose served—and considerable hardship created—by asking private counsel to accept appointments to the Commission. In short, private counsel may prefer to accept appointment as a special government employee in the Department of Justice in order to avoid the particular difficulties that would be in store for them in accepting an appointment from the Commission if the Commission's views of its constitutional placement in the judicial branch were ultimately to prevail in court.

Conclusion

In summary, we believe that the Attorney General may, consistent with section 516, permit the Sentencing Commission independently to present its views respecting its status and authority to a court in litigation where it has been named as a party defendant. The Department, of course, remains responsible for conducting the litigation, for representing the Commission as a party defendant, and for exercising its own independent judgment respecting the position of the United States on the merits of the issues involved. In this regard, we remain convinced that, because of its composition and powers, the Sentencing Commission can only be defended as an entity within the executive branch. If the Sentencing Com-

[22] Employees in the executive and legislative branches may be designated by their employing agency official as "special government employees" if their service is not expected to exceed 130 days during any period of 365 days. Individuals so designated are subject to the disabilities deriving from 18 U.S.C §§ 203 and 205 only with respect to representational activity before the particular agency in which they are employed. *See* 18 U.S C. §§ 203(b), 205 The impact of the conflicts laws is even further limited where "special" appointees serve no longer than 60 days. *Id.* While special government employees are subject to the disqualification requirements of 18 U.S.C. § 208, they are not subject to the prohibition against supplementation of federal salary in 18 U S.C § 209

mission chooses to present to the court a contrary position on this and other related issues, it would in no way obviate the Department's continuing right and duty to present the position of the United States on them. Finally, if the Commission does choose independently to present its views in court, it may do so constitutionally only through individuals properly appointed as officers of the United States.

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

Legal Constraints on Lobbying Efforts in Support of Contra Aid and Ratification of the INF Treaty

The Administration may expend appropriated funds on grass-roots lobbying and assistance to private groups in support of ratification of the Intermediate-Range Nuclear Forces Treaty, but it may not communicate its support of the treaty through the undisclosed use of third parties.

The President, his aides, and cabinet officials may use appropriated funds for grass-roots lobbying in support of aid to the Contras until legislation is introduced. Although activities having the principal purpose of grass-roots lobbying would be prohibited after legislation is introduced, Administration officials could still engage in a wide variety of informational activities, such as writing letters, giving speeches, and briefing opinion leaders, as long as such communications on behalf of the Contras are not made in the guise of third parties.

February 1, 1988

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

Introduction and Summary

You have requested the opinion of this Office concerning the extent to which the Anti-Lobbying Act, 18 U.S.C. § 1913, and section 109 of the Foreign Relations Authorization Act for Fiscal Year 1988, Pub. L. No. 100–204, 101 Stat. 1331 (1987), impose constraints on the use of appropriated funds for proposed lobbying efforts in support of continued aid to the Nicaraguan Contras and ratification of the INF Treaty.[1] These provisions create three separate restrictions on the use of appropriated funds for lobbying purposes: 18 U.S.C. § 1913 prohibits the use of appropriated funds for activities designed to influence members of Congress concerning any legislation or appropriation; subsection (1) of section 109 of the Foreign Relations Authorization Act for Fiscal Year 1988 prohibits expenditures for "publicity or propaganda" designed to influence members of Congress regarding pending legislation; and subsection (3) of section 109 prohibits the use of appropriated funds for "publicity or propaganda purposes not authorized by Congress."

We understand that the lobbying activities under consideration may include mass mailings requesting the recipient to contact members of Congress and urge that they support the Administration's positions. They may also include briefings

[1] This memorandum addresses as a matter of statutory interpretation only the extent to which these provisions restrict lobbying activities. Should these statutory prohibitions foreclose specific activities you wish to pursue, we would be pleased to consider in a supplementary memorandum the constitutionality of these prohibitions as applied to such activities.

of opinion leaders throughout the country by appropriate Administration officials, as well as coordinating private lobbying efforts in support of Contra aid and ratification of the INF Treaty. The Administration is also considering referring media requests for "op-ed pieces" or interviews to Administration supporters in the private sector, soliciting the media to publish articles by or interviews with private sector supporters of the Administration's positions, and possibly preparing "op-ed pieces" for publication over the signature of private sector supporters. In light of the time constraints under which our advice is sought, we have relied on this Office's traditional learning concerning the scope of section 1913 and have not reexamined our long-standing interpretation of this provision. Moreover, for the interpretation of section 109 of the Foreign Relations Authorization Act, we have relied largely on the Comptroller General's opinions interpreting previous publicity or propaganda riders. Of course, the opinions of the Comptroller General, an agent of Congress, are not as a general matter binding on the executive branch. Opinions concerning publicity or propaganda riders similar to section 109, however, are relevant to the construction of that section because they may well be the best indication of what members of Congress intended to prohibit by enactment of such a rider.[2]

Based on these sources, we have concluded that section 1913 and sections 109(1) and (2) are wholly inapplicable to lobbying efforts in support of the INF Treaty. Accordingly, appropriated funds may be expended on grass-roots lobbying and assistance to private lobbying groups at any time with regard to ratification of the INF Treaty. Section 109(3) is applicable to lobbying in support of the INF Treaty. This section prohibits the Administration from engaging in "covert propaganda." Accordingly, the Administration may not communicate its support of the treaty through the undisclosed use of third parties.

We also conclude that because (1) section 1913 has been interpreted not to apply to grass-roots lobbying by the President, his aides, or Cabinet officials within the scope of their official responsibilities, and (2) section 109(1) has been read to apply only to lobbying on behalf of pending legislation, the President, his aides, and Cabinet officials may use appropriated funds for grass-roots lobbying on behalf of aid to the Contras until the introduction of legislation on that subject. After the legislation is introduced, however, section 109(1) would prohibit the Administration from engaging in activities which have as their principal purpose grass-roots lobbying, but would not interfere with a wide variety of informational activities, such as writing letters, giving speeches, and briefing opinion leaders. Both before and after legislation is introduced, section 109(3) prohibits communications on behalf of the Contras that are made in the guise of third parties.

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[2] Moreover, we note that the Comptroller General has a statutory role in certifying the expenses the Treasury may pay from appropriated funds. *See* 31 U.S.C. § 3526. Although we do not address or endorse the constitutionality of this provision, the Comptroller General's role in the certification process provides him with a means by which he may attempt to enforce his opinions in this area of the law.

Analysis

A. Anti-Lobbying Act

18 U.S.C. § 1913 provides:

> No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, request for legislation or appropriations which they deem necessary for the efficient conduct of the public business.

Although section 1913's broad wording would seem to prohibit virtually any efforts by the executive branch to influence congressional action in matters of legislation and appropriation, the Department of Justice has consistently read the provision more narrowly. Both the Office of Legal Counsel and the Criminal Division have taken the position that section 1913 does not apply at all to the lobbying activities of those officials of the executive branch whose positions typically and historically entail an active effort to secure public support for the legislative proposals of their administration.[3] This construction is based on the language of the statute that exempts lobbying activities that are carried on pursuant to an "express authorization by Congress." The Department's view has been that, as to those officials whose positions typically and historically entail actively seeking public support for legislative proposals, continued appropriation of funds by Congress for such positions constitutes "express authorization by Congress" for the lobbying activities of these officials, and thus exempts their activities from section 1913.[4] Officials whose activities are covered by this "express authoriza-

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[3] Memorandum for Arthur B. Culvahouse, Jr., Counsel to the President, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of 18 U.S.C. § 1913 to Lobbying Efforts in Support of Ratification of INF Treaty* at 6 n.7 (Dec 31, 1987) ("Culvahouse memo"), Memorandum for John R. Bolton, Assistant Attorney General, Office of Legislative Affairs, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re Applicability of 18 U.S.C. § 1913 to Contracts Between United States Attorneys and Members of Congress in Support of Pending Legislation* at 5–6 (Oct. 27, 1987) ("Bolton memo"); Memorandum for Paul Michel, Acting Deputy Attorney General, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Alleged Violations of 18 U.S.C. § 1913* at 2, 3–4 (Feb. 20, 1980) ("Michel memo"); Memorandum for Philip B. Heymann, Assistant Attorney General, Criminal Division from Thomas H. Henderson, Jr., Chief, Public Integrity Section, Criminal Division at 8–10 (Oct. 15, 1979) ("Henderson memo").

[4] Culvahouse memo at 6 n.7; Bolton memo at 5–6, Henderson memo at 8–10, Michel memo at 2, 3–4.

tion" exception to section 1913 include the President, his aides and assistants within the Executive Office of the President, and Cabinet members within their areas of responsibility.[5]

As to those officials who are within the coverage of section 1913, the Department has consistently interpreted the statute to prohibit only "grass-roots" lobbying by executive branch employees, *i.e.*, communication by executive branch employees directed to members of the public and intended to persuade them to lobby members of Congress. Even this restriction, however, does not apply to public speeches or writings in which executive branch officials urge public support for particular legislation, where such speeches or writings are not part of a large-scale campaign intended to galvanize the public into lobbying activity of its own.[6]

In sum, the Department has construed section 1913 to proscribe only

> conduct by those to whom no official lobbying responsibilities are delegated by the President or the head of an agency or department, and to limit lobbying activities outside the subject area of official responsibility of those with formal lobbying duties. The nature of the activities those subject to the statute may not engage in is limited to large-scale grass-roots efforts to generate contacts with Members of Congress.

Michel memo at 4 (footnote omitted).

B. Foreign Relations Authorization Act

The remaining two restrictions on the use of appropriated funds for lobbying are contained in section 109 of the Foreign Relations Authorization Act for Fiscal Year 1988. That section states:

> No funds authorized to be appropriated by this Act or by any other Act authorizing funds for any entity engaged in any activity concerning the foreign affairs of the United States shall be used:
>
> (1) for publicity or propaganda purposes designed to support or defeat legislation pending before Congress;

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[5] Although this Department has consistently construed section 1913 as not inhibiting the lobbying activities, including grass-roots lobbying, of the President, his aides and assistants in the Executive Office, and Cabinet members within their areas of responsibility, we suggest that this analysis should not be stretched to justify lobbying activities of unprecedented scope. Accordingly, we caution against grass-roots appeals, even by the President, that involve substantial expenditures of appropriated funds for such things as television or radio time, newspaper or magazine advertisements, or mass, unsolicited distribution of printed materials

[6] Culvahouse memo at 6 n.7; Bolton memo at 5; Memorandum for Robert J. Lipshutz, Counsel to the President, from John M Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Statutory Restraints on Lobbying Activity by Federal Officials* at 10–14 (Nov. 29, 1977) ("Harmon memo")

> (2) to influence in any way the outcome of a political election in the United States; or
>
> (3) for any publicity or propaganda purposes not authorized by Congress.

Pub. L. No. 100–204, tit. I, § 109, 101 Stat. 1331, 1339 (1987). Of these three provisions only subsections (1) and (3) are immediately relevant to the activities you have under consideration.[7]

Section 109(1) originally appeared as section 503(1) of S. 1394, the Senate version of the authorization bill. There is no legislative history directly bearing on the reasons for its introduction or the scope of the activities it was meant to prohibit.[8]

The Comptroller General has construed previous publicity or propaganda riders regarding pending legislation as prohibiting grass-roots lobbying. As a recent Comptroller General opinion put it:

> The Comptroller General has construed this kind of lobbying statute as applying to indirect or "grass-roots" lobbying. In other words, the statute prohibits appeals to members of the public suggesting that they, in turn, contact their elected representatives to indicate support of, or opposition to, pending legislation, thereby expressly or implicitly urging the legislators to vote in a particular manner.

B-226449, 1987 WL 102278, at *3 (C.G. Apr. 3, 1987). *See also* 56 Comp. Gen. 889, 890–91 (1977).

Appeals to members of the public to "let the Congress know how they feel on this critical issue" or to contact your representatives and make sure they are aware of your feelings concerning this important legislation are considered violations of the publicity or propaganda prohibition when the context of the appeal makes clear what views the public is being urged to communicate. B-178648, 1973 WL 21832, at *4 (C.G. Sept. 21, 1973); B-128938 (July 12, 1976); General Ac-

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[7] To conform to the restrictions of section 109(2), any lobbying efforts should, of course, eschew any suggestion that legislators should be supported or defeated in any election because of their position on Contra aid or the INF Treaty.

[8] Publicity or propaganda riders date back at least to the early 1950s. *See, e g.*, Labor-Federal Security Appropriation Act, 1952, ch. 373, § 702, 65 Stat 223 (1951). The sparse legislative history available on this provision indicates that it was intended by its sponsor "to prevent as far as possible the spending of unreasonable amounts for propaganda and publicity purposes." 97 Cong. Rec. 4098 (1951) (remarks of Representative Smith of Wisconsin). The section's sponsor also expressed the belief, not entirely justified by experience, that "[w]e can well distinguish between what is propaganda and what is educational matter." *Id.* We do not find these comments particularly helpful in construing section 702 of the 1951 Act, much less so in construing section 109. We consider it likely that the Congress that enacted the Foreign Relations Authorization Act was more influenced by the recent Comptroller General decisions interpreting publicity or propaganda riders than by the relatively opaque remarks of a single congressman thirty-six years earlier.

counting Office, Principles of Federal Appropriations Law 3–136 to 3–137 (1982) ("GAO Manual"). An appeal to the public to contact members of Congress in regard to a particular issue is not legitimized by including a disclaimer that the appeal is made "regardless of whether those who contact their Congressman happen to be in agreement with me." B-178648, 1973 WL 21832, at *5 (C.G. Sept. 21, 1973).

On the other hand, the Comptroller General has not interpreted provisions identical to section 109(1) to prohibit communication to the public concerning legislation. In construing these riders, the Comptroller General has recognized that "[e]very agency has a legitimate interest in communicating with the public and with the Congress regarding its functions, policies, and activities." GAO Manual at 3–133. In decision B-178528, 1978 WL 10850, at *2 (July 27, 1973), the Comptroller General noted: "The President, his Cabinet, and other high officials have a duty to inform the public on government policies and, traditionally, high-ranking officials have utilized government resources to disseminate information in explanation and defense of those policies." Clearly the Comptroller General does not interpret the publicity or propaganda riders as prohibiting the use of appropriated funds for all communications concerning legislation. 56 Comp. Gen. 889, 890 (1977); B-178528, 1978 WL 10850 (C.G. July 27, 1973).[9] In other words, the Comptroller General essentially prohibits communications whose *raison d'etre* is generating public pressure to influence Congress. Communications

[9] We do not believe that either section 1913 or the publicity or propaganda riders impose any requirement of neutrality or balance in the presentation of the Administration's views. The Comptroller General has recognized that whenever an agency's policies or activities are affected by pending or proposed legislation, "discussion by officials of that policy or activity will necessarily, either explicitly or by implication, refer to such legislation and will presumably be either in support of or opposition to it." 56 Comp. Gen 889, 890 (1977) The Administration may advocate one side or the other on issues of public policy without violating statutory limits on the use of appropriated funds.

It is true that in two instances GAO considered government publications to constitute propaganda because they were "oversimplified" and "misleading." The first case involved a pamphlet distributed by the former Energy Research and Development Administration ("ERDA") entitled "Shedding Light on Facts About Nuclear Energy." The pamphlet, which had a strong pro-nuclear bias, purportedly had been created as part of an employee motivational program, but GAO found that ERDA had "printed copies of the pamphlet far in excess of any legitimate program needs and inundated the State of California with them in the months preceding a nuclear safeguards initiative vote in that State." GAO Manual at 3–140. GAO determined that the pamphlet constituted "propaganda" because it was "oversimplified and misleading," and recommended that distribution be halted and remaining copies destroyed *Id* GAO did not find, however, that publication of the pamphlet constituted an illegal use of appropriated funds because it was directed at state rather than federal legislation *Id*

The other instance in which GAO objected to publications because they were "oversimplified" also involved an issue concerning nuclear energy, the Clinch River Breeder Reactor Project. Upon review, GAO found that several of the publications were "oversimplified and distorted propaganda and as such questionable for distribution to the public." *Id* Because the publications had been funded with private money, however, the GAO found no violation of federal law.

We do not believe that these two cases impose any substantial limits on executive branch speech As already indicated, the Comptroller General has recognized in a published opinion that executive branch officials are not neutral on questions of public policy and that they must be free to express their views. The Comptroller General's unpublished opinions in the nuclear energy cases must be narrowly construed as limited to false or misleading factual information and not as imposing any general requirement of neutrality or objectivity Any other approach would raise very serious constitutional concerns.

setting forth an agency's position on legislation are permissible, however, even if their natural consequence is to increase the support for this position.[10]

A corollary to the Comptroller General's prohibition on grass roots lobbying is a prohibition on the provision of assistance to private groups engaged in lobbying on pending legislation. This is "an outgrowth of the concept that an agency should not be able to do indirectly that which it cannot do directly." GAO Manual at 3–141.

There are very few Comptroller General decisions in this area. The GAO Manual, however, states that the publicity or propaganda riders bar

> the use of appropriated funds to develop propaganda material to be given to private lobbying organizations to be used in their efforts to lobby Congress. An important distinction must be made. There would be nothing wrong with servicing requests for information from outside groups, lobbists [sic] included, by providing such items as stock education materials or position papers from agency files, since this material would presumably be available in any event under the Freedom of Information Act. The improper use of appropriated funds arises when an agency assigns personnel or otherwise provides administrative support to prepare material not otherwise in existence to be given to a private lobbying organization.

GAO Manual at 3–141.

This aspect of the Comptroller General's jurisprudence may be best characterized as a prohibition on active assistance to groups or individuals seeking to influence legislation. Administration officials may provide such groups only assistance that does not require the expenditure of additional appropriated funds. In short, the Comptroller General interprets the publicity or propaganda rider concerning pending legislation in much the same way that this office and the Criminal Division have interpreted 18 U.S.C. § 1913.[11] There are, however, two sig-

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[10] Moreover, the Comptroller General has recognized that the publicity or propaganda riders provide little clear guidance in distinguishing permissible from prohibited expenditures He has stated:

> GAO will rely heavily on the agency's administrative justification. In other words, the agency gets the benefit of any legitimate doubt. GAO will override the agency's determination only where it is clear that the action was designed to influence Congress in certain precise ways

GAO Manual at 3–134. The Comptroller General does not "override administrative determinations and justification of propriety, except where they are so palpably erroneous as to be unreasonable in the face of the prohibiting statute." B-178528, 1978 WL 10850, at *2 (C G. July 27, 1973).

[11] Although publicity or propaganda riders have received little attention from this office, our conclusions have not been inconsistent with those of the Comptroller General. In a 1977 opinion we interpreted the riders as speaking to "mass distribution, the use of federal funds to underwrite a dissemination of some magnitude." Harmon memo at 5. The conduct that Congress sought to avoid was not routine executive branch lobbying of Congress or of particular citizen interest groups, but was rather "the unchecked growth of a government public relations arm used to disseminate agency appeals to the public at large." *Id* at 6

In keeping with this understanding, the Harmon memo concluded that the publicity or propaganda rider imposed no limitation on "the initial expression of an official's opinion," but only upon the "subsequent dissemina-

nificant differences. The Department of Justice has opined that section 1913 does not apply at all to the lobbying activities of those officials of the executive branch whose positions typically and historically entail an active effort to secure public support for the legislative proposals of their administration, at least to the extent that those officials engage in the kinds of activities typically and historically engaged in by the occupants of those offices. We have held that this exception to section 1913 includes the President, his aides and assistants within the Executive Office of the President, and Cabinet members within their areas of responsibility. Under our interpretation, these officials would be permitted to use appropriated funds to engage in grass-roots lobbying to the extent that such lobbying has typically and historically been engaged in by their predecessors. Nothing in the Comptroller General's opinions, however, suggests that the GAO recognizes a comparable exception under the publicity or propaganda rider.

The second major difference is that the publicity or propaganda rider applies only when legislation is "pending." The Comptroller General recognizes that this is a threshold requirement in determining the applicability of the publicity or propaganda rider. GAO Manual at 3–134. This interpretation is supported by a comparison of section 109(1), which refers to "pending legislation," with 18 U.S.C. § 1913, which specifically prohibits certain lobbying activities "whether before or after the introduction of any bill or resolution."

The final restriction discussed in this memorandum is the prohibition of section 109(3) on the use of appropriated funds for "publicity or propaganda purposes not authorized by Congress." This subsection was added in an amendment offered by Senator Kerry, who explained that his amendment was motivated by a particular abuse:

> During the Iran hearings, we learned of money that was being illegally spent by the State Department on propaganda efforts with respect to the whole issue of Central America. It was agreed by the members of the Foreign Relations Committee that there should be some criminal penalties attached to that and not merely a prohibition as to that activity.[12]

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[11] (. . . continued)

tion by the Government of those views when they no longer qualify as a news event, *e.g.*, the mass mailing of unsolicited copies of an official's speech urging support of particular legislation." *Id* The memo cautioned, however, that the circumstances of a particular dissemination may bring otherwise inoffensive speech within the prohibition of the publicity or propaganda rider. As the memo noted: "[e]xtensive campaigns in support of administration proposals may . . . become so excessive as to amount to forbidden overreaching by the Executive Branch Under some circumstances, therefore, expression that is ordinarily outside the scope of the rider may well rise to the level of propaganda." *Id.* at n.14.

The same opinion noted two further limitations derived from the publicity or propaganda rider. First, the rider prohibits grass-roots lobbying. "An explicit or implicit call for citizens to contact their Congressional representatives with their views involves a clearly forbidden effort in the nature of propaganda to influence legislation " *Id* at 7. Finally, the memo suggested that "partisan expressions" were also "suspect," although it recognized that the rider did not prohibit taking a stand on a controversial issue

Id

133 Cong. Rec. 26,496 (1987).

Although Senator Kerry did not specify what he meant by "money that was being illegally spent by the State Department on propaganda efforts with respect to the whole issue of Central America," it appears that he was referring to the self-described "white propaganda" operation conducted by the State Department's Office of Public Diplomacy for Latin America and the Caribbean ("S/LPD"). The Report of the Congressional Committees Investigating the Iran-Contra Affair describes the "public diplomacy" efforts of S/LPD as "public relations-lobbying, all at taxpayers' expense." H.R. Rep. No. 433 (S. Rep. No. 216), 100th Cong., lst Sess. 34 (1987). The report also quotes with apparent approval the Comptroller General's conclusion that the "white propaganda" efforts violated the restriction prohibiting the use of federal funds for publicity or propaganda purposes not authorized by Congress. *Id.* (quoting 66 Comp. Gen. 707 (1987)).

In his report the Comptroller General evaluated the legality of certain activities of the Office for Public Diplomacy. These activities included "arrang[ing] for the publication of articles which purportedly had been prepared by, and reflected the views of, persons not associated with the government but which, in fact, had been prepared at the request of government officials and partially or wholly paid for with government funds." 66 Comp. Gen. at 708. S/LPD also used a "cut-out" to arrange visits to various news media by a Nicaraguan opposition leader. *Id.* at 709. The Comptroller General found that these activities were "beyond the range of acceptable agency public information activities because the articles prepared in whole or part by S/LPD staff as the ostensible position of persons not associated with the government and the media visits arranged by S/LPD were misleading as to their origin and reasonably constituted 'propaganda' within the common understanding of that term." *Id.* Such activities therefore violated the rider of the Department of State appropriation act in effect at that time that prohibited "publicity or propaganda . . . not authorized by Congress."[13]

The prohibition in subsection (3) on the use of appropriated funds for "publicity or propaganda purposes not authorized by Congress" would thus appear to

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[12] In addition to adding the prohibition on use of appropriated funds for publicity or propaganda purposes not authorized by Congress, Senator Kerry's amendment also provided criminal penalties of up to one year's imprisonment and/or a fine of up to $1000, as well as removal from office. 133 Cong. Rec. 26,496 (1987). The House bill did not contain a publicity or propaganda provision. At the conference, the two houses agreed to Senator Kerry's version, but without the criminal and employment penalties. 133 Cong. Rec. 35,491 (1987).

[13] The application of such publicity or propaganda riders to covert propaganda activities apparently originated in an opinion in October 1986 regarding the Small Business Administration. At that time the Administration was proposing to transfer the SBA to the Department of Commerce and to eliminate SBA's finance and investment programs and some management assistance activities. SBA prepared a substantial amount of public information material explaining and generally supporting the proposed changes. These included a pamphlet entitled "The Future of SBA," suggested editorials, and suggested "letters to the editor." The Comptroller General found no problem with most of the material, but noted he had "serious difficulties with SBA's distribution of 'suggested editorials' supporting the Administration's reorganization plan. The editorials, prepared by SBA for publication as the ostensible editorial position of the recipient newspapers, are misleading as to their origin and reasonably constitute 'propaganda' within the common understanding of that term." B-223098.2, 1986 WL 64325, at *6 (C.G. Oct. 10, 1986). The Comptroller General concluded that [t]he SBA 'suggested editorials' are beyond the range of acceptable agency public information activities and, accordingly, violate the 'publicity and propaganda' prohibition of section 601." *Id*

embody the view expressed in the Comptroller General's September 30, 1987, opinion that "covert propaganda activities of an agency" are an illegal use of appropriated funds.[14]

C. Application of 18 U.S.C. § 1913 and Section 109 of the Foreign Relations Authorization Act to Lobbying Activities on Behalf of the INF Treaty and Contra Aid

1) INF Treaty

For the reasons set forth in our December 31, 1987, memorandum, we do not believe that the Senate's advice and consent to the ratification of a treaty constitutes "legislation." Although that memorandum discussed legislation within the context of 18 U.S.C. § 1913, we believe that it has the same meaning when used in the rider prohibiting the use of appropriated funds to influence pending legislation. Because we do not believe that the advice and consent of the Senate constitutes legislation, the publicity or propaganda rider of section 109(1) would be inapplicable to lobbying efforts in support of the INF Treaty. Accordingly, we conclude that neither the grass-roots lobbying restriction nor the prohibition on assistance to private lobbying groups would apply to your efforts in support of the INF Treaty.

It is clear, however, that the rider prohibiting covert propaganda activities would apply to ratification of the INF Treaty. The legislative history of section 109(3) implies Congressional approval of the Comptroller General's view, enunciated in his September 30, 1987, opinion, that the "not authorized by Congress" version of the publicity or propaganda rider prohibits covert propaganda activities. Accordingly, the Administration may not covertly communicate its support of the INF Treaty in the guise of a private group or individual.

2) Contra Aid

According to the Comptroller General, the legal restrictions of section 109(1) on lobbying in support of aid to the Contras depend on whether the lobbying occurs before or after legislation reflecting the Administration's position is introduced in Congress. In the absence of such pending legislation, section 109(1) is simply inapplicable to lobbying efforts. Moreover, under the Department's longstanding interpretation of section 1913, that provision would not restrict grass-roots activities of the President, his aides within the Executive Office of the President, or Cabinet members within their areas of responsibility. Accordingly, the

[14] B-229069, 1987 WL 95776, at *3 (C.G. Sept. 30, 1987). The Comptroller General has also consistently interpreted earlier riders prohibiting "publicity or propaganda . . . not authorized by Congress" as prohibiting agency "self-aggrandizement" or "puffery," *i.e.*, "publicity of a nature tending to emphasize the importance of the agency or activity in question." 31 Comp. Gen. 311, 313 (1952). It seems clear that this prohibition would not be applicable to any of your contemplated activities.

only restriction on Administration lobbying activities in the period preceding introduction of an Administration-backed bill derives from section 109(3), which prohibits covert attempts to mold opinion through the undisclosed use of third parties.

After an Administration-backed bill is introduced, however, section 109(1) would be applicable. Under the Comptroller General's interpretation, this provision would restrict Administration officials, including those in the Executive Office of the President, from engaging in grass-roots lobbying. It would not, however, restrict Administration officials from engaging in public informational activities such as writing speeches or letters in the areas of their official responsibility or briefing opinion leaders, even if the natural consequence of such activities is to increase public support for the President's position on legislation aiding the Contras.

According to the decisions of the Comptroller General in this area, the legality of providing assistance to private groups that support Contra aid will depend on whether the assistance requires the use of appropriated funds in excess of what would otherwise be expended. Accordingly, the Administration can make available to private groups, upon request, printed materials that explain and justify the Administration's position on Contra aid. These materials must be items that were created in the normal course of business and not specifically produced for use by these private groups.

We also believe that the Administration may respond to media requests for "op-ed pieces" or interviews by referring the media to supporters in the private sector, because such responses would not involve additional use of appropriated funds. It would be unwise, however, for the Administration to solicit the media to print articles by or interviews with anyone not serving in the government. And, of course, the Administration cannot assist in the preparation of any articles or statements by private sector supporters, other than through the provision of informational materials as described in the preceding paragraph.

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

Constitutionality of Amended Version of the Indian Land Consolidation Act

As amended, the Indian Land Consolidation Act should survive a constitutional challenge under the Takings Clause of the Fifth Amendment because it does not completely abolish both descent and devise of Indian trust lands.

Consistent with the Due Process Clause, the amended Act may be applied only to those allottees given a "reasonable opportunity" to arrange their affairs to avoid escheat.

March 4, 1988

MEMORANDUM OPINION FOR THE SOLICITOR
DEPARTMENT OF THE INTERIOR

You have requested the opinion of this Office on the constitutionality of 25 U.S.C. § 2206, the "escheat" provision of the Indian Land Consolidation Act of 1983, Pub. L. No. 97–459, § 207, 96 Stat. 2515, 2519, as amended by Pub. L. No. 98–608, § 1(4), 98 Stat. 3171, 3172 (1984). Amended section 2206 prohibits intestate descent of certain fractional interests in allotment lands and limits testamentary devise of those interests to persons who already own an interest in the same land. Section 2206 further provides that the fractional interests of owners of allotted lands who died intestate or who attempted to devise their interest to persons who did not already hold an interest in the land escheat to the tribe that has jurisdiction over the land. Although the issue is not free from doubt, we believe that the restrictions that section 2206 imposes on the possibility of descent and devise will withstand a challenge under the Takings Clause of the Fifth Amendment. We also conclude, however, that due process requires that the escheat provisions of section 2206 be applied only against landowners who had a reasonable opportunity to arrange their affairs to avoid forfeiture of their interests.

Background

Current section 2206 is an amended version of section 207 of the Indian Land Consolidation Act of 1983, Pub. L. No. 97–459, 96 Stat. at 2519. As originally enacted, section 207 provided that:

> No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall [descend] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the

total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.

In *Hodel v. Irving*, 481 U.S. 704 (1987), the Supreme Court invalidated original section 207. The majority of the Court, in an opinion by Justice O'Connor, held that the complete abrogation of the right to dispose of property at death by descent or devise constituted an uncompensated taking in violation of the Just Compensation Clause of the Fifth Amendment. Justice Stevens, writing for himself and Justice White, agreed that section 207 was unconstitutional, but on the ground that the statute effected a denial of property without due process of law because it did not afford holders of fractional interests "a reasonable opportunity to make *inter vivos* dispositions that will avoid the consequences" of the law. *Id.* at 726.

Congress amended section 207 to make three changes in the statute.[1] The first concerns the definition of fractional interests covered by the law. Where old section 207 applied to fractional interests of 2% or less of a tract that earned $100 or less in the year prior to escheat (*i.e.*, the year prior to the death of the allottee), the new version applies to fractional interests of 2% or less that are "incapable of earning $100 in any one of the five years from the date of decendent's death." 25 U.S.C. § 2206(a). The fact that the fractional interest earned "less than $100 in any one of the five years before the decedent's death . . . [constitutes] a rebuttable presumption that such interest is incapable of earning $100 in any one of the five years following the death of the decedent." *Id.* This change was made to prevent the escheat of valuable land that had, because of temporary market conditions, failed to earn $100 in the year preceding the allottee's death.

The second change made by the 1984 amendments was the elimination of the total ban on dispositions of covered interests by testamentary devise. The statute now permits disposition by devise of a covered interest "to any other owner of an undivided fractional interest in such parcel or tract." 25 U.S.C. § 2206(b). Finally, the statute provides that its escheat provisions may be superseded by tribal law, subject to the approval of the Secretary of the Interior. The Secretary may not, however, approve any alternative tribal scheme "that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests." 25 U.S.C. § 2206(c).

The critical difference between the current statute and its predecessor is that the former does permit some testamentary disposition of fractional interests.[2] The

[1] The amendment occurred after the escheat of the interests involved in *Hodel v Irving*, but before appellate review of the resulting lawsuit The Eighth Circuit declared that both the original and amended versions of the statute were unconstitutional *Irving v Clark*, 758 F.2d 1260, 1261 n.1, 1269 (8th Cir 1985). The Supreme Court dismissed the latter "declaration" as "at best, dicta," and explicitly declined to rule on the constitutionality of the amended statute. *Hodel v. Irving*, 481 U S. at 710 n.1.

[2] We believe that only the second change, the relaxation of the ban on descent or devise of fractional interests, is significant for purposes of constitutional analysis. The narrowing of the definition of interests subject to escheat under the act has no bearing on the constitutionality of the escheat of interests that are covered. Similarly, the invitation to enact alternative procedures under superseding tribal law gives no greater legitimacy to the statutorily prescribed procedures applicable if the invitation is refused, particularly since no individual allottee has the authority to require the tribe to accept the invitation.

allottee's right to transfer property at death is therefore not wholly destroyed. The amended statute does not, however, provide any grace period for allottees to make inter vivos dispositions to avoid escheat of their interests. Accordingly, two constitutional issues are presented by the amended statute; first, whether the limited right to transfer that remains is sufficient to render the statute a permissible regulation rather than an impermissible taking, and second, whether the absence of a grace period makes the escheat of a covered interest a deprivation of property without due process of law.

Analysis

The Court in *Hodel v. Irving* condemned original section 207 because it completely abolished "both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property." 481 U.S. at 718. Although recognizing Congress' "broad authority to regulate the descent and devise of Indian trust lands," *id.* at 712, and even though conceding the legitimacy of the government's purpose in seeking consolidation of these small interests, *id.*, the Court held that the "*total* abrogation" of any possibility of descent or devise of covered interests constituted an unlawful taking. *Id.* at 717.

The Court's opinion, however, includes important dicta suggesting that the United States retains broad power to restrict descent and devise of such Indian lands in a manner not dissimilar to the restriction at issue here. The opinion acknowledges the "long line of cases recognizing the States', and where appropriate, the United States', broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause." *Id.* It then explicitly states that some limitations on an allottee's ability to transfer his fractional interest at death would be constitutional. "Surely it is permissible for the United States *to prevent the owners of such interests from further subdividing them among future heirs on pain of escheat.*" *Id.* at 718 (emphasis added). What the Court could not countenance, what made "[t]he difference in this case," was "the fact that both descent and devise are completely abolished." *Id.* at 717.

Amended section 2206 does not suffer from this critical defect. It does eliminate descent of covered interests by intestate succession, and it restricts devise of such interests to other holders of fractional interests in the same tract. This provision obviously limits an allottee's ability to choose his devisee, since only devises to other holders of interests in the property are permitted. But the Court has already indicated that limiting the allottee's choice by requiring the transfer of his entire interest to a single devisee, as opposed to subdividing the interest among several devisees, would "[s]urely . . . [be] permissible." *Id.* at 718. Moreover, the Court's opinion recognized that "[t]he Government has considerable latitude in regulating property rights in ways that may adversely affect the owners," *id.* at 713, and cited with approval the case of *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), in which the Court reaffirmed the principle

that "'[w]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking.'" *Id.* at 497 (quoting *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979)).

Amended section 207 admittedly would preclude, absent some inter vivos transaction, transfers by devise from one generation to the next. It is not uncommon, however, for the law to limit a testator's ability to transfer property to the next generation. The rule against perpetuities and the statutes providing for a forced share for a surviving spouse are obvious examples of legal rules that restrict a testator's ability to transfer property to his descendants. The spouse's elective share statutes typically require that one-third to one-half of the estate be left to the surviving spouse.[3] By contrast, the interests at stake here, which range in size from modest to infinitesimal, will typically constitute a much smaller portion of an allottee's estate. We believe, therefore, that the escheat provisions of the amended statute would not be unconstitutional under the majority's takings analysis in *Hodel*.

We do not have the same confidence with respect to the due process issue. As noted earlier, Justice Stevens found original section 207 unconstitutional because it did not allow allottees whose interests would be subject to escheat sufficient opportunity to make inter vivos arrangements to avoid the effects of the statute. The plaintiffs' decedents in the three cases decided by *Hodel* died between two and five months after the effective date of the Indian Land Consolidation Act. Justice Stevens concluded that the statute unconstitutionally deprived plaintiffs' decedents of their property without due process of law because they were not afforded "a reasonable grace period . . . to put their affairs in order." 481 U.S. at 733.

Justice Stevens' concurrence is particularly important because he wrote the majority opinion in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), the leading Supreme Court case on due process limitations on forfeiture statutes. *Texaco* involved the constitutionality of an Indiana statute that provided that mineral rights that were unused for a period of twenty years would be extinguished and revert to the owner of the surface estate, unless the owner of the rights filed a statement of claim prior to the end of the twenty year period. The statute contained a two-year grace period in which owners of interests subject to forfeiture at the time the statute took effect could file a statement of claim and retain their rights.

The statute's constitutionality was challenged by owners of mineral rights that were unused for twenty years or more at the time the statute took effect and who failed to file statements of claim within the two-year grace period. The owners of the lapsed interests claimed that they had been deprived of their property without due process of law, because they had not received notice of the imminent lapse of their interests. The Court, by a 5 to 4 margin, rejected this claim, holding that to initiate a new legislative scheme that adversely affected property rights,

[3] We recognize that these laws do not operate under pain of escheat and thus may be distinguishable from the statute at issue here. The *Irving* Court, however, specifically stated that restrictions may be enforced "on pain of escheat." 481 U.S. at 718.

a state "need do nothing more than enact and publish the law, *and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.*" 454 U.S. at 532 (emphasis added).[4]

The amended version of section 2206 does nothing to provide a grace period that will afford the owner of the lands at issue "a reasonable opportunity to familiarize itself with its terms and to comply," since technically the amended statute was effective upon enactment. We believe, therefore, that applying the standard of *Texaco*, the Supreme Court would hold that escheat of a property interest without affording the owner any opportunity to avoid the forfeiture would violate the Due Process Clause.[5] Accordingly, we believe it likely that the Supreme Court would find that amended section 2206 effects an unconstitutional deprivation of property without due process of law as applied to any allottee who did not have a reasonable opportunity to arrange his affairs to avoid forfeiture of his interest.

We understand that final disposition of escheatable interests belonging to allottees who have died since enactment of the amended statute has been stayed pending the opinion of this Office. Your Department has also taken steps to advise Indian landowners subject to section 2206 of its provisions and effects. These steps have varied from agency to agency, but have included such measures as written notices sent to all landowners, written notices sent to all tribes, public meetings to explain the law, publication of articles in local newspapers, and oral notice to landowners who visited agency offices. Some agencies have provided comprehensive information to all individual landowners, while other agencies appear to have taken no action whatever.

The Supreme Court has not specified what constitutes a "reasonable opportunity" for those affected to familiarize themselves with law and avoid forfeiture. In the *Texaco* case, a two-year grace period was deemed sufficient, even though there was no effort by the state to bring the forfeiture law to the attention of the owners of affected mineral interests. On the other hand, plaintiffs' decedents in *Hodel v. Irving* died between two and five months after the enactment of original section 2206. Justices Stevens and White concluded that they had not had "anything approaching a reasonable opportunity to arrange for the consolidation of their respective fractional interests with those of other owners." 481 U.S. at 732–33.

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[4] The four dissenting justices argued that the unusual nature of the Indiana statute required more than simple publication and a reasonable grace period. *See Texaco*, 454 U S at 542 (Brennan, J. dissenting) They would have required individual notice and an opportunity to cure before any mineral rights could be forfeited.

[5] We are fortified in this conclusion by considering the votes of individual justices in *Hodel v. Irving*. Justices Stevens and White voted to strike down the original section 2206 because it lacked a grace period and would presumably find the same omission in the amended version equally objectionable. We assume that the dissenters in *Texaco* (Justices Brennan, White, Marshall, and Powell), who argued in that case that due process required both a reasonable grace period *and* individual notice of the impending forfeiture, would share that view With Justice Powell's retirement, there are four sitting justices who have already expressed views strongly indicating amended section 2206 is unconstitutional. We have no reason to believe that the other members of the *Texaco* majority who voted to uphold the Indiana statute containing a two-year grace period on the ground that such a period provided those affected a reasonable opportunity to comply with the law would uphold amended section 2206, which contains no grace period whatever.

Although the lack of Supreme Court and lower court authority defining what constitutes "a reasonable opportunity" makes this standard difficult to apply, common sense suggests that there is an inverse relationship between the government's efforts to publicize a forfeiture statute and the length of time constitutionally required for the grace period. In other words, if the government simply publishes a forfeiture statute in the normal manner and relies on word of mouth to spread the news, a longer grace period may well be required than if the government makes extraordinary efforts to bring the statute to the attention of affected persons.

In the instant case, the efforts by the Department of the Interior to bring amended section 2206 to the attention of affected Indian landowners have varied widely. Because your Department is much better able than we to determine the effectiveness of its notification efforts, we believe you are in a better position to determine when affected landowners have been afforded a "reasonable opportunity" to adjust their affairs.[6]

Conclusion

The very nature of the Court's takings jurisprudence, which requires an "essentially ad hoc" analysis of factors "such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action," *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), *quoted in Hodel v. Irving*, 481 U.S. 704, 714 (1987), precludes certainty in resolving the question posed by your letter. It is true that amended section 2206 provides allottees only slightly greater opportunities to transfer their property at death than did the original version condemned in *Hodel*. Nevertheless, we believe that the crux of the Court's objection to the original statute, the *total* elimination of any transfer by descent or devise, has been eliminated. In view of Congress' broad authority to regulate the transfer of Indian lands, and the Court's acknowledgment of the seriousness of the fractionation problem, we believe amended section 2206 would survive constitutional challenge under the Takings Clause. We believe, however, that in order to comply with the requirements of the Due Process Clause, application of the statute must be limited to those allottees who had an adequate opportunity to adjust their affairs to avoid forfeiture of their interests.

JOHN O. MCGINNIS
Deputy Assistant Attorney General
Office of Legal Counsel

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[6] For whatever assistance it may be, however, we offer one observation. The amendment of section 2206 was enacted on October 30, 1984, and took effect immediately. The first step by the Department of the Interior in publicizing the new statute appears to have been a directive sent by the Deputy to the Assistant Secretary-Indian Affairs (Operations) to all Area Directors on January 25, 1985, advising that "Area Offices and Agencies are urged to provide all Indian landowners under their jurisdiction with notice of [section 2206's] effects." *See* Memorandum from the Acting Deputy to the Assistant Secretary-Indian Affairs (Trust and Economic Development) to all Area Directors (June 9, 1987) Thus those agencies that took any steps at all to notify their clients of the law did so no earlier than February 1985. We suggest that a reasonable grace period may therefore have to extend several months from February 1985.

Statute Limiting the President's Authority to Supervise the Director of the Centers for Disease Control in the Distribution of an AIDS Pamphlet

Statutory provision requiring the Director of the Centers for Disease Control to distribute an AIDS information pamphlet to the public "without necessary clearance of the content by any official, organization or office" violates the separation of powers by unconstitutionally infringing upon the President's authority to supervise the executive branch.

March 11, 1988

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This memorandum responds to your request that this Office comment on the constitutionality of a provision found in H.J. Res. 395 (the fiscal 1988 Continuing Resolution), which purports to require the Director of the Centers for Disease Control ("CDC") to arrange for the mass mailing of AIDS information fliers, free from any executive branch supervision. For the reasons set forth below, we believe that this provision violates the separation of powers by unconstitutionally infringing upon the President's authority to supervise the executive branch.[1]

I. Background

The provision in question is found at page 22 of the "Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Act," one of the appropriations measures subsumed within H.J. Res. 395. That provision requires "[t]hat the Director [of the CDC] *shall cause to be distributed without necessary clearance of the content by any official, organization or office*, an AIDS mailer to every American household by June 30, 1988, as approved and funded by the Congress in Public Law 100–71" (emphasis added).[2]

[1] This memorandum is confined to the constitutional illegitimacy of this provision's restriction on the President's exercise of his supervisory powers. Accordingly, this memorandum does not address the constitutionality of the provision's establishment of a June 30, 1988, deadline for the mailing of AIDS fliers. *See* text of provision, *infra*, main text.

[2] The provision's legislative history suggests that congressional concern over White House delays in authorizing the mailing of AIDS fliers by the CDC led to passage of the provision under scrutiny in this memorandum. The Senate Appropriations Committee Report accompanying the fiscal 1988 Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriations Bill stated: "The Committee is greatly concerned that the $20,000,000 provided by the Committee in the 1987 supplemental for an every-household mailing has been delayed by the White House The Committee believes that this is an important initiative as recommended by the

The CDC is a subordinate executive branch agency within the Public Health Service of the Department of Health and Human Services ("HHS").[3] On its face, the language highlighted above ("*shall* cause to be distributed *without* . . . clearance of the content by *any* official") appears to preclude the President and his subordinates from overseeing the CDC's determination of the content of the AIDS mailer. This language thus prevents the President, either directly or through his subordinates, from supervising a subordinate executive branch official (the CDC Director) in the conduct of certain of his duties (*viz.*, the dissemination of specified AIDS-related information to the public), trenching upon the President's exclusive constitutional authority to supervise the executive branch. *See* U.S. Const. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").[4]

II. Discussion

A. *The Nature of the Unitary Executive*

As head of a unitary executive, the President controls all subordinate officers within the executive branch. The Constitution vests in the President of the United States "The executive Power," which means the *whole* executive power. Because no one individual could personally carry out all executive functions, the President delegates many of these functions to his subordinates in the executive branch. But because the Constitution vests this power in him alone, it follows that he is solely responsible for supervising and directing the activities of his subordinates in carrying out executive functions. Any attempt by Congress to constrain the President's authority to supervise and direct his subordinates in this respect, violates the Constitution.

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[2] (. . continued)
CDC and the Department [of Health and Human Services], and bill language has been included mandating this mailing by February 15, 1988." S. Rep No 189, 100th Cong., 1st Sess. 70 (1987). (The mailing deadline date was changed to June 30, 1988, in the final Continuing Resolution.) Reflecting this concern, the amended version of the Labor and Related Agencies Appropriations Bill, reported by the Appropriations Committee and debated by the full Senate on October 13, 1987, contained language requiring CDC to distribute AIDS mailers "without necessary clearance of the content by any official, organization or office." *See* 133 Cong Rec. 27,372 (1987).

[3] The CDC was established by the Secretary of HHS pursuant to his authority under section 301 of the Act of July 1, 1944, as amended, 58 Stat. 691 (1944) (codified at 42 U.S.C § 241). That section authorizes the Secretary of HHS to "conduct in the [Public Health] Service . . . research, investigations, experiments, demonstrations, and studies relating to the causes, diagnosis, treatment, control, and prevention of physical and mental diseases and impairments of man." 42 U.S.C § 241(a). The CDC was organized as the "Communicable Disease Center" in the 1950s, and redesignated the CDC in 1970. *See* 35 Fed. Reg 10,797 (1970). The CDC was given full "agency status" in 1973. *See* 38 Fed. Reg. 18,261 (1973). The CDC was reorganized in 1980. *See* 45 Fed. Reg. 67,772 (1980).

[4] Since the provision in question, on its face, precludes supervision of the CDC Director "by any official, organization or office," the question arises whether the President himself is an "official, organization or office" within the meaning of the statute. Even assuming that the President himself is deemed to be neither an "official" (a strained interpretation, since the President certainly exercises "official" functions in carrying out his duties, such as the duty to "take Care that the Laws be faithfully executed") nor an "organization" nor an "office," the provision at issue is constitutionally impermissible, in that it effectively eviscerates the President's ability to supervise a subordinate executive branch agency, the CDC. Since even under this construction the terms "official," "organization," and "of-

B. Evidence of Original Intent

Evidence of the framers' original intent demonstrates that the Constitution was designed to vest the whole executive power in the President.[5] The framers purposefully chose a unitary executive approach over a more traditional alternative. Influenced by the British model, in which ministers were held responsible for the acts of an unimpeachable monarch, most of the original states inhibited their governors' power by forcing them to act through, or in cooperation with, some form of privy council or constitutional cabinet. *See* The Federalist No. 70 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The Federalist"). This device was carefully considered and deliberately rejected by the Federal Convention. The question of the proper disposition of the executive power in the new Constitution provoked a lengthy explication in several numbers of the The Federalist.

The two main reasons for adopting a truly unitary executive in the new Constitution were complementary and mutually reinforcing. On the one hand, unity obviously promotes dispatch and decisiveness, which is of far greater importance in the executive than in either of the other branches. As Hamilton pointed out:

> In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarring of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority. . . . But no favorable circumstances palliate or atone for the disadvantages of dissention in the executive department. . . . They serve to embarrass and weaken the execution of the plan or measure to which they relate, from the first step to the final conclusion of it.

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[4] (. . . continued)
fice" certainly encompass all officers of the executive branch other than the President, the President would be precluded from assigning supervision of the CDC's AIDS mailer activities to *any* of his subordinates Wholly apart from the fact that limitations on the President's time would prevent him personally from overseeing the CDC's AIDS-related functions, such a preclusion would intolerably denude the President of his constitutional prerogative to establish the means by which his supervisory authority is to be exercised As this Office has opined, the mere fact that Congress places particular executive functions in specified executive branch agencies does not preclude the President from exercising general supervisory authority with regard to those functions through his agents, such as the Office of Management and Budget *See Proposed Executive Order Entitled "Federal Regulation"*, 5 Op O L.C. 59, 63–64 (1981). Yet the statutory provision at issue would bar him from assigning supervision of the CDC's AIDS mailer to any other individual or entity within the executive branch. (For example, even assuming the President himself is not covered by this statute, he could not assign supervision of the CDC's AIDS mailer activities to his subordinates within the White House Office, since the term "office" would appear to apply to that entity. Buttressing this conclusion is the fact that the Senate's concern about "White House delays" (*see supra* note 2) apparently prompted adoption of the statutory provision under scrutiny.) In sum, even if the President is not personally covered, the effective result of this statutory provision would be an infringement on the President's supervisory authority vis-a-vis CDC's AIDS mailer activities.

[5] Our discussion of the Framers' original intent with respect to the unitary executive does not purport to be exhaustive, but illustrative. For a fuller discussion of the issue, *see Myers v United States*, 272 U.S. 52 (1926).

The Federalist No. 70, at 426–27 (Alexander Hamilton). Even more important in Hamilton's view, however, unity in the executive promotes accountability, which is the necessary flip side of decisiveness. As Hamilton pointed out, the more that the executive power is watered down and distributed among various persons, the easier it is for everyone concerned to avoid the blame for bad actions taken or for desirable actions left undone.

At the Pennsylvania ratifying convention, James Wilson offered the same view of the advantages of a unitary executive:

> The next good quality that I remark is, that the *executive authority is one.* . . . The executive power is better to be trusted when it has no screen. . . . We secure *vigor.* We well know what numerous executives are. We know there is neither vigor, decision, nor responsibility, in them. Add to all this, that officer is placed high, and is possessed of power far from being contemptible, yet not a *single privilege* is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by *impeachment.*

2 Elliot's Debates 480.

The Framers were under no illusions that vesting the executive power in a single person would suffice to accomplish the goals they had in mind when they chose a unitary executive. They believed that the nature of popular government is such that legislative tyranny is the danger most to be feared: as Madison noted, legislatures inevitably seek to draw "all power into [their] impetuous vortex." The Federalist No. 48, at 309 (James Madison). Alexander Hamilton explained this tendency as follows: "The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity." The Federalist No. 71, at 433.

The constitutional remedies for what Madison called "this inconveniency" (The Federalist No. 51, at 322) (James Madison) included the devices of bicameralism and the presidential veto. But human nature being what it is, the framers anticipated that the legislature would inevitably seek and find new devices for encroaching on the other branches and for trying to make those other branches its servants. The only way to prevent this from happening was to arm the President and encourage him to fight against it:

> [T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means

> and personal motives to *resist* encroachments of the others. . . . Ambition must be made to counteract ambition.

The Federalist No. 51, at 321–322 (James Madison) (emphasis added). *See also INS v. Chadha*, 462 U.S. 919, 951 (1983) ("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.").

The fundamental need for the President to have firm control over the conduct of his executive branch subordinates was recognized by the First Congress when it debated whether he had the inherent power to remove those subordinates from office. In the course of an extended debate in the House of Representatives, numerous Congressmen articulated the reasons for leaving the President the means of remaining master in his own house. *See* 1 Annals of Cong. 462–584 (1789). For example, James Madison said:

> Vest [the power of removal] in the Senate jointly with the President, and you abolish at once that great principle of *unity and responsibility* in the Executive department . . . . If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved . . . . The powers relative to offices are partly Legislative and partly Executive. The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation. *This done, the Legislative power ceases.*

Id. at 499, 581–82 (emphasis added). Mr. Boudinot of New Jersey described what would happen if the President could not unilaterally dismiss his subordinates:

> [W]hat a situation is the President then in, surrounded by officers with whom, by his situation, he is compelled to act, but in whom he can have no confidence, *reversing the privilege given him by the Constitution*, to prevent his having officers imposed upon him who do not meet his approbation?

Id. at 469 (emphasis added). Mr. Sedgwick of Massachusetts said:

> Shall a man . . . be saddled upon the President, who has been appointed for no other purpose but to aid the President in performing certain duties? . . . If he is, where is the responsibility? Are you to look for it in the President, who has no control over the of-

> ficer, no power to remove him if he acts unfeelingly or unfaithfully?[6]

Id. at 522–23.

In short, the Framers believed that the President should enjoy exclusive authority to supervise his subordinates in carrying out executive functions, free from interference by the other branches.

C. *Case Law Precedents*

Supreme Court jurisprudence supports the proposition that the President should enjoy full power to supervise his subordinates in carrying out executive branch functions. For example, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–66 (1803), Chief Justice Marshall stated:

> By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.
>
> In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.

The extent of the President's right to control subordinate officers was specifically considered by the Supreme Court in a trilogy of cases involving the President's power to remove federal officials. In *Myers v. United States*, 272 U.S. 52 (1926), the Court ruled unconstitutional a statute that limited the President's power to remove certain postmasters, and it declared, in dictum, that the repealed

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[6] Admittedly, this debate was not entirely one-sided. Some Members of Congress argued that the Senate must consent to the President's removal of particular subordinates. For example, Mr. Jackson of Georgia argued against allowing officers of the executive departments to be "mere creatures of the President," on the ground that such a result would cause executive "ministers [to] obtrude upon us to govern and direct the measures of the Legislature, and to support the influence of their master." *Id* at 487 Mr. White of Virginia maintained that the President's claimed power to remove executive officers "is a doctrine not to be learned in American Governments; is no part of the Constitution of the Union." *Id* at 513. Nevertheless, the point of view articulated by Madison—that the President alone possesses the power to remove his subordinates within the executive branch—carried the day. In enacting legislation creating executive departments, the First Congress decided *not* to include provisions specifying the means by which executive officers could be removed from Office.

Tenure of Office Act had been unconstitutional as well.[7] In reaching this conclusion, the Court considered a number of factors, including the constitutional debates, previous congressional practice, and the relationship between the power to appoint and the power to remove. In addition, the Court expressly based its decision on the conclusion that "Article II grants to the President the executive power of the Government, *i.e.*, the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed." 272 U.S. at 163–64. The Court based this conclusion on the following analysis of the President's control over subordinate officials:

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

Id. at 135.

The Court confirmed this view of the President's power over his subordinates within the executive branch in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). In that case, the Court ruled that Congress could, consistent with the Constitution, immunize a Commissioner of the Federal Trade Commission from removal by the President at his pleasure. The Court reasoned that the FTC could not "be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control." *Id.* at 628. Specifically, the Court found that "the [C]ommission acts in part quasi-legislatively [in making investigations for the information of Congress] and in part quasi-judicially [in acting as a 'master in chancery'] . . . . To the extent that it exercises any executive function . . . it does

[7] The Tenure of Office Act, 14 Stat. 430 (1867), had provided that all officers appointed by and with the consent of the Senate should hold their offices until their successors had been appointed and approved, and that certain heads of departments, including the Secretary of War, should hold their offices during the term of the President who appointed them, subject to removal by consent of the Senate. This Act was the principal basis for the articles of impeachment filed against President Andrew Johnson after he dismissed his Secretary of War without the consent of the Senate.

so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government." *Id.* (citation omitted). *Myers* was distinguished on the ground that "[t]he actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is." *Id.* at 627. The Court emphasized that the President retained the right to direct the actions of his subordinates in carrying out executive branch functions, free from interference by another branch:

> The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there.

Id. at 629–30. Thus, by narrowing *Myers* to cover only subordinates of the President carrying out purely executive functions, the Court linked the removal power even more clearly to the right of the President to control purely executive officials.

This principle was reaffirmed in *Wiener v. United States*, 357 U.S. 349 (1958). In that case, the Court held that the President did not have a constitutional right to remove a member of the War Claims Commission. The Court ruled that the Commission was essentially judicial in nature and that it was intended by Congress to operate entirely free of the President's control. *Id.* at 355–56. The Court expressly linked the right of removal with the right of the President to control a particular official:

> If, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, *a fortiori* must it be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.

Id. at 356. The Court thus emphasized that *Humphrey's Executor* "drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers," and those who were members of an independent body required to exercise its judgment without hindrance from the Executive. *Id.* at 353. As the Court pointed out, it is the *function* of a governmental body that determines whether it is subject to

executive control. The "sharp differentiation [between those officials who are freely removable by virtue of the President's inherent constitutional powers and those who are not] derives from the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference." *Id.*

These three cases clearly establish the President's right to control the actions and duties of his subordinates within the executive branch. *Myers* explicitly set forth the President's right to control as one of the bases for establishing the presidential right to discharge subordinate officials. *Humphrey's Executor* and *Wiener*, while limiting the President's removal power, reinforced the link between the President's right to control and his right to remove executive branch officials. Since, in the instant case, the Director of the CDC performs an executive function and is thus inescapably within the executive branch, the limitations imposed by *Humphrey's Executor* and *Wiener* do not apply to presidential supervision of the CDC Director.

The President's right to control the execution of the laws free from undue interference from coordinate branches of government is supported by an additional line of authority. In *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court confirmed that the Constitution protects the integrity of the executive branch decision-making process from interference by another branch through demands for information about the executive's deliberations. The Court recognized

> the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process.

Id. at 705. The Court specifically acknowledged that this right of confidentiality "can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinings." *Id.* at 705–06 (footnote omitted). The Court further noted that this protection "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id.* at 708.

This decision gives further content to the principle that the constitutional separation of powers requires the President to have effective control over the decision-making process within the executive branch. The constitutional prerogative recognized by the Court connects the President's constitutional responsibility to take care that the laws be faithfully executed with the practical need for confidentiality in executive branch deliberations. The Court has unmistakably declared

that the powers necessary to the implementation of the President's authority over the executive branch cannot be abridged absent a compelling and specific need asserted by another branch.[8]

D. *Implications for the Instant Case*

The preceding discussion delineating the President's control of the unitary executive is directly applicable to the instant case. The Director of the CDC, as a subordinate executive branch officer within the Department of Health and Human Services, is subject to the complete supervision of the President with respect to the carrying out of executive functions. The congressionally-imposed requirement that the Director of the CDC develop and distribute AIDS information to the general public entails the carrying out of a purely executive function. The dissemination of AIDS information to the public does not involve the judicial function of the adjudication of cases, nor does it involve legislative activity.[9] Rather, the dissemination of this information clearly involves "[i]nterpreting a law enacted by Congress [the Continuing Resolution] to implement the legislative mandate" of furthering the public health and welfare by informing the public about AIDS, which "plainly entail[s] execution of the law in constitutional terms." *Bowsher v. Synar*, 478 U.S. 714, 732–33 (1986). In short, the President has complete constitutional authority to supervise the Director of the CDC (a subordinate executive branch officer) in connection with the dissemination of AIDS fliers to the general public (an executive function). Accordingly, by preventing the President from supervising the CDC Director in this regard, the Continuing Resolution provision at issue in this memorandum unconstitutionally infringes upon the President's exercise of that authority.

The unconstitutional nature of the AIDS-related Continuing Resolution provision also may be established by reference to the Supreme Court's discussion in *Nixon* of Congress's constitutional inability to undercut the confidential nature of internal executive branch deliberative processes. The fundamental principle emerging from *Nixon* is that Congress cannot constitutionally require the President to render unto it information bearing on the precise manner in which

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[8] Although the *Nixon* case dealt with communications between the President and White House advisors, it seems clear that the principles enunciated therein extend at least to other important decision makers within the executive branch. *See United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977). The *Nixon* Court specifically referred not simply to the President but to "high Government officials and those who advise and assist them." 418 U.S. at 705. Furthermore, as the Supreme Court recognized in *Barr v. Matteo*, 360 U.S. 564 (1959), where it extended the privilege against libel suits involving official utterances to executive officials below Cabinet rank:

> We do not think that the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.

360 U.S. at 572–73 (footnote omitted).

[9] Nor can the CDC's task be viewed as quasi-legislative or quasi-judicial, as those terms are used in *Humphrey's Executor*.

the President carries out his supervisory authority. It follows, a fortiori, that the Constitution precludes the Congress from undermining the executive decision-making process by preventing the President from *even exercising* his supervisory authority over an executive agency, such as the CDC. If Congress is barred from *unacceptably interfering* in internal executive branch deliberations (*Nixon*), it surely is precluded from preventing the carrying out of such deliberations—the result that would obtain if Congress were permitted to bar presidential oversight of CDC actions.

Our conclusion that Congress cannot constitutionally preclude presidential oversight of the CDC's dissemination of AIDS mailers (or the CDC's carrying out of any other executive function) is fully in keeping with principles previously enunciated by this Office. As this Office opined in commenting upon a law that purported to require a subordinate executive officer to provide specified information directly to Congress, "[t]he separation of powers *requires* that the President have ultimate control over subordinate officials who perform purely executive functions and assist him in the performance of his constitutional responsibilities. This power includes the right to supervise and review the work of such subordinate officials, *including reports issued* either *to the public* or to Congress." *Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress*, 6 Op. O.L.C. 632, 633 (1982) (emphasis added). Accordingly, a legislative provision precluding presidential review of AIDS fliers drafted by the CDC for public dissemination violates the separation of powers.

Consistent with the preceding analysis, it matters not at all that the information in the AIDS fliers may be highly scientific in nature. The President's supervisory authority encompasses *all* of the activities of his executive branch subordinates, whether those activities be technical or non-technical in nature.[10] This necessarily follows from the fact that the Constitution vests "[t]he entire executive Power," without subject matter limitation, in the President.[11]

Finally, we wish to stress the significance of the fundamental constitutional principles at stake here. The egregious manner in which the Continuing Resolution provision at issue offends the separation of powers cannot be overemphasized. Congress has no more right to prevent the President from supervising a subordinate (the CDC Director) in his performance of an executive task (the dissemination of AIDS-related information) than the President would have to preclude federal judges from reviewing draft opinions prepared by their clerks—or than the federal judiciary would have to bar Members of Congress from reviewing draft legislation and reports prepared by congressional staff. If the principle

[10] Thus, for example, the President enjoys supervisory authority over Environmental Protection Agency deliberations in the area of environmental science, and over National Aeronautics and Space Administration deliberations dealing with space science

[11] Indeed, it would be an absurdity to suggest that the existence of the President's supervisory authority should turn on the nature of the executive duties being exercised. In enacting laws, Congress does not categorize the many different statutory duties it creates according to their "technical" or "non-technical" nature. Moreover, there is no suggestion in the Constitution that the nature of the President's responsibility to "take Care that the Laws be faithfully executed" (U S Const art. II, § 3) is affected by the subject matter of the law under consideration

of separation of powers means anything, it means that each one of the three co-equal branches of government must be free to supervise its subordinates in the performance of their official duties. Any effort by one branch to intrude upon and, indeed, eviscerate the supervisory prerogatives of another branch is patently offensive to the separation of powers. Such a destruction of the coequality of the branches would help bring about "a gradual concentration of the several powers in the same [offending] department", thereby eliminating the means by which "[a]mbition must be made to counteract ambition." The Federalist No. 51, at 321–22 (James Madison). As such the provision at issue here is fundamentally inconsistent with our tripartite system of republican government.

III. Conclusion

For the foregoing reasons, we conclude that Congress cannot, consistent with the Constitution, preclude the President from reviewing, either personally or through subordinates, the content of AIDS mailers that are to be distributed to the public. Statutory language that purports to preclude the President from carrying out such supervision is unconstitutional on its face and should be regarded as a nullity.

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

Constitutionality of Seizing the Passports of Individuals Found to be Importing Controlled Substances Into the United States

A Customs Service directive to seize as evidence of a federal crime the passports of individuals found to be importing controlled substances into the United States would not implicate the Fourth or Fifth Amendments to the United States Constitution, nor give rise to any valid constitutional claims of denial of due process or deprivation of freedom to travel.

March 15, 1988

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum evaluates the legality of the proposal by the United States Customs Service to seize the United States passports of individuals found to be in possession of illegal drugs upon entering the United States. In our view, the proposal involves nothing more than the lawful seizure of evidence of crime and raises no novel or substantial questions under the Fourth or Fifth Amendments. Indeed, according to the Customs Service, current practice is to seize passports in a large number of serious crimes. The current proposal would simply extend that practice to all cases involving the importation of any quantity of illegal drugs. There has been some confusion in the press accounts describing the Customs proposal and, therefore, we begin with a brief description of the plan.

I. Background

Under the Customs Service directive, beginning March 15, 1988, Customs Service officials are to seize an individual's U.S. passport "as criminal evidence" and all "other evidentiary material" whenever "a person is found to be in violation of federal, state, or local criminal laws regarding the importation and/or possession of controlled substances." Memorandum to All Regional Commissioners, District Directors, Inspection and Control Stations, Regional and District Counsels, Special Agents in Charge, from Commissioner of Customs, *Re: Seizure of Controlled Substance Violator Passports for Evidence* at 1 (Mar. 8, 1988) ("Customs Directive"). The individual will be given a custody receipt for retained or seized property such as the passport and other personal items being held as evidence. According to officials from the State Department, an individual whose passport is seized and held as evidence of importation of illegal drugs may apply for, and, at least absent a risk to national security, be granted, a new passport.[1]

[1] Meeting with Mary V. Mochary, Deputy Legal Advisor, United States Department of State (Mar 14, 1988).

The local Customs Duty Agent will then be notified of the violation, and make a determination whether the violator should be arrested or released. In addition, the Customs Duty Agent is directed to "attempt to obtain federal prosecution of the violator" under 21 U.S.C. § 844 (possession of a controlled substance) and 21 U.S.C. § 952 (importation of a controlled substance), or, if federal prosecution is declined, to "attempt to obtain state or local prosecution for violations of any applicable state laws concerning controlled substances." Customs Directive at 2. If federal, state, or local prosecution is accepted, the Customs Duty Agent is directed to initiate a chain of custody and transfer the passport and evidence to the appropriate officials for use in prosecution. In addition, "[t]he chain of custody must state that once the passport is no longer required as criminal evidence, the . . . officer having possession must send it *directly* to the Department of State." *Id.* If federal, state, and local prosecution is declined, the Customs Service is to forward seized passports to the Department of State for disposition and notify the violator of the address to which he may direct inquiries concerning his passport.

II. Discussion

As described in the Customs Directive, the plan to seize the passports of those engaged in the importation of controlled substances into the United States appears to involve nothing more than the lawful seizure of evidence of a crime pursuant to a lawful search. It has long been established that "routine searches of persons and things may be made upon their entry into the country without first obtaining a search warrant and without establishing probable cause or any suspicion at all in the individual case." 1 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 3.9, at 326 (1984) (footnote omitted). According to the Supreme Court, "searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

Assuming a lawful border search, customs officials are entitled to seize all evidence of a crime for use in subsequent prosecution. In *Warden v. Hayden*, 387 U.S. 294 (1967), the Supreme Court abandoned any distinction between seizure of "'mere evidence'" and seizure of "fruits, instrumentalities or contraband" for purposes of the Fourth Amendment, and held that evidence could be seized so long as there is "a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior." *Id.* at 307.

The passport of an individual found to be in possession of a controlled substance upon entering the United States is clearly subject to lawful seizure. Under federal law, it is a felony "to import into the United States from any place outside thereof, any controlled substance . . . or any narcotic drug." 21 U.S.C. § 952(a). As recently stated by the Fourth Circuit, "[a] critical element of the offense is that the defendant import the substance or cause it to be imported." *United*

States v. Samad, 754 F.2d 1091, 1096 (4th Cir. 1984). Under federal law, the only means by which an American can lawfully enter or leave the country—absent a presidentially granted exception—is with a passport. *See* 8 U.S.C. § 1185(b). Thus, even assuming that an individual's passport is not itself an instrumentality of the crime of importing drugs, it certainly constitutes evidence with a nexus to the crime of importation of drugs. The passport is evidence of the individual's identification, destination, and normally his place of origin. Since the offense of importation requires the prosecution to prove that the defendant imported drugs (1) into the United States, and (2) from a place outside of the United States, there is certainly a nexus between the defendant's passport and criminal behavior. *See Warden v. Hayden*, 387 U.S. at 307.

Of course, an individual whose passport has been seized as evidence in these circumstances may be entitled to its return following conviction, acquittal, or a decision not to prosecute.[2] *See Warden v. Hayden*, 387 U.S. at 307–08. But the mere fact that properly seized evidence may be subject to return does not in any way affect the legality of the initial seizure. *Id.* at 307–10. Under the Customs Directive, when they are of no further evidentiary use, passports seized as evidence of importation of controlled substances are to be forwarded to the Department of State with appropriate notification to the individual to whom the passport was issued. The State Department may hold the passport pending a request for its return or determine immediately whether there are adequate grounds under applicable regulations for revoking the passport.[3] There is no valid constitutional objection to this scheme. First, post-deprivation process is necessarily adequate when a passport is seized lawfully as evidence of crime. *See Warden v. Hayden*, 387 U.S. at 307–08; *cf. Haig v. Agee*, 453 U.S. 280, 309–10 (1981) (post-revocation notice and hearing is constitutionally sufficient when passport revoked on the ground that "there is a substantial likelihood of 'serious damage' to national security or foreign policy as a result of a passport holder's activities in foreign countries").

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[2] In addition, an individual may seek return of his passport *prior* to trial pursuant to Federal Rule of Criminal Procedure 41(e) That rule provides.

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12

Thus, the denial of a motion for the return of seized property under Rule 41(e) is in effect a finding that the search and seizure were lawful, and therefore an individual whose passport has been seized would have no independent legal objection to retention of his passport for use as evidence.

[3] At a meeting on March 14, 1988, Mary V. Mochary, Deputy Legal Advisor, United States Department of State, informed this Office that the State Department does not intend to revoke passports it receives from the Customs Service pursuant to the Customs Directive. According to Ms. Mochary, the State Department's practice has been to hold passports used as evidence until the persons to whom they were issued request their return or until the passports expire. Ms. Mochary stated that few, if any, individuals have requested return of a seized passport, preferring simply to apply for and be issued a new one.

Further, there would be no unconstitutional infringement of the citizen's freedom to travel abroad. In the first place, the freedom to travel apparently will not be infringed at all since, as noted below, the State Department will issue a *new* passport even to a person whose passport has been seized as evidence in a drug trafficking or other criminal prosecution. In light of the availability of a replacement passport, there is no plausible argument that a temporary deprivation of one's passport meaningfully restricts the liberty to travel abroad.

In any event, the Supreme Court has recognized repeatedly that this freedom "is subject to reasonable governmental regulation," and that "the *freedom* to travel outside the United States must be distinguished from the *right* to travel within the United States." *Haig v. Agee*, 453 U.S. at 306. For this proposition, the *Agee* Court relied on *Califano v. Aznavorian*, 439 U.S. 170 (1978), in which the Court explained:

> The constitutional right of interstate travel is virtually unqualified. By contrast the 'right' of international travel has been considered to be no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment. As such this 'right,' the Court has held, can be regulated within the bounds of due process.

Id. at 176 (citations omitted) (quoting *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978)). For the reasons already stated, the seizure and retention of a passport as evidence of criminal activity is consistent with due process. Whether the Secretary of State's potential, future revocation of the passport would be reasonable and comply with due process will depend on the facts and circumstances surrounding that action, *see generally Haig v. Agee*, and would not bear upon the legality of the actions to be taken pursuant to the Customs Directive.[4] Thus, even if replacement passports were not provided, there would be no constitutional impediment to seizing passports in this manner.

Conclusion

The Customs Directive to seize as evidence the passports of individuals found to be importing controlled substances into the United States raises no novel or substantial constitutional questions. Supreme Court precedent clearly establishes

[4] Under the State Department's current regulations, a passport may be revoked if "[t]he Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." *See* 22 C.F.R. §§ 51.71(a), 51.70(b)(4). Any action taken by the Secretary that adversely affects the ability of a person to receive or use a passport is subject to the provisions of 22 C.F.R. §§ 51.80 - 51.89, which provide for notice and hearing.

Of course, after a passport is no longer of any evidentiary use but prior to any determination by the Secretary, an individual may seek return of a passport (as in the case of all evidence) by initiating a "'possessory action to reclaim that which is wrongfully withheld.'" *Warden v Hayden*, 387 U.S. at 308 (quoting *Land v Dollar*, 330 U.S. 731, 738 (1947)).

that the passport of an individual found to be importing drugs may be seized as the instrumentality or evidence of a federal crime. Nor does the proposal give rise to a valid due process objection or an objection based on the freedom of international travel.

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

Authority to Advance Funds to Cuban Detainees To Purchase Commissary Items

The Director of the Bureau of Prisons has the authority under 18 U.S.C. § 4042 to direct that money from general prison operating funds be advanced to indigent Cuban detainees as a credit to their commissary accounts.

March 30, 1988

MEMORANDUM OPINION FOR THE DIRECTOR
BUREAU OF PRISONS

You have asked our opinion on the question whether you have authority to direct that certain indigent Cuban detainees in secured housing status in federal prisons be advanced from general prison operating funds a small sum of money each month, as a credit to their commissary accounts, to purchase items from the commissary.[1] In your memorandum of March 1, 1988, you point out that, because of their secured housing status, the detainees in question can be given no opportunity to earn money by working in a prison assignment. You further state that they are housed under particularly stressful circumstances, with few of the opportunities other inmates have for relaxation and recreation. In your view it is necessary to provide a way for these individuals to purchase items from the prison commissary such as magazines and cigarettes, in order to avoid possible violence.

In his memorandum of March 7, 1988, your General Counsel states that, in his opinion, authority to make the advances in question is implicit in the general authority given the Director of the Bureau of Prisons in 18 U.S.C. § 4042(2) to provide for the "safekeeping, care, and subsistence" of all inmates in federal prisons. He notes that section 4042(2) has been regarded as the source of the Director's authority to provide inmates with "basic and necessary items of hygiene, such as soap, toothpaste and toothbrushes." In his opinion that section also authorizes the provision of less essential items, "where, as here, the items are considered to be important if not essential to maintain calm in a group that has proved itself highly disruptive." For reasons set forth below, we agree that it is within your authority to direct that these advances be made.

The general authority of the Attorney General in directing the Bureau of Prisons, which has been delegated to the Director in 28 C.F.R. § 0.96, is set forth in

[1] The specific amount you suggest is $15 per month. As a credit to each inmate's account at the commissary, this sum could be used to purchase any items available in the commissary, including postage stamps, snacks, magazines, and cigarettes. The advance would be considered a loan to be repaid when possible, not a gift.

18 U.S.C. § 4042. As relevant here, subsection (1) gives the Bureau charge of the "management and regulation" of all federal penal institutions; subsection (2) directs the Bureau to provide "suitable quarters" for inmates, and for their "safekeeping, care, and subsistence"; and subsection (3) directs the Bureau to provide "protection, instruction, and discipline" to inmates. These general formulations first appeared in the 1930 statute that established the federal prison system under the direction of the Bureau of Prisons, *see* Pub. L. No. 71–218, 46 Stat. 325 (1930). The precise meaning of the terms employed in section 4042 is not discussed in the legislative history of the 1930 statute, nor is the more general question of the Attorney General's authority under this section. And, we have been informed by your General Counsel that neither has ever been given formal administrative construction that would be relevant in this situation. It also appears to be the case, again based on our discussion with your General Counsel's office, that the Bureau has never before implemented a policy of making loans to inmates to permit them to purchase items at the prison commissary.

With this background in mind, we turn to the principles that would apply in testing the legality of the directive proposed in your March 1 memorandum. Over the years courts have uniformly given a broad construction to the general managerial and administrative powers of the Bureau of Prisons under section 4042. They have accorded federal prison officials "wide ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Schlobohm v. United States Attorney General*, 479 F. Supp. 401, 402 (M.D. Pa. 1979). *See also Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 126 (1977) (recognizing the "wide-ranging deference to be accorded the decisions of prison administrators"). Even in the face of constitutional challenges under the Fifth and Eighth Amendments, courts have recognized the necessity of giving federal prison officials wide latitude in providing for the care of inmates and the management of penal institutions. *See Bell v. Wolfish*, 441 U.S. 520, 546–47, 560 (1979); *Phillips v. Bureau of Prisons*, 591 F.2d 966, 972 (D.C. Cir. 1979). In *Bell*, Justice Rehnquist noted that "maintaining institutional security and preserving internal order and discipline are essential goals" of a prison administrator, and that "[p]rison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel." 441 U.S. at 546–47. *See also Pell v. Procunier*, 417 U.S. 817 (1974)(deference given state prison officials in the face of a First Amendment challenge to prison regulations restricting inmates' ability to publish writings).

The deference that has been accorded the Bureau of Prisons in construing and applying the statute which it administers is consistent with the general administrative law principles reaffirmed by the Supreme Court. *See Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842–45 (1984)("if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute"); *see also Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1086 (D.C. Cir. 1987)(en banc), *cert. denied*, 485 U.S. 913 (1988).

Under *Chevron*, if Congress has not "directly addressed the precise question at issue," then the only question is whether the agency's interpretation of the statute is "a reasonable one." 467 U.S. at 843, 845. Applying the legal principles set forth in the foregoing paragraphs to the proposal at issue here, we see no basis upon which to take issue with your judgment that it is within your discretionary authority under section 4042 to expend Bureau of Prison funds in this fashion.[2] No statute expressly prohibits providing money advances to inmates; nor does your current appropriations statute suggest such a limit on your ability to expend funds to carry out your responsibilities under section 4042. Finally, we know of no general bar on expending appropriated funds for the kinds of items that we understand are generally available in prison commissaries. While section 4042 does not "directly address" the question of money advances to inmates, we believe that, especially in these circumstances, such advances are consistent with the congressional intention expressed in the broad and general terms "safekeeping" and "care" in subsection (2), as well as the term "protection" in subsection (3). We have no basis for questioning your judgment that the expenditure of funds you propose is in fact likely to help avert prison violence, and that it will thus be in direct furtherance of your more general responsibilities under the statute. As such, your construction of the statute seems to us both reasonable and permissible, as we understand the *Chevron* Court's use of those terms.

In sum, under the general administrative law principles of the *Chevron* case, and the more specific legal principles developed in caselaw interpreting the authority of federal prison officials, we believe that the proposed directive is within your authority under 18 U.S.C. § 4042.

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

[2] The fact that the funds will not actually be paid out to each inmate, but rather credited to their individual commissary accounts at the commissary, does not strike us as having any independent legal significance, if the funds are authorized to be expanded under section 4042. Nor does describing the credits as loans whose repayment is expected as soon as possible after an inmate's release.

Authority of Foreign Law Enforcement Agents to Carry Weapons in the United States

No federal statutes generally authorize foreign law enforcement agents to carry firearms in the United States. In particular, 18 U.S.C. § 951 does not provide such authority.

Absent congressional consent, the Emoluments Clause precludes foreign agents from enforcing federal laws. 19 U.S.C. § 1401(i) does not constitute such consent.

The President does not possess inherent authority to designate foreign agents to carry firearms in the United States in order to enforce federal law.

April 12, 1988

MEMORANDUM OPINION FOR THE DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

This memorandum is in response to your request for our opinion as to the existence of any basis in federal law for a United States law enforcement agency to authorize foreign law enforcement agents to carry firearms within the United States. You also requested that we consider 18 U.S.C. § 951 and 19 U.S.C. § 1401(i) in connection with this issue. 18 U.S.C. § 951 requires those who act as agents of foreign governments to notify the Attorney General; 19 U.S.C. § 1401(i) authorizes the Treasury to designate persons as customs agents, who may then as customs agents carry firearms to enforce the customs laws. First, to our knowledge, no statute generally authorizes foreign law enforcement agents ("foreign agents") to carry firearms in the United States. In particular, 18 U.S.C. § 951 clearly does not provide such authority, because it simply requires those who act as agents of a foreign government to notify the Attorney General. Second, in the absence of the consent of Congress, the Emoluments Clause of the United States Constitution precludes foreign agents from exercising authority to enforce federal law. 19 U.S.C. § 1401(i), which authorizes the Secretary of the Treasury to designate individuals to enforce the customs laws, and thus to carry weapons, does not constitute such consent. Finally, the President does not possess inherent authority to designate foreign agents to carry firearms in order to enforce federal law.[1]

[1] We do not address the authority of foreign agents to possess firearms under state law. We are aware of no federal law that would prevent the states from authorizing the carrying of firearms by foreign agents. We also have not addressed the rights or obligations of the United States in connection with any treaties to which it is a party. This memorandum also does not consider the sharing of law enforcement information, or similar forms of cooperation, between United States and foreign law enforcement officials, and the conclusions set forth herein do not preclude such cooperation. As our analysis reveals, assuming that foreign agents are not designated as United States officers and do not exercise law enforcement powers on behalf of the United States, cooperation would not by itself render a foreign law enforcement agent an officer of the United States and thus subject to the Emoluments Clause.

Analysis

I. Federal Statutes Authorizing Foreign Agents to Carry Firearms

To our knowledge no law authorizes foreign agents to carry firearms. In particular, 18 U.S.C. § 951 does not represent such authorization. Section 951 merely requires that persons who act as agents of a foreign government notify the Attorney General. Section 951(b) authorizes the Attorney General to promulgate "rules and regulations establishing requirements for notification." Nothing in the text or legislative history of the statute suggests that it provides a basis in federal law for the Attorney General to permit foreign agents to carry firearms.

II. Federal Statutes Authorizing Designated Persons to Enforce Federal Law

It has also been suggested that other statutes, such as 19 U.S.C. § 1401(i), that permit the federal government to designate persons to enforce federal laws, may authorize foreign agents designated under these statutes to carry firearms. Because we believe that the Emoluments Clause precludes the designation of foreign agents to enforce federal law in the absence of congressional consent, we do not believe that section 1401(i), or any other statute that we have examined, can be used to authorize foreign agents to carry firearms.

The Emoluments Clause prohibits federal officers from receiving a variety of benefits from foreign governments in the absence of the consent of Congress. The Clause provides in part:

> [N]o Person holding any Office of Profit or Trust under them [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

U.S. Const. art. I, § 9, cl. 8. This clause, adopted unanimously at the Constitutional Convention of 1787, was intended by the Framers to preserve the independence of officers of the United States from corruption and foreign influence.[2]

The Emoluments Clause must be read broadly in order to fulfill that purpose. Accordingly, the Clause applies to all persons holding an office of profit or trust under the United States, and not merely to that smaller group of persons who are deemed to be "officers of the United States" for purposes of Article II, Section 2 of the Constitution.[3] Thus, a part-time staff consultant to the Nuclear Regulatory

[2] 3 *The Records of the Federal Convention of 1787*, at 327 (Max Farrand ed., 1966).

[3] Letter for James A. Fitzgerald, Assistant General Counsel, United States Nuclear Regulatory Commission, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel at 3–5 (June 3, 1986) ("Fitzgerald letter").

Commission, an assistant director of a division within the National Archives, and a postal clerk have all been recognized as occupying an "office of profit or trust" for purposes of the Emoluments Clause.[4] As a matter of general principle, anyone exercising law enforcement powers on behalf of the United States must be viewed as holding an office of trust under the Emoluments Clause. Federal law enforcement agents, by the nature of their office, are frequently granted an array of powers that are denied to the private citizen; in turn, citizens look to such officers to perform a host of dangerous but necessary tasks to the best of their ability and with undivided loyalty to the United States.[5]

These same characteristics of office—the reposing of trust, the importance of the task performed by those who hold the office, the necessity for undivided loyalty—have been cited in other contexts in support of a determination that an office is an "office of profit or trust" under the United States for purposes of the Emoluments Clause.[6] Moreover, as the text of the Emoluments Clause suggests, one can hold an "office of trust" for purposes of the Emoluments Clause even if the office entails no compensation. 15 Op. Att'y Gen. 187, 188 (1877) (members of Centennial Commission who receive no compensation may nonetheless hold "offices of trust" under the Emoluments Clause). Accordingly, those who possess federal law enforcement powers, whether paid or unpaid, hold offices of trust under the United States. It is equally clear that foreign law enforcement agents are in the position of receiving or expecting to receive "emoluments" from their own governments: salary and pension benefits, among many other potential "emoluments." At a minimum, it is well established that compensation for services performed for a foreign government constitutes an "emolument" for purposes of the Emoluments Clause.[7]

Therefore, any foreign agent authorized by the federal government to enforce federal law would hold an office of trust under the United States, while at the

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[4] Fitzgerald letter; *Applicability of Emoluments Clause to Proposed Service of Government Employee on Commission of International Historians*, 11 Op. O.L.C. 89 (1987); 27 Op. Att'y Gen. 219 (1909)

[5] *See also Foley v. Connelie*, 435 U.S 291, 299–300 (1978)

[6] *E.g.*, Fitzgerald letter at 5

[7] Fitzgerald letter at 2 n.2.

To the extent that a Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, to Dudley H. Chapman, Associate Counsel to the President, May 10, 1974, suggests at page 4 that the appointment of a foreign official to an office of profit or trust under the United States may raise only a limited concern under the Emoluments Clause because "the fact of foreign service would be known to the appointing official and could therefore be evaluated in connection with the duties required by the contemplated appointment," we disagree As an initial matter, we find no support in the words of the Constitution for any such limited concern The Emoluments Clause by its terms erects a prohibition against the receipt of benefits from foreign governments: that prohibition may only be avoided with the consent of Congress. There is no further provision that the Emoluments Clause does not apply to foreign officials who are offered offices of profit or trust under the United States, or when the receipt of the foreign emolument is known beforehand The sole test is, again, whether Congress has consented or not.

Moreover, even were some argument to be made that in this case a foreign agent can be deemed to have "accepted" his foreign emolument prior to becoming an officer of the United States, and thus should escape the prohibition of the Emoluments Clause, it would nonetheless be clear that such an agent would be in a position of expecting to receive future "emoluments" from a foreign government. The express terms of the Emoluments Clause clearly would apply to such a situation, and equally clearly would forbid the creation of such divided loyalties.

same time receiving emoluments from a foreign government. The divided loyalty thus produced by such an authorization is prohibited by the Emoluments Clause, absent the consent of Congress.[8] None of the statutes that we have reviewed constitutes such consent.

As described in your memorandum, it is evidently the practice of the Customs Service to designate foreign law enforcement officers as customs agents, under 19 U.S.C. § 1401(i), thereby permitting them—as customs agents—to carry firearms in the United States.[9] Assuming that the Customs Service is observing the requirements of 19 U.S.C. § 1401(i) that the Secretary of the Treasury (or his delegate) make such a designation, its use of section 1401 to designate individuals who are not beholden to foreign governments as customs agents would be lawful. Section 1401(i) has been upheld repeatedly as a basis for designating border patrol officers as customs agents, thereby extending to the border patrol the broader search and seizure powers of customs agents. *E.g.*, *United States v. McDaniel*, 463 F.2d 129, 130 (5th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973); *United States v. Thompson*, 475 F.2d 1359, 1362–63 (5th Cir. 1973).

Extending section 1401 to the designation of foreign agents, however, would violate the Emoluments Clause. The designated foreign agents would become customs agents of the United States, yet customs agents occupy positions of trust to which special powers have been granted and which require undivided loyalty to the United States. Customs agents, therefore, including designated customs agents, hold "offices of profit or trust" within the meaning of the Emoluments Clause. A foreign agent designated as a United States customs agent, however, would simultaneously be expecting "emoluments"—for example, his pay—from a foreign government.[10] Accordingly, designating a foreign agent who expects pay from his foreign government as a United States customs agent runs afoul of the Emoluments Clause.

Moreover, section 1401 by itself cannot be held to constitute the consent of Congress necessary to exempt foreign agents from the Emoluments Clause prohibition. As noted above, section 1401(i) occurs in a list of statutory definitions, and simply provides that "any . . . other person" may be designated as a customs agent. The statute does not specifically address the designation of foreign law enforcement agents as customs agents. When Congress has granted its consent to the receipt of foreign emoluments by federal officers, it has done so explicitly. Thus, the Foreign Gifts Act provides in so many words that "Congress consents" to federal employees accepting gifts "of minimal value," tendered by a foreign government as a "mark of courtesy." 5 U.S.C. § 7342(c). Similarly, 5 U.S.C.

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[8] Fitzgerald letter at 6–7.

[9] Section 1401(i), which appears in a list of statutory definitions, provides:

> The terms "officer of the customs" and "customs officer" mean any officer of the United States Customs Service of the Treasury Department (also hereinafter referred to as the "Customs Service") or any commissioned, warrant, or petty officer of the Coast Guard, or any agent or other person authorized by law or designated by the Secretary of the Treasury to perform any duties of an officer of the Customs Service.

[10] See text accompanying note 7, *supra*

§ 7342(d) provides that "Congress consents" to federal employees accepting decorations offered by foreign governments. While the consent of Congress may be expressed without invoking the words "Congress consents," a statute must demonstrate through its text or purpose that Congress intended to consent to the holding of specific offices by those receiving foreign emoluments. Only through such an affirmative legislative decision may the Constitution's requirement of consent be satisfied. There is, however, no such indication of consent reflected in the text or purpose of section 1401(i).[11] Another statute which, on its face, is similar to section 1401(i) is 28 U.S.C. § 533. That statute provides that the Attorney General may appoint officials "to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General." The accompanying Historical and Revision Notes state that such officials are to have "the authority necessary to perform their duties." The argument could be made that the Attorney General could appoint a foreign agent to serve as a federal investigative official under this statute, and that if it is necessary for such an official to carry firearms in order to perform his duties, he would be accordingly empowered to do so. Similarly, 18 U.S.C. § 3053, which grants to U.S. Marshals and their deputies the power to carry firearms, could be seen as a vehicle for deputizing foreign law enforcement agents. For the reasons stated above, however, the Emoluments Clause would appear to preclude the use of these statutes to appoint a foreign agent as a federal "investigative official," or as a deputy U.S. Marshal. Neither statute contains or reflects the consent of Congress necessary to avoid the Emoluments Clause.

III. Application of the Emoluments Clause to the President's Inherent Authority

The President does not have inherent authority to authorize foreign law enforcement officers to carry firearms in the United States. As set forth below, any attempt to invoke the President's inherent authority to designate agents to enforce federal law would pose the same Emoluments Clause problem discussed above. Because Congress would have to consent to such a designation, the President has no authority to make such designations without Congress' consent. The President has broad inherent authority to enforce federal law under the Constitution. That inherent authority is based upon the President's position as chief executive, his responsibility for the conduct of foreign affairs, and his obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II, §§ 1, 2 and 3; *In re Debs*, 158 U.S. 564, 581–82 (1895); *In re Neagle*, 135 U.S. 1, 63–68 (1890); Memorandum for Robert E. Jordan III, General Counsel of the Depart-

[11] Moreover, had Congress intended to consent to the designation of foreign agents as armed custom agents, it would presumably also have addressed the number of other statutory problems that such a designation would present. Such problems may include the requirement under 5 U.S.C. § 3331 that appointees to the civil service take an oath of loyalty to the United States.

ment of the Army, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Authority to Use Troops to Protect Federal Functions, including The Safeguarding of Foreign Embassies in the United States* at 1–2 (May 11, 1970) (inherent authority provides basis for using federal troops to protect foreign embassies); Memorandum for Wayne B. Colburn, Director, United States Marshals Service, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Law Enforcement Authority of Special Deputies Assigned to DOT to Guard Against Air Piracy* at 1–3 (Sept. 30, 1970) (inherent authority may be invoked to appoint sky Marshals with enforcement powers). The President's inherent authority, however, is of course circumscribed by the specific provisions of the Constitution. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). As discussed above, foreign agents enlisted to help enforce the laws of the United States will be exercising federal law enforcement authority within the United States, regardless of what title they carry; their federal function alone will suffice to make them officers of the United States for purposes of the Emoluments Clause. Because Congress must consent to the holding of office by foreign agents, the President does not have the inherent authority to designate foreign agents to enforce federal law.

Conclusion

For the reasons stated, we do not believe that any federal law to which you have directed our attention authorizes foreign agents to carry firearms. Nor does the President have inherent authority to authorize foreign agents to carry firearms in order to execute federal law.

JOHN O. MCGINNIS
Deputy Assistant Attorney General
Office of Legal Counsel

Disclosure of Advisory Committee Deliberative Materials

The Federal Advisory Committee Act requires advisory committees to make available for public inspection written advisory committee documents, including predecisional materials such as drafts, working papers and studies.

The disclosure exemption available to agencies under exemption 5 of the Freedom of Information Act for predecisional documents and other privileged materials is narrowly limited in the context of the Federal Advisory Committee Act to privileged inter-agency or intra-agency documents prepared by an agency and transmitted to an advisory committee.

April 29, 1988

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

Introduction and Summary

This responds to your request for the views of this Office concerning the extent to which exemption 5 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, is available to withhold deliberative materials prepared by an advisory committee that would otherwise be subject to the disclosure requirements of section 10(b) of the Federal Advisory Committee Act, 5 U.S.C. app. I ("FACA").[1] Section 10(b) provides in pertinent part that "[s]ubject to section 552 of title 5,

[1] This memorandum addresses only exemption 5 of FOIA To the extent one of the other eight statutory exemptions applies, the covered documents are independently protected from disclosure. We also emphasize both that separation of powers may preclude Congress from applying FACA to certain advisory groups and that documents subject to the disclosure requirements of section 10(b) may be withheld pursuant to a valid claim of executive privilege. We do not here address these constitutional bases for withholding documents but observe that several courts have described the threat posed by a literal reading of FACA to presidential powers *See, e g , National Anti-Hunger Coalition v. Executive Comm of the President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 530 (D.D.C.), *aff'd and remanded*, 711 F.2d 1071 (D C Cir.), *judgment amended*, 566 F. Supp. 1515 (D.D.C. 1983) (FACA is "obscure, imprecise, and open to interpretations so broad that it would threaten to impinge unduly upon prerogatives preserved by the separation of powers doctrine"); *Nader v Baroody*, 396 F. Supp 1231, 1234 (D D.C. 1975), *vacated as moot*, No 75–1969 (D.C Cir Jan. 10, 1977) ("Nowhere is there an indication that Congress intended to intrude upon the day-to-day functioning of the presidency . . . ."). Thus, for example, it is the government's position that the American Bar Association Standing Committee on the Federal Judiciary is not "utilized" by the President and therefore not subject to FACA, or alternatively, that the application of FACA to the ABA Committee would unconstitutionally impinge on the President's exclusive authority to nominate and appoint Article III judges, subject to the advice and consent function of the Senate. U.S. Const. art. II, § 2, cl. 2. *Washington Legal Found v. United States Dept. of Justice*, 691 F. Supp. 483 (D D C. 1988) In addition, congressional disclosure statutes, including FACA, necessarily raise separation of powers and executive privilege issues as applied to communications among the President and his advisors and advice prepared for the President by his advisors *See, e g , Nixon v. General Serv Admin.*, 433 U.S. 425, 441–55 (1977); *Soucie v David*, 448 F 2d 1067, 1073 (D.C. Cir. 1971); *National Anti-Hunger Coalition*, 557 F. Supp. at 530. Because the operation of presidential powers in the context of FACA is not the subject of the present inquiry directed to this Office, the discussion herein is simply meant to be illustrative.

United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection."[2] Exemption 5 of FOIA exempts inter-agency and intra-agency deliberative or predecisional documents from disclosure.[3] The issue presented is the scope to be given to exemption 5 in light of section 10(b)'s enumeration of deliberative documents such as working papers and drafts as being specifically subject to disclosure.[4]

We conclude that FACA requires disclosure of written advisory committee documents, including predecisional materials such as drafts, working papers, and studies.[5] The disclosure exemption available to agencies under exemption 5 of FOIA for predecisional documents and other privileged materials is narrowly limited in the context of FACA to privileged "inter-agency or intra-agency" documents prepared by an agency and transmitted to an advisory committee. The language of the FACA statute and its legislative history support this restrictive application of exemption 5 to requests for public access to advisory committee

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[2] Section 10(b) of FACA reads in full:

> Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

[3] Exemption 5, 5 U.S.C. § 552(b)(5), provides that the disclosure obligations of FOIA do not "apply to matters that are— (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

[4] Public Citizen Litigation Group has also requested DOJ to issue a policy statement clarifying that the deliberative process exemption does not "shield from public scrutiny" the drafts, working papers, and other deliberative documents prepared by advisory committees. Public Citizen represented the ACLU in its suit to enjoin the Attorney General's Commission on Pornography from holding meetings until it released drafts and working papers. *ACLU v Attorney General's Commission on Pornography, Department of Justice*, No. 86–0893 (D.D.C. filed Apr. 3, 1986) Although the Commission initially asserted that the documents were covered by exemption 5 as incorporated by FACA, the parties stipulated a settlement providing for release of the documents and the suit was withdrawn

[5] This Office has not previously addressed this issue directly Soon after FACA was enacted, we noted the potential conflict between exemption 5 and section 10, but did not opine on the proper resolution of the issue Memorandum for Dwight A. Ink, Assistant Director, Office of Management and Budget, from Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel, *Re Treatment of Exemption 5 of the Freedom of Information Act in Denying Access to Meetings and Records of Federal Advisory Committees* (Jan. 2, 1973) In 1974, we advised the Clemency Board that it was an advisory committee and therefore subject to the disclosure provisions of FACA The memorandum by Assistant Attorney General Antonin Scalia identified three potentially applicable FOIA exemptions, but conspicuously did not cite exemption 5. Memorandum for the Clemency Board, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel (Sept. 24, 1974). In 1982, in the process of rendering an opinion that activities by staff members on task forces to President's Private Sector Survey on Cost Control did not fall within the ambit of FACA, we noted in dicta and without analysis that materials made available to committee had to be made available to the public under section 10(b), unless exempted under FOIA, in which case it "need not be made publicly available under 10(b) of FACA." Memorandum for Fred F. Fielding, Counsel to the President, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re. President's Private Sector Survey on Cost Control* at 7 (Nov. 1, 1982) We also opined in 1982 that advisory committee documents are available through FOIA requests made to the supervising agency and that the advisory committee must cooperate, but we did not specifically address the impact of exemption 5 Memorandum for Fred F. Fielding, Counsel to the President, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of the Freedom of Information Act to Federal Advisory Committee* (Dec. 30, 1982).

documents. Moreover, since an advisory committee is not itself an agency, this construction is supported by the express language of exemption 5 which applies only to inter-agency or intra-agency materials.[6]

We emphasize that despite these conclusions many documents that are part of the advisory committee process will not be subject to disclosure. Section 10(b) itself applies only to materials made available to or prepared for or by an advisory committee established by statute or reorganization plan or established or utilized by the President or an agency. 5 U.S.C. app. I, §§ 3(2), 10(b). Accordingly, in determining whether a document is to be disclosed the first issue is not whether it is subject to an exemption under 5 U.S.C. § 552 but whether it meets this threshold definition.

Analysis

A. Defining the Class of Documents to which Section 10(b) Applies.

By the express terms of section 10(b), deliberative materials, in order to be subject to disclosure, must be "made available to or prepared for or by" an advisory committee, 5 U.S.C. app. I, § 10(b), which is established by statute or reorganization plan or "*established or utilized by the President*" or an agency. *Id.* § 3(2)(B) (emphasis added).[7] The courts and this Office have construed the concept of advisory committees established or utilized by the President or an agency to preclude section 10(b)'s application to the work prepared by a staff member of an advisory committee or a staffing entity within an advisory committee, such as an independent task force limited to gathering information, or a subcommittee of the advisory committee that is not itself established or utilized by the President or agency, so long as the material was not used by the committee as a whole. The reasoning behind the construction of the concept is straightforward:

> [Such staffing entities or subcommittees] do not directly advise the President or any federal agency, but rather provide information and recommendations for consideration to the Committee. Consequently, they are not directly "established or utilized" by the President or any agency . . . .

See National Anti-Hunger Coalition, 557 F. Supp. at 529. *See also* Memorandum for Fred H. Wybrandt, Chairman, National Crime Information Center Ad-

[6] We do not address or express any opinion in this memorandum on the separate issue of the disclosure obligations of the agency under FOIA with respect to written materials delivered from an agency advisory committee to an agency.

[7] FACA defines an advisory committee as "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof, . . . which is—(A) established by statute or reorganization plan, or (B) established or utilized by the President, or (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government." 5 U.S.C. app. I, § 3(2).

visory Policy Board, from Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel (Apr. 28, 1987) ("Wybrandt Memorandum"). This limitation on section 10(b)'s disclosure requirement has important practical consequences. For example, the President established a presidential advisory committee, the President's Private Sector Survey on Cost Control ("Survey"), funded by the Department of Commerce, but whose staff had to be paid for by the private sector.[8] A non-profit Foundation for the Survey, chaired by members of the Executive Committee, organized the private staff into thirty-six task forces to gather information, perform studies, and draft recommendations and reports for the Executive Committee. Based on this structure, the district and appellate courts concluded that the non-profit task forces were not subject to FACA because they did not provide advice directly to the President or any agency, but rather performed activities analogous to staff work. *National Anti-Hunger Coalition*, 557 F. Supp. at 529–30; 711 F.2d at 1075–76.[9]

Based on the same reasoning, as well as an exhaustive survey of the FACA legislative history, this Office recently concluded that subcommittees of the National Crime Information Center ("NCIC") Advisory Policy Board are likewise not covered by FACA because they "perform preparatory work or professional staff functions in aid of, but not displacing, the actual advisory committee function performed by the Board." Wybrandt Memorandum at 1.[10] Although each advisory committee structure will determine the results in a particular case, the general point can be made that FACA compels disclosure of a limited subset of information, namely the material used by the advisory committee or subgroup established or utilized by the ultimate decision-maker, which typically will be an agency or the President.

B. The Scope of Exemption 5 in the Context of Section 10(b)'s Disclosure Requirements.

Assuming that documents are subject to section 10(b), we turn to the scope of FOIA's exemption 5 under FACA. First, it is necessary to presume that Congress did not intend to create an irreconcilable conflict between the two laws; *i.e.*, on the one hand, to protect deliberative advisory committee materials from public inspection via exemption 5, but on the other, to order detailed disclosure of all "records, reports, transcripts, minutes, appendixes, working papers, drafts, stud-

[8] Exec. Order No. 12369, sec. 3(e), 3 C F.R. 190 (1983).

[9] On the other hand, the subcommittee officially established by the Survey was held to be covered by FACA because it "is responsible for reviewing the task force reports and making detailed recommendations to the President and the affected federal agencies." *National Anti-Hunger Coalition*, 711 F.2d at 1072. The D.C. Circuit panel also states in dictum that if the task force reports were in fact not exhaustively reviewed and revised by the Executive Committee, but were merely rubber-stamped recommendations given little or no independent consideration, it would be within a district court's power to find that the provisions of FACA apply to the task forces as well. *Id.* at 1075–76.

[10] As in our prior opinion, however, "[w]e must emphasize that our opinion should not in any way be read as support for attempting to use subcommittees to evade the . . . requirements of FACA." Wybrandt Memorandum at 9.

ies, agenda, or other documents" that are otherwise covered by FACA.[11] The potential conflict is underscored by the obligation to disclose committee drafts, working papers and studies, whereas exemption 5 is designed to preserve the integrity of precisely these types of "predecisional" internal deliberations from public view.[12] The two objectives, if not harmonized, would present an insurmountable internal statutory conflict.

We conclude that exemption 5 is not generally applicable to materials prepared by or for an advisory committee, but that it does extend to protect privileged documents delivered from the agency to an advisory committee. This construction gives meaning to exemption 5 without vitiating Congress' enumeration of deliberative documents such as working papers and drafts as subject to disclosure. It is also supported by a close reading of exemption 5 itself. Because by its terms exemption 5 protects only inter-agency and intra-agency documents and because an advisory committee is not an agency, documents do not receive the protection of exemption 5 by virtue of the fact that they are prepared by an advisory committee. On the other hand, documents prepared by an agency do not lose the protection of exemption 5 by virtue of the fact that they are delivered to an advisory committee.[13]

At the outset, we note that the application of FOIA to advisory committees in the FACA statute is not a model of draftsmanship.[14] Most glaringly, Congress incorporated the FOIA exemptions, yet gave no explicit consideration to

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[11] Pursuant to section 10(b), the right of public access to deliberative committee documents expires when the "committee ceases to exist." The material available for public inspection is thereafter restricted by the statute to the "report made by every advisory committee and, where appropriate, background papers prepared by consultants." 5 U.S.C. app. I, § 13. The Director of OMB is responsible for filing this material, subject to FOIA, with the Library of Congress where it is maintained for public inspection in a depository *Id* The depository materials will presumptively not include the preparatory material covered by section 10(b), such as working papers, drafts, studies, and agendas, unless the materials are incorporated in the committee report or are appropriate background papers prepared by consultants.

[12] Exemption 5 in general protects agency documents that would normally be privileged in civil discovery. *See NLRB v Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). To date, the Supreme Court has recognized five privileges, including those expressly mentioned in the legislative history, as well as those that are "well-settled" in the case law or are "rough analogies" to privileges recognized by Congress. *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 801–02 (1984). The privilege primarily at issue in the intersection of FOIA and FACA is that protecting advice and recommendations which are part of the deliberative processes of government.

In addition to deliberative process, exemption 5 protects attorney work product, *Hickman v. Taylor*, 329 U.S. 495, 509–10 (1947); *FTC v. Grolier, Inc.*, 462 U.S 19, 25–28 (1983), matters covered by attorney-client privilege, *NLRB*, 421 U.S. at 154, confidential commercial information generated to award contracts, *Federal Open Market Comm. of the Fed Reserve Sys. v Merrill*, 443 U.S 340, 360 (1979), third-party witness statements to military investigators, *Weber Aircraft*, 465 U.S. at 792, and perhaps other privileges as well, *see Durns v. United States Dept of Justice*, 804 F.2d 701 (D.C. Cir.), *reh'g en banc denied*, 806 F.2d 1122 (D.C. Cir. 1986) (presentence reports); *Hoover v. United States Dep't. of Interior*, 611 F.2d 1132, 1138–42 (5th Cir. 1980) (expert witness reports).

[13] We express no opinion on the operation of exemption 5 in the context of a FOIA request to an agency

[14] The courts have noted the ambiguity of the FACA statute generally, and the problems that would be created for the conduct of government affairs by the literal application of its terms *See, e g , Natural Resources Defense Council v Herrington*, 637 F. Supp. 116, 118–21 (D.D.C. 1986), *National Anti-Hunger Coalition*, 557 F. Supp at 530; *Center for Auto Safety v. Tiemann*, 414 F. Supp 215, 223 (D.D C. 1976), *aff'd in part*, 580 F.2d 689 (D.C. Cir 1978), *Lombardo v Handler*, 397 F. Supp. 792, 800 (D.D.C 1975), *aff'd*, 546 F 2d 1043 (D.C. Cir 1976), *cert. denied*, 431 U.S. 932 (1977).

the difficulties in squaring exemption 5 and section 10. The legislative record indicates in fact that minimal attention was given on the whole to the incorporation of FOIA or its intended operation in the particular context of advisory committees.

On the Senate side, as described in the committee report from the Committee on Government Operations, the clean FACA bill sent to conference, S. 3529, reflected "a compromise between the mandatory requirements of openness and public participation contained in S. 1637 and the permissive agency option for public access contained in S. 2064 and S. 1964." Congressional Research Service, 95th Cong., 2d Sess., Federal Advisory Committee Act 166 (Comm. Print 1978) ("Legislative History"). In tandem with this controversy about access to meetings, the original three bills provided either for unrestricted access to committee records and reports, S. 1637[15] and S. 2064,[16] or did not provide for any disclosure of written material whatsoever, S. 1964.[17]

Based on the hearings and additional study, it was concluded, according to the Senate committee report, that despite "considerable opposition" "there was substantial merit in opening advisory committee deliberations and documentation to the public." *Id.* In exchange for granting the public a right of access to meetings and documents, the protections of FOIA were incorporated: "The exemptions under the Freedom of Information Act were chosen because they had received the most thorough scrutiny and consideration by the Congress in this sensitive area between public disclosure and privileged information. Further, they seemed to meet most of the objections raised as to openness during the hearings."[18] *Id.* at 166–67. The FOIA exemptions constituted a ready made legislative vehicle for balancing disclosure and privilege. The record, however, contains no additional

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[15] The pertinent section of S 1637, sec. 10(b), pertaining to reports and records provided:

> Each Federal agency shall make available to the public for inspection and copying the records and files, including agenda, transcrips [sic], studies, analyses, reports, and any other data compilations and working papers, which were made available to or prepared for or by each advisory committee. Such records shall be maintained at a single location in each agency for a period of five years after the committee ceases to exist.

Reprinted in Legislative History at 135.

[16] S. 2064 provided in section 12(d), in pertinent part, as follows:

> Each Federal agency shall make available to the public for inspection and copying the records and files, including agenda, transcripts, studies, analyses, reports, and any other data compilations and working papers, which were made available to or prepared for or by each agency advisory committee (except to the extent they deal with national security matter).

Reprinted in Legislative History at 149.

[17] S 1964 did, however, require in section 10(d) that the Comptroller General have access, "for the purpose of audit and examination, to any books, documents, papers, and records of each statutory advisory committee." *Reprinted in* Legislative History at 143.

[18] The opposition to open meetings came "particularly from agencies whose committees dealt with such issues as national defense and foreign policy, trade secrets, matters relating to the regulation and supervision of financial institutions and markets, and information concerning the competence and character of individuals, such as that taken up by the grant review committees of the National Institutes of Health, the National Science Foundation, and NASA." *See* Legislative History at 166.

discussion that would suggest Congress was even aware of the potential conflict posed by exemption 5 as applied to section 10 of FACA.[19]

In the statute as enacted, the language of S. 3529 was adopted in full, but the structure was slightly altered. Rather than providing that all three sections would be subject to 552(b), section 10(b) was prefaced with the "[s]ubject to section 552" language. No further elucidation of the relation between FACA and FOIA was provided. Upon review, therefore, it seems fair to conclude that Congress broadly opted in favor of disclosure for advisory committees, but in response to specific problems raised, adopted FOIA as the vehicle for protecting certain classes of materials. Beyond that, however, Congress did not explain its intentions with respect to the interaction of FOIA and FACA in general or of exemption 5 in particular.

Absent apparent recognition by Congress of the problem, the proper application intended for exemption 5 is necessarily drawn from the plain language of section 10(b). At least as to deliberative, predecisional materials, such as working papers, drafts, and studies, there appears to be no doubt that Congress intended full disclosure. The enumeration in extensive detail of specific kinds of deliberative material subject to mandatory inspection and copying during the life of the committee provides the best evidence that the exemption 5 protection for deliberative materials was intended to have limited application as applied to FACA.

The legislative history reinforces the view that Congress intended the narrow application of exemption 5 to FACA. In particular, key legislators made numerous and essentially uncontradicted statements that they intended the public to be in a position to affect the committee's deliberations and that they fully intended to provide the public with access to deliberative committee materials during the committee's lifetime. For example, in sponsoring the bill on the Senate floor, Senator Metcalf, as acting subcommittee chairman within the Committee on Government Operations, which submitted S. 3529, stated:[20]

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[19] The House bill, H.R. 4383, as amended, is even less illuminating In substance, the provision concerning reports and records seems to be closely analogous to S. 3529: "The provisions of section 552 of title 5, United States Code, shall apply to all records and files, including agenda, transcripts, studies, analyses, reports, meeting notices, and any other data, compilations, and working papers which were made available to or prepared for or by each advisory committee." Legislative History at 303. Yet the House committee report impliedly states that the reference to 552 is actually to 552(a), namely that portion of FOIA that broadly states the obligation to disclose, rather than to 552(b), which sets forth the nine exemptions:

> This provision has the effect of assuring openness in the operations of advisory committees. This provision coupled with the requirement that complete and accurate minutes of committee meetings be kept serves to prevent the surreptitious use of advisory committees to further the interests of any special interest group. Along with the provisions for balanced representation contained in § 4 of the bill, this requirement of openness is a strong safeguard of the public interest.

Legislative History at 280.

[20] In much the same vein, the subcommittee report accompanying S. 3529 quotes Senator Metcalf's remarks opening subcommittee hearings. His language, while not entirely unambiguous, would again strongly suggest that the rationale for access to committee papers includes, rather than excludes, influence on the deliberative process:

> Those who get information to policymakers, or get information for them, can benefit their cause, whatever it may be. Outsiders can be adversely and unknowingly affected. And decision-makers who

> Further evidence has shown that there exists a tendency among advisory committees to operate in a closed environment, permitting little opportunity for the public to be informed of their *deliberations and recommendations, and of the materials and information on which they rely. . . .*
>
> Thus, the legislation provides both a housekeeping function in the interests of efficiency and economy in Government and a function of disclosure and objective counsel—so that the public will know what advice their Government is *getting and how they might add their contribution to the information process.*

Legislative History at 198 (emphasis added). On the House side, Congressman Moorhead supported H.R. 4383, as amended, emphasizing the following:

> Another feature of the bill which must be applauded is the requirement for public access to the deliberations and recommendations of these advisory committees. All too often, such committees meet behind closed doors, and submit advice to Executive departments without any opportunity for the public to comment on or be aware of the purport of such advice.

Legislative History at 297.

Moreover, this construction is also supported by a close reading of the express terms of exemption 5, which protects only inter-*agency* and intra-*agency* memorandums. These terms do not apply to documents prepared by and in the possession of an advisory committee because an advisory committee within the meaning of FACA is neither an agency nor a sub-group within an agency.[21] FACA specifically distinguishes between an advisory committee and an agency in its section defining statutory terms, making clear that an advisory committee is not

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[20] (. . . continued)

> get information from special interest groups who are not subject to rebuttal because opposing interests do not know about meetings — and could not get in the door if they did—may not make tempered judgments. *We are looking at two fundamentals, disclosure and counsel, the rights of people to find out what is going on and, if they want, to do something about it.*

S. Rep. No. 1098, 92d Cong., 2d Sess at 4 (1972), *reprinted in* Legislative History at 154 (emphasis added). These views are seconded by Senator Percy:

> The second major element of the bill is its provisions for opening up advisory committees to public scrutiny During the extensive hearings . . ., we became convinced that there were too many instances where advisory committees were consulting with Government offices on important policies and decisions without an adequate guarantee that the public interest was being served Meetings are typically closed to the public Minutes and documents used in meetings are typically not available for public inspection.

Remarks of Senator Percy, 118 Cong. Rec. 30,274 (1972), *reprinted in* Legislative History at 202 (endorsing S. 3529).

[21] Decisions under FOIA hold that exemption 5 applies when an agency document in the possession of an agency has been transmitted by a non-agency such as Congress, *see infra* note 29 Our conclusion, however, applies only to documents that are neither prepared by an agency nor in an agency's possession.

an agency. It defines the term agency to have the same meaning as used in FOIA, 5 U.S.C. app. I, § 3(3),[22] whereas it defines "advisory committee" as "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof" established by statute or reorganization plan or utilized by the President or one or more agencies "in the interest of obtaining advice or recommendations." 5 U.S.C. app. I, § 3(2). More broadly, FACA is predicated on the assumption, emphasized several times in the statute, that advisory committees give advice and recommendations,[23] whereas agencies are operating arms of government characterized by "substantial independent authority in the exercise of specific functions," *Soucie v. David*, 448 F.2d at 1073, or the "authority in law to make decisions." *Washington Research Project, Inc. v. HEW*, 504 F.2d 238, 248 (D.C. Cir. 1974). Several courts,[24] as well as this Office,[25] have construed the statutory distinction to signify that advisory committees are not agencies.[26]

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[22] Pursuant to 5 U.S.C. § 551(1), the term "agency" is defined, subject to exceptions, as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency."

[23] FACA in several provisions underscores the self-evident function of advisory committees to provide advice. *See, e g* , 5 U.S.C. app. I, § 2(6) ("the function of advisory committees should be advisory only"); 5 U.S.C. app. I, § 9(b) ("Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions."). *See also* Legislative History at 197–98 (Among the enumerated purposes of S 3529 is "to assure that the functions of Federal advisory committees shall be advisory only and that all matters under their consideration shall be determined solely by Federal officials and agencies "). To the extent FACA recognizes that advisory committees in individual circumstances might exceed their advisory function, 5 U.S.C. app I, § 9(b), (c)(F), the general conclusion that advisory committees are not agencies or divisions of agencies would need to be evaluated based on the specific powers and activities of the committee

[24] *See, e.g* , *Nader v. Dunlop*, 370 F. Supp. 177, 178–79 (D.D.C. 1973) (exemption 5 does not exempt from public access meetings of advisory committees to the Cost of Living Council); *Gates v. Schlesinger*, 366 F. Supp. 797, 798–800 (D D C. 1973) (same with respect to advisory committee to Department of Defense) These two cases apply to meetings, 5 U.S C app. I, § 10(d), not documentary disclosure, 5 U.S.C. app. I, § 10(b), but because they preceded the 1976 amendment to FACA which eliminated the availability of exemption 5 for meetings, but not for documents, the reasoning is applicable to documentary materials under the statute as presently written

[25] Memorandum for the Clemency Board, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel (Sept 24, 1974) (explaining that if advisory committees were considered to be agencies, the full panoply of requirements mandated by the Administrative Procedure Act would apply to committee operations).

[26] We are aware of no language in FACA's legislative history supporting the construction that advisory committees are agencies. One possible exception is a remark by Congressman Thone in reference to a provision in the House bill regarding access to advisory committee documents filed with the Library of Congress:

> Subsection (b) provides that the Freedom of Information Act is applicable to this section.
>
> This should remove any doubt as to whether advisory committees are subject to the Freedom of Information Act. Otherwise, I assume, it might be argued that advisory committees do not fall within the definition of agency in section 551(1) of the Freedom of Information Act and are, therefore, not subject to the act.

118 Cong. Rec 16,298 (1972).

This isolated remark about a provision collateral to section 10 carries little weight, especially since it runs counter to the statute's language and other legislative history *See, e g , Ernst & Ernst v Hochfelder*, 425 U S. 185, 203 n.24 (1976); *NLRB v Fruit Packers*, 377 U.S. 58, 66 (1964) Moreover, the substance of the remark is ambiguous. The congressman may have intended to say that advisory committees are agencies or, alternatively, that the Act expressly makes FOIA applicable to FACA, and therefore avoids any question whether FOIA is *independently* applicable to advisory committees as agencies. *See, e g* , Memorandum for the Clemency Board, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel at 9 (Sept. 24, 1974) ("There are two routes by which the Freedom of Information Act may be applied to the Board. One is through the Federal Advisory Committee Act. A second possible route is through the Administrative Procedure Act, of which the Freedom of Information Act is a part, if the [Clemency] Board is to be regarded as an agency, as that term is defined in the Administrative Procedure Act.")

For similar reasons, an advisory committee cannot be deemed a component within an agency whose deliberative documents are subject to exemption 5. The Act requires that all legislation authorizing an advisory committee "assure that the advice and recommendations of the advisory committee . . . not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment." 5 U.S.C. app. I, § 5(b)(3). The emphasis on independence, and on judgment, highlights the separation of committees from agencies, as do the provisions for independent staffing, 5 U.S.C. app. I, § 5(b)(4), temporary duration, 5 U.S.C. app. I, § 14, the prohibition of committees composed wholly of full-time federal officials or employees, 5 U.S.C. app. I, § 3(2), and the requirement that "[n]o advisory committee shall meet or take any action until an advisory committee charter has been filed" with the appropriate authority, 5 U.S.C. app. I, § 9(c). As the district court in *Gates*, 366 F. Supp. at 799, observed: "[T]he exchange of information does not make an advisory committee 'part of' its government agency."

The committee is not an internal organ, but again by its very nature, is a group of 'outsiders' called upon because of their expertise to offer views and comments unavailable within the agency.[27] In short, given that an advisory committee is neither an agency itself nor a component of an agency, exemption 5 cannot generally apply to FACA advisory committees' documents since by its terms it only protects "inter-agency and intra-agency memorandums."[28]

On the other hand, by its express terms exemption 5 would apply to deliberative documents prepared by an agency and delivered to the advisory committee.[29]

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[27] Moreover, the Senate report urges that advisory committees not be formed if the agency can accomplish the advisory work internally Advisory committees are plainly meant to supplement agency resources, not duplicate them. Although the Act authorizes agency officials to call and adjourn meetings, 5 U.S.C. app. I, § 10(e) and (f), and broadly monitor the operation of advisory committees established by an agency, 5 U.S.C. app. I, § 8, these provisions implement the Act's designated purpose to rein in the operation of advisory committees, not place them within the jurisdictional confines of the agency or subject them to agency mandate on the substantive issue under review by the committee

[28] We recognize that under FOIA the courts have ruled on several occasions that materials supplied to an agency by outside experts and consultants, *see, e g., Hoover v United States Dep't of Interior*, 611 F.2d 1132, 1138 (5th Cir. 1980) (report of private appraiser); *Lead Industries Ass'n v. OSHA*, 610 F.2d 70, 83 (2d Cir. 1979) (analyses of scientific testimony prepared by consultants); or the courts, *see Durns v Bureau of Prisons*, 804 F.2d 701 (D D.C. 1986) (presentence reports); or Congress, *see, e.g., Ryan v Department of Justice*, 617 F.2d 781, 789–90 (D.C. Cir. 1980) (Senators' responses to agency's questionnaire intra-agency records), fall within exemption 5—thereby loosely construing the meaning of "intra-agency." This line of cases, however, does not alter our conclusion that an advisory committee cannot invoke exemption 5's inter-agency exemption to protect materials prepared by it and in its possession. These cases simply stand for the proposition that an agency may protect certain documents in its possession from disclosure. Accordingly, under this line of cases, when an agency makes use of advisory materials, such materials may indeed properly become deliberative documents to the agency. Section 10(b), however, imposes disclosure requirements on the advisory committee itself.

[29] This is consistent with the holding in *Aviation Consumer Action Project v Washburn*, 535 F.2d 101, 107–08 (D.C. Cir. 1976) that agencies may disclose predecisional documents to advisory committees without waiving their ability to protect the records under exemption 5, at least where such disclosures further the "free and candid exchange of ideas during the process of decision-making." It is also consistent with FOIA caselaw holding that the delivery of internal documents to Congress does not necessarily vitiate exemption 5 protection. *See, e g , Letelier v United States Dept. of Justice*, 3 GDS 82,257, 82,714 (D.D.C. 1982) ("documents reflecting consultations between CIA and Congress are protected by exemption 5 since such consultations are an integral part of the deliberative process and to discuss this process in public view would inhibit frank discussions"); *Allen v Department of Defense*, 580 F. Supp 74, 83 (D D.C. 1983) ("exemption 5 may, in an appropriate case, be applied to agency-congressional communications").

Accordingly, our construction still gives vitality to exemption 5 in the context of section 10(b) disclosure requirements. Under this construction, documents transmitted to an advisory committee by an agency do not lose the protection of an agency's deliberative process exemption under FOIA.

Conclusion

For the foregoing reasons, exemption 5 properly applies under FACA when the agency has transmitted to an advisory committee a document that would be protected from disclosure if in the possession of the agency. Under the detailed enumeration of covered materials in section 10 of FACA, however, the advisory committees must, as a general matter, disclose the materials "made available to" the committee, "prepared by" the committee or "prepared for" the committee, so long as the committee is utilized or established by the President, an agency, or statute or reorganization plan, and then only "until the advisory committee ceases to exist." 5 U.S.C. app. I, § 10(b).

JOHN O. MCGINNIS
Deputy Assistant Attorney General
Office of Legal Counsel

Applicability of 18 U.S.C. § 207(a) to the Union Station Development Corporation

18 U.S.C. § 207(a) does not prohibit a former employee of the District of Columbia government now working for the Union Station Redevelopment Corporation from communicating with the District government concerning matters on which she worked as a District employee, because the Corporation should be regarded as "the United States" for the purposes of that statute.

May 10, 1988

MEMORANDUM OPINION FOR THE DEPUTY DIRECTOR
OFFICE OF GOVERNMENT ETHICS

This responds to your request for the opinion of this Office whether 18 U.S.C. § 207(a) bars a former employee of the District of Columbia government now working for the Union Station Redevelopment Corporation ("USRC") from communicating with the District government in connection with matters on which she worked as a District employee. Section 207(a) prohibits former federal government employees, including employees of the District of Columbia government, from representing "any other person (except the United States)" in matters on which the employee worked as a government employee. For the reasons set forth below, we conclude that section 207(a) poses no bar to the former employee's communicating with the District government because USRC should be regarded as "the United States" for purposes of that statute.

In the past, we have looked to the definition of "agency of the United States" in 18 U.S.C. § 6 to determine if an entity should be regarded as the United States for the purposes of the conflict of interest laws. *See Applicability of 18 U.S.C. § 205 to Union Organizing Activities of Department of Justice Employee*, 5 Op. O.L.C. 194 (1981) (Office of the Architect of the Capitol an agency of the United States for purposes of 18 U.S.C. § 205); Letter for the Secretary of the Army, from Attorney General Clark (Dec. 2, 1948) (Panama Railroad Company an agency of the United States for purposes of the conflict of interest laws). Section 6 provides:

> The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

18 U.S.C. § 6. The legislative history of the provision adds:

> The phrase "corporation in which the United States has a proprietary interest" is intended to include those governmental corporations in which stock is not actually issued, as well as those in which stock is owned by the United States. It excludes those corporations in which the interest of the Government is custodial or incidental.

H.R. Rep. No. 304, 80th Cong., 1st Sess. A6 (1947) (revisers' notes reprinted in 18 U.S.C. § 6).

Few judicial precedents are available to guide us in interpreting 18 U.S.C. § 6, and none of those involve corporations similar to USRC.[1] In his 1948 letter to the Secretary of the Army, *supra*, the Attorney General concluded that the Panama Railroad Company was an agency of the United States under 18 U.S.C. § 6. Although he did not explain what factors led to that conclusion, an examination of the status of the Panama Railroad Company in 1948 reveals several relevant considerations. Under the Act of June 29, 1948, 62 Stat. 1075, 1076–80, the Panama Railroad Company was "an agency and instrumentality of the United States," funded by congressional appropriations and transfers from other government agencies, with the responsibility for operating a railroad across the Panamanian Isthmus and for building and maintaining the infrastructure of the Canal Zone.

More helpful is the discussion of the definition of "agency of the United States" in this Office's opinion finding the Federal National Mortgage Association ("FNMA") an agency of the United States for the purposes of 18 U.S.C. § 431. Section 431, another conflict of interest provision, prohibits Members of Congress from entering into contracts with agencies of the United States. In a memorandum for Joseph F. Dolan, Assistant Deputy Attorney General, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel (Dec. 18, 1963) ("Schlei Memorandum"), we concluded that the status of the FNMA as an agency of the United States precluded the FNMA's representation by a law firm of which a Congressman was a member. We examined the charter of the FNMA and determined that it was a "corporation in which the United States has a proprietary interest." *Id.* at 3. In making this determination we took into account the following factors: 1) the corporation was created by federal statute; 2) one of the FNMA's functions was "to provide Government assistance for certain types of mortgages"; 3) the FNMA was a mixed-ownership corporation in which the Secretary of the Treasury owned the preferred stock; and 4) the United States exercised substantial control over the FNMA's activities. *Id.* at 4–6.

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[1] *Compare United States v Allen*, 193 F. Supp. 954, 957 (S D. Cal. 1961) (a federal grand jury is not an agency of the United States) *with United States v. Stark*, 131 F. Supp. 190, 194 (D. Md. 1955) (the FBI is an agency of the United States). Neither of these cases suggests any standards that can be used to decide whether a particular corporate entity should be regarded as an "agency of the United States" under the statute.

Based upon these precedents, we believe that USRC should be regarded as an agency of the United States for purposes of title 18 if the interest of the United States in the corporation is "proprietary," but not if the interest of the United States is "custodial or incidental." In making this determination, we look to USRC's functions, financing, control, and management. *Cf. Government Nat'l Mortgage Ass'n v. Terry*, 608 F.2d 614, 618 (5th Cir. 1979).[2]

USRC's functions are those entrusted by Congress to the Department of Transportation in the Union Station Redevelopment Act of 1981, 40 U.S.C. §§ 801–819. Congress anticipated that "a nonprofit, public-private development corporation" could be created to manage the redevelopment of the Union Station complex. S. Rep. No. 269, 97th Cong., 1st Sess. 13 (1981), *reprinted in* 1981 U.S.C.C.A.N. 2711, 2723. USRC "was formed to assist the Secretary in achieving the objectives of the Redevelopment Act and generally to facilitate the redevelopment of the Union Station complex." Union Station Redevelopment Cooperative Agreement at 3 (Nov. 1983) ("Union Station Agreement"). In particular, USRC's responsibilities include selecting and monitoring the developer of the station complex, ensuring that adequate provision is afforded Amtrak for its current and future use of the station, and working with other interested parties in the redevelopment of the station. *Id.* at 6–7. Although these functions presumably could be handled by private enterprise without federal control, that is not an adequate basis for finding that an entity is not an agency of the United States. *See Rauscher*, 789 F.2d at 315. *See also* Schlei Memorandum at 5 (FNMA is an agency of the United States even though it is empowered "to engage in its business activities in a manner comparable to that of private institutions engaged in similar activities"). In this case, Congress assigned USRC's responsibilities to the Department of Transportation. USRC is simply the vehicle created by that Department to accomplish the congressional mandate.

USRC is financed by several sources. Amtrak is obligated to provide up to seventy million dollars to USRC for the redevelopment project. Union Station Agree-

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[2] *Terry* construed the meaning of "agency" under 28 U.S.C. § 451, which defines "agency" in a manner similar to the definition in 18 U.S.C. § 6. Moreover, the historical and revisions notes of section 451 state that "agency" in section 451 conforms to the definition of "agency" in 18 U.S.C. § 6. Accordingly, the court in *Terry* used the discussion of "proprietary corporation" in the revisers' notes to 18 U.S.C. § 6 to determine if Ginnie Mae should be held an agency of the United States for the purposes of determining federal jurisdiction *See* 608 F.2d at 618–20 (Ginnie Mae is an agency because of the control HUD exercises over Ginnie Mae, the intent of Congress to retain governmental control over the federal housing program, and the funds provided by—and profits returned by Ginnie Mae to—the federal government). *See also Rauscher Pierce Refsnes, Inc. v. FDIC*, 789 F.2d 313, 314–16 (5th Cir. 1986) (FDIC is an agency because of the "important governmental functions" performed by the FDIC, the presence of the Comptroller General and two presidential appointees on the three member board, the authority to issue regulations, and the control by Treasury over the money of the FDIC); *LPR Land Holdings v. Federal Land Bank*, 651 F. Supp. 287, 290 (E.D. Mich. 1987) (a federal land bank is not an agency because being chartered by and regulated by the federal government is not sufficient to make an entity an agency of the United States).

Although title 28 incorporates the definition of agency in title 18, the converse is not true. It is possible that different considerations influence whether an agency should be considered part of the United States for jurisdictional purposes and whether an agency is part of the United States for the purpose of defining a criminal offense. Thus, cases decided under title 28 are not dispositive under title 18, but they are useful in examining the factors that courts have found relevant to deciding whether an entity is an "agency" of the United States.

ment at 8.[3] The Federal Railroad Administration ("FRA"), an agency within the Department of Transportation, was required to provide $340,000 for the operation and maintenance of Union Station between October 1, 1983 and September 30, 1984; the FRA has a continuing obligation to provide financial assistance to USRC to the extent that its funds are available for this purpose. *Id.* at 4–5, 9. The District of Columbia contributes federal highway funds to USRC. Also, any income that USRC earns in the course of its work is to be used "to further project objectives." *Id.* at 11. USRC has no obligation to seek funds from any source. *Id.* at 7.

USRC is managed by a five member board of directors. Two members—the Secretary of Transportation and the Federal Railroad Administrator—are officials of the federal government. A third member—the Mayor of the District of Columbia—has the status of a federal official under the conflicts laws. Another member—the president of Amtrak—represents a mixed-ownership government corporation. *See supra* note 3. The president of the Federal City Council represents a private entity.[4] The day-to-day operations of USRC are handled by a president, a vice-president, two full-time employees, and one part-time employee, although the members of the board of directors also play significant, albeit varying, roles in this regard.[5]

While the question seems to us a close one, on balance we believe that the functions, financing, management and control of USRC make that entity an "agency of the United States" under 18 U.S.C. § 6, and that accordingly it should be considered "the United States" under 18 U.S.C. § 207(a). Our conclusion in this regard is reinforced by the purposes of section 207(a) itself. Several justifications for the restrictions imposed by that section on post-government employment have been advanced: the need to prevent the use of confidential government information for the benefit of a private party, the unseemliness of switching sides, the fear of undue influence over former colleagues, avoidance of pressure on government employees who anticipate future private employment, and protection from the appearance of a conflict of interest. *See, e.g.*, Bayless Manning, *Federal Conflict of Interest Law* 179–81 (1964) (reviewing the legislative history of the predecessor statute to section 207). *See also* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975). These same dangers are

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[3] Amtrak is a "mixed-ownership Government corporation." 31 U.S.C § 9101(2)(A). It is not "an agency or establishment of the United States Government." 45 U S C. §§ 541, 581(b)(1). Nonetheless, we have advised that Amtrak is an "agency" for the purposes of the Privacy Act, 5 U.S.C. § 552a, because Amtrak is a "Government controlled corporation" under 5 U.S.C. § 552(e). Letter for William M. Nichols, General Counsel, Office of Management and Budget, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel (Oct. 7, 1976) Further, more than one-third of Amtrak's total expenses for fiscal year 1987 was funded by congressional appropriations. *See* H R. Rep No. 202, 100th Cong , 1st Sess. 101–02 (1987)

[4] The Federal City Council is a civic organization comprised of prominent Washington residents It essentially operates as a booster group for the city.

[5] The General Counsel of the FRA has daily contact with USRC and is involved in most of the substantive decisions made by the corporation The Federal Railroad Administrator has perhaps weekly contact with the USRC. The other members of the board of directors have less frequent contact with the corporation.

not posed when a government employee moves "from one salaried government position to another." *Id.* at 6. Thus, for example, it would be entirely permissible for an individual to work on the redevelopment of Union Station as an employee of the District of Columbia and then work on the same matter as an employee of the Department of Transportation. We believe that the nature of USRC, as the entity performing the statutory responsibilities of the Department of Transportation for the Union Station project, under the guidance of government officials and with the assistance of federal funding, suggests that the same result should be reached when an individual moves from employment with the District of Columbia to employment with USRC.

In sum, we believe that the exclusively federal functions of USRC, and the significant control over its operations exercised by the federal government, warrant the conclusion that USRC should be considered "the United States" for the purposes of 18 U.S.C. § 207(a). Accordingly, the prohibitions of that section do not apply where a former employee of the District of Columbia accepts employment with USRC.

MICHAEL CARVIN
Deputy Assistant Attorney General
Office of Legal Counsel

Applicability of the Davis-Bacon Act to the Veterans Administration's Lease of Medical Facilities

The Attorney General has authority to review legal determinations made by the Secretary of Labor under the Davis-Bacon Act.

A lease of a privately owned facility is not a "contract for construction of a public building" within the meaning of the Davis-Bacon Act. The mere fact that a lessor undertakes construction in order to fulfill its obligations is insufficient to convert a lease into such a contract.

June 6, 1988

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
VETERANS ADMINISTRATION

This memorandum responds to the Veterans Administration's December 16, 1987, request for an opinion on the applicability of the Davis-Bacon Act ("the Act") to the lease of a privately owned facility by the Veterans Administration.

I. Background

The Veterans Administration ("VA") is authorized to lease space that the Administrator of Veterans Affairs considers necessary for use as a medical facility. 38 U.S.C. § 5003. Pursuant to that authority, the VA entered into a lease to obtain space for an outpatient clinic in Crown Point, Indiana. On June 10, 1986, and again on July 25, 1986, the President of the Building and Construction Trades Department, AFL-CIO, requested a ruling from the Department of Labor's Wage and Hour Administrator that the Davis-Bacon Act—which applies to certain "contract[s] . . . for construction . . . of public buildings"—be applied retroactively to the Crown Point lease.

In a decision dated August 15, 1986, the Administrator advised the VA that the Davis-Bacon Act was applicable to the Crown Point lease, because in this instance the lessor had chosen to construct a new facility to lease to the VA, and

[1] In soliciting offers for the lease, the VA did not specify that it was seeking either a new or a preexisting facility, and indeed the VA's Solicitation for Offers contemplated that an offeror with a suitable existing building could be awarded the lease *E g* § 16 ("Preference will be given to offerors of space in buildings on, or formally listed as eligible for inclusion in, the National Register of Historic Places and to historically significant buildings in historic districts listed in the National Register."); § 33 ("Buildings which have incurable functional obsolescence . may be rejected by the Contracting Officer."), § 97 (dealing with asbestos in "existing buildings" offered for lease) As stated by the Veterans Administration

> The VA's decision to lease space for the Crown Point clinic was based on an economic cost analysis performed prior to the issuance of the [solicitation for offers]. This analysis is used to determine the least costly method of providing the necessary space to accommodate veterans' medical care needs Here, leasing proved to be the least costly alternative . . When this [solicitation] is prepared, the type

therefore "the nature of the agreement [is] a contract for construction." *Id.* at 1.[1] The Administrator reaffirmed that ruling on November 13, 1986. The Department of Labor's Wage Appeals Board upheld the Administrator on June 26, 1987, stating that even though "the principal purpose of the VA contract is to lease a facility," "[t]he lease aspect of the negotiations between the VA and the developer does not in any way change the construction nature of the contract." *In re Applicability of Davis-Bacon Act to Lease of Space For Outpatient Clinic, Crown Point, Indiana*, WAB Case No. 86–33, at 6, 4 (June 26, 1987).

The VA thereafter expressed its disagreement with that interpretation of the Davis-Bacon Act, and announced its intention to seek the opinion of the Attorney General as to the applicability of the Davis-Bacon Act to a lease by the VA, pursuant to 38 U.S.C. § 5003, of privately owned and privately constructed facilities.[2]

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[1] (. . . continued)

of space that will be offered, i.e , space already in existence, presently under construction, or in a facility that will be constructed, cannot be anticipated.

Letter for Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, from Donald L Ivers, General Counsel, Veterans Administration at 7 (Dec. 16, 1987) ("Ivers Letter"). Although the lessor of the Crown Point facility chose to construct a new facility, the lessor was clearly not required to do so Legal and equitable title will remain in the lessor throughout the term of the lease, and the lessor is free to sell the building or to lease it to someone else at the conclusion of the lease. Lease payments began "after the VA [took] occupancy of the leased premises," and will continue "on a monthly basis in arrears " *Id* at 6.

The Department of Labor suggests that there was "a lump sum payment by the VA to the contractor of $440,128.16 for . . construction" of certain "Schedule B" items. Letter for Charles J Cooper, Assistant Attorney General, Office of Legal Counsel, from George R. Salem, Solicitor of Labor at 8 (Apr. 22, 1988) ("Salem Letter"). This assertion would appear to conflict with the VA's statement that "Federal funds [were] not provided for the purposes of construction" at Crown Point. Ivers Letter at 6.

Whether any or all of these "Schedule B" items constitute construction is a factual issue which was neither relied upon by the Department of Labor's Wage Appeals Board in its Crown Point decision, nor directly presented to us for resolution There is nothing precluding lease payments, or portions of lease payments, from being paid as a lump sum, rather than over time. Indeed, under the VA's solicitation for offers, offerors were required to provide alternate proposals, calculating the "Schedule B" items both as "lump sum payment not to be included in the rental rate," and as a rental rate "which included the cost of these items." The VA reserved to itself the right to select the "most favorable" option. Solicitation for Offers, § 10. Moreover, we note that even under the regulations purporting to cover "nonconstruction contracts"—and even assuming that those regulations apply to leases—there is an exception to coverage for construction work that "is incidental to the furnishing of supplies, equipment, or services" or that is "so merged with nonconstruction work" as to be incapable of being "segregated" as a separate contractual requirement. 48 C.F.R § 22.402(b). *See also infra* note 12.

Thus, while we do not here attempt to resolve this factual issue, considerable evidence exists to support the VA's position that the payments contemplated for "Schedule B" items were not for construction. In any event, it is clear that even if the Department of Labor's factual contention regarding the nature of the "Schedule B" items is correct, application of Davis-Bacon requirements would be limited under the statute to the payments (or some part thereof) attributable to the "Schedule B" items.

[2] Both the General Services Administration and the Department of Defense have submitted written statements supporting the VA's interpretation of the Davis-Bacon Act. Letter for Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, from Clyde C. Pearce, Jr , General Counsel, General Services Administration (Dec 31, 1987); Letter for Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, from Kathleen A. Buck, General Counsel, Department of Defense (May 5, 1988) ("Any expansion of the Davis-Bacon Act beyond its express language should be done by Congress, not by agency interpretation.")

II. Discussion

A. *Jurisdiction*

Before turning to the substantive issues presented by the VA's 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 Davis-Bacon Act at the request of the VA. The Department of Labor, by letter dated April 22, 1988, has suggested that Executive Order No. 12146, 3 C.F.R. 409 (1979), governs the issue of the Attorney General's authority to give an opinion in this matter, and that that Executive Order, by its terms, prohibits the Attorney General from responding to the VA's request.[3]

As an initial matter, the Executive Order is not the sole basis for the Attorney General's jurisdiction over this matter. Congress has authorized the Veterans Administration to "require the opinion of the Attorney General on any question of law arising in the administration of the Veterans Administration." 38 U.S.C. § 211(b). The applicability vel non of the Davis-Bacon Act to leases entered into by the VA is clearly a "question of law arising in the administration of the Veterans Administration"; among other things, the interpretation given to the Davis-Bacon Act may determine the required terms of certain contracts entered into by the Administrator.[4] Accordingly, the VA has statutory authority under section 211 to request an opinion from the Attorney General, and the Attorney General has statutory authority to respond to that request.[5]

Moreover, contrary to the Department of Labor's suggestion, Executive Order No. 12146 also authorizes the Attorney General to issue an opinion in this matter. The Executive Order provides in part:

> Section 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.

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[3] Salem Letter at 1–6.

[4] *See Application of the Davis-Bacon Act to Urban Development Projects that Receive Partial Federal Funding*, 11 Op. O.L.C. 92, 95 (1987) (interpretation of statute that will affect contracts entered into by department is a legal question "arising in the administration of [the] department" within meaning of identical language contained in 28 U S C. § 512).

[5] *Accord, id.* at 94–95 (construing identical statutory language contained in 28 U S.C § 512 to mean that the requesting agency "is entitled by law to the opinion of the Attorney General")

The Department of Labor seeks to distinguish the Cooper Opinion, by noting that the Attorney General exercised jurisdiction therein pursuant to 28 U.S.C. § 512, whereas in the present instance 28 U S.C § 512 has no application—implying that if 28 U.S.C § 512 did apply, the Department would not contest the jurisdictional issue. Salem Letter at 1 n.1. The pertinent language of 28 U S C. § 512, however, is identical to the language of 38 U.S.C. § 211, which is applicable here. The Department of Labor does not address 38 U.S.C. § 211 in the Salem Letter.

The Department of Labor interprets section 1–401 to mean that the Attorney General may exercise jurisdiction only when the dispute is "voluntarily submitted by the disagreeing agencies," *i.e.*, only when both (or all) agencies involved agree to submit the dispute to the Attorney General. Because in this case the Secretary of Labor "does not submit this matter for resolution by the Attorney General," the Department urges that section 1–401 may not serve as a basis for the Attorney General's jurisdiction.[6]

We believe that the Department's interpretation is incorrect. Section 1–401 specifically states that *each* agency is encouraged to submit any such dispute to the Attorney General: there is no requirement that *every* agency involved in a dispute request an opinion from the Attorney General. Thus, section 1-401 entitles any agency, by itself, to request the Attorney General to resolve a legal dispute with another agency—as the VA has done here. The interpretation offered by the Department of Labor is contradicted by the plain language of the Order itself.

Further, that interpretation would defeat the purposes of the Order by granting any agency a "veto" over the Attorney General's section 1–401 jurisdiction, thereby insuring that some disputes could never be resolved within the terms of the Executive Order. Nothing in the Executive Order supports such an anomalous result.[7]

The Attorney General's statutory authority over all litigation in which a United States agency is a party provides an additional basis for the exercise of jurisdiction here.[8] As we noted in a prior opinion, in response to a similar challenge to the Attorney General's jurisdiction:

> [T]he Attorney General's authority to give his opinion . . . 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 Secre-

[6] Salem Letter at 2

[7] *See also* 11 Op. O L.C. at 97 (reaffirming the authority of the head of any executive department, acting alone and without obtaining the consent of any other agency that may be a party to a dispute, to request an opinion from the Attorney General under 28 U S C § 512). Executive Order No 12146 "expands the authority of the Attorney General to render legal opinions beyond his statutory obligation," *id* , further suggesting that no "one agency veto" provision should be read into section 1–401.

[8] Given the clear jurisdictional bases for the Attorney General's opinion in this matter, we need not consider whether section 1–401 of Executive Order No. 12146 provides further authority for the Attorney General to respond to the VA's request. *See also* 11 Op. O.L.C at 97–98

> tary 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.[9]

Thus, we conclude that the Attorney General has the authority to decide the legal question presented by the VA.[10]

B. *Substantive Issues*

The Davis-Bacon Act, at 40 U.S.C. § 276a(a), provides in part:

> The advertised specifications for every contract in excess of $2000, to which the United States . . . is a party, for construction, alteration, and/or repair . . . of public buildings or public works of the United States . . . and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village . . . in which the work is to be performed . . . .

The language of the statute is both plain and precise. Section 276a(a) applies only to certain contracts to which the United States "is a party," and that are "for con-

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[9] *Id.* at 98.

We note that on October 20, 1987, the AFL-CIO's Building and Construction Trades Department filed suit to compel the VA to comply with the Department of Labor's Wage Appeals Board's June 26, 1987 decision *Building and Construction Trades Department v. Turnage*, 705 F. Supp. 5 (D.D.C. 1988).

The Department of Labor implicitly challenges the Attorney General's litigating authority as a basis for jurisdiction here, by suggesting that the interpretation of the Davis-Bacon Act is not an issue in the pending litigation. Salem Letter at 6. That suggestion is incorrect: resolution of the conflicting interpretations of the Davis-Bacon Act will clearly affect the conduct of the litigation. For example, should we conclude that the VA's interpretation of the Davis-Bacon Act is incorrect, that decision would be binding upon the VA and the litigation would be mooted. *See, e.g.*, Executive Order No. 2877 (May 31, 1918).

[10] As set out above, the Attorney General is authorized to provide opinions on "questions of law" and to resolve "legal disputes" within the executive branch. *E.g.*, 38 U.S.C. § 211, Executive Order No. 12146. How far that authority permits the Attorney General to resolve factual questions necessarily incident to a properly presented legal dispute need not be addressed here. As we conceive the question posed by the VA, our analysis does not turn upon the particular facts surrounding the Crown Point lease; rather, our opinion is addressed to the question of Davis-Bacon coverage of leases, as a matter of statutory construction.

struction, alteration, and/or repair . . . of public buildings." The question presented here is whether the lease of a privately owned facility is a "contract . . . for construction . . . of [a] public building" within the meaning of the Act. We think the plain language of section 276a(a) demonstrates that it is not.

We start with 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). Although the Davis-Bacon Act is a remedial statute, to be construed liberally, the carefully drawn language of section 276a(a) limits its application to "contract[s] . . . for construction"; there is nothing in the language of the statute to suggest that it was meant to extend beyond construction contracts to leases, or to construction undertaken by private entities in order to enter into or fulfill a lease agreement with the government.[11]

That the words "contract . . . for construction" in the Act were meant to have their plain meaning was confirmed by Attorney General Cummings, who reviewed the legislative history of the Davis-Bacon Act, noted that the Act was "*restricted by its terms* to 'construction, alteration, and/or repair'" and concluded that the Act applied to "buildings erected with funds supplied by the Congress." 38 Op. Att'y Gen. 229, 233 (1935) (emphasis added). Similarly, Attorney General Rogers noted that the House Committee on Public Works characterized the Davis-Bacon Act as "appl[ying] to all direct Federal construction." 41 Op. Att'y Gen. 488, 495 (1960).

A contract to lease a privately owned facility, however, is not a contract to erect buildings "with funds supplied by the Congress," nor does such a lease involve "direct Federal construction." *See* 38 Op. Att'y Gen. at 233; 41 Op. Att'y Gen. at 495. Similarly, the fact that a private entity might undertake construction with private funds in order to offer the government a lease, or to fulfill lease obligations, does not make the United States a party to a contract for construction, nor does that fact convert a lease into a contract for "direct Federal construction." 41 Op. Att'y Gen. at 495. More specifically, construction undertaken by a private party, with private funds, in order to satisfy government specifications and thus to enable the private party to fulfill its obligations as a lessor to the government, or to enter into a lessor relationship with the government, is not construction pursuant to a "contract . . . for construction" to which "the United States . . . is a

[11] Congress has not only crafted 40 U.S.C. § 276a(a) to exclude leases, but has also distinguished between construction contracts and leases in the statute authorizing the VA to enter into leases. Thus, 38 U.S.C. § 5003(a)(1) authorizes the VA to "construct or alter" any medical facility; 38 U.S.C. § 5003(a)(2) separately authorizes the VA to acquire such facilities "by lease." The statute was comprehensively amended in 1979 in part "[t]o help assure the timely completion of leasing arrangements." S. Rep. No. 100, 96th Cong., 1st Sess. 58 (1979), *reprinted in* 1979 U.S.C.C.A.N. 169, 212.

party" as required by the language of the Act. Accordingly, such privately financed construction is not covered by the Act.[12]

The Comptroller General has reached the same conclusion, holding that the Davis-Bacon Act does not apply to the construction of buildings in accordance with government specifications, for lease by the government. The Comptroller General acknowledged the "basic distinction which exists between the procurement of a right to use improvements, even though constructed for that particular usage, and the actual procurement of such improvements." In light of that distinction, the Comptroller General held that "the mere fact that construction work is prerequisite to supplying a public need or use does not give such work a Davis-Bacon status." 42 Comp. Gen. 47, 49 (1962).[13]

The language of section 276a(a) also contrasts sharply with the language of several similar statutes under which leases are explicitly subject to the prevailing wage requirements of the Davis-Bacon Act. For example, 39 U.S.C. § 410(d)(1) states explicitly that certain "lease agreement[s]" entered into by the Postal Service shall be covered by prevailing wages established under section 276a.[14] Similarly, 40 U.S.C. §§ 801–851, authorizing the lease of the Union Station Building by the Federal Government, specifically provide that alterations to the leased facility shall be subject to the prevailing wage requirements of the Davis-Bacon Act. 40 U.S.C. § 808. Additionally, 42 U.S.C. § 1437j also specifically lists "contract[s] for . . . lease" as being subject to those requirements. That Congress in these statutes felt called upon to specify that leases were to be covered by the Davis-Bacon Act indicates not only that Congress knows how to insure that leases are covered by the Davis-Bacon Act in those few situations where it so chooses, but also that section 276a(a) by itself does not include leases.[15]

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[12] We note that the various regulations cited in the Salem letter are not inconsistent with this conclusion. Regulations promulgated under the Davis-Bacon Act that purport to apply the Act to "nonconstruction contracts," 48 C.F.R. § 22.402(b), do not embrace lease agreements. Similarly, 29 C.F.R. § 4.116(c)(2), promulgated under the Service Contract Act and dealing with application of the Davis-Bacon Act to contracts for services, does not apply here. 29 C F.R. § 5 2(k) is merely an interpretation of "public building" and "public work" as those phrases appear in the Act, and makes no reference to leases. Moreover, the regulation itself provides that those terms include only construction work "carried on directly by authority of or with funds of a Federal agency." It seems plain that even if the regulation applied to leases, the lease by the government of a privately constructed and owned facility does not constitute construction work carried on directly by authority of a Federal agency, or with the funds of a Federal agency.

In any event, any interpretation of these regulations as extending to leases would result in an impermissible conflict between the regulations and the plain language and intent of the statute itself, for the reasons discussed above. *See also Chevron U S A v Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984)

[13] The Department of Labor states with respect to this decision that "[i]t is the position of the Department that the Comptroller General lacks the authority to issue opinions regarding the proper application of the Davis-Bacon Act." Salem Letter at 9 n.7. The Comptroller General's decision, however, was issued in response to a request from the Department of Labor. Moreover, whatever the merits of the Department's challenge to the Comptroller General's authority, we refer to the Comptroller General's opinion not as binding precedent but rather as additional confirmation for our own conclusions.

[14] When Congress amended 39 U.S.C. § 410(d) to make the Davis-Bacon Act applicable to certain Postal Service leases, Congress acknowledged that that application was an extension of Davis-Bacon coverage. H.R. Rep. No. 1104, 91st Cong., 2d Sess. 27 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3649, 3675

Conclusion

In light of the language and legislative history of the Davis-Bacon Act, the distinction that Congress has drawn between leases and contracts for construction in numerous statutes, including the statute governing the VA's leasing authority, and several opinions of the Attorney General and Comptroller General, we conclude that the coverage of the Davis-Bacon Act does not extend to leases. The mere fact that a lessor undertakes construction in order to fulfill its lease obligations is insufficient to convert a lease into a "contract . . . for construction" within the meaning of the Act.

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

[15] Pending legislation in Congress also provides some minor support to the conclusion that the Davis-Bacon Act does not apply to leases. The "Davis-Bacon Amendments of 1987" would amend current 40 U.S.C § 276a to provide that "a contract for construction . . . includes a contract for the lease of a facility which is to be constructed . . . if construction . . . is required for fulfillment of the contract." Although it is quite true that "[t]he views of members of a later Congress . . are entitled to little if any weight" in interpreting a statute, *Teamsters v United States*, 431 U.S. 324, 354 n.39 (1977), it is nonetheless the case that in enacting a statute, Congress is presumed to intend to change existing law, rather than to commit a meaningless act.

The Department of Labor suggests that "there is no indication that Congress has ever dealt with this issue [of coverage of leases by the Davis-Bacon Act]," because Congress has not, for example, "pass[ed] an amendment providing that leases are not subject to the Act." Salem Letter at 10. Congress, however, need not pass such negative amendments to make its intent clear: the very words of the statute that Congress did choose to pass are sufficient to make it clear that the Act does not cover leases

Interpretation of District of Columbia Good Time Credits Act of 1986

The District of Columbia Good Time Credits Act of 1986, which requires that prisoners "be given credit on the maximum . . . term of imprisonment for time spent . . . on parole" does not impliedly repeal another provision of the D.C. Code, that requires that recommitted parole violators not receive credit against their sentences for time spent on parole.

June 8, 1988

MEMORANDUM OPINION FOR THE CHAIRMAN
UNITED STATES PAROLE COMMISSION

You have requested the opinion of this Office on whether section 5(a) of the District of Columbia Good Time Credits Act of 1986, D.C. Code § 24–431 (Supp. 1987), repeals by implication D.C. Code § 24–206(a) (1981). For the reasons set forth in this memorandum, we believe that section 5(a) of the 1986 Act does not repeal D.C. Code § 24–206(a).

Background

The District of Columbia, like virtually every jurisdiction, affords most prisoners an opportunity to serve a portion of their sentences on parole. Parolees are required to report periodically to their parole officers and to observe the conditions of their paroles, but they are not confined in correctional institutions and generally enjoy substantial freedom.

If a parolee violates the conditions of his parole (the most common violation being the commission of a new offense), the parole may be revoked and the parolee recommitted to a correctional institution. In all jurisdictions of which we are aware, when a parole violator is returned to prison, the time he spent on parole prior to the revocation is not credited against his sentence. Until recently that was unquestionably the rule in the District of Columbia, for D.C. Code § 24–206(a) (1981) provides that:

> If the order of parole shall be revoked, the prisoner, unless subsequently reparoled, shall serve the remainder of the sentence originally imposed less any commutation for good conduct which may be earned by him after his return to custody. For the purpose of commutation for good conduct, the remainder of the sentence originally imposed shall be considered as a new sentence. The

> time a prisoner was on parole shall not be taken into account to diminish the time for which he was sentenced.

On April 11, 1987, however, the District of Columbia Good Time Credits Act of 1986, D.C. Code §§ 24–428 - 24–434 (Supp. 1987), took effect. Section 5(a) of the Act, D.C. Code § 24-431 (Supp. 1987), provides that:

> Every person shall be given credit on the maximum and the minimum term of imprisonment for time spent in custody or on parole as a result of the offense for which the sentence was imposed. When entering the final order in any case, the court shall provide that the person be given credit for the time spent in custody or on parole as a result of the offense for which sentence was imposed.

The question thus arises whether the first sentence of section 5(a), which requires that prisoners "be given credit on the maximum . . . term of imprisonment for time spent . . . on parole," impliedly repeals D.C. Code § 24–206(a), which requires that recommitted parole violators *not* receive credit against their sentences for time spent on parole.

The United States Parole Commission, which supervises District of Columbia offenders committed to federal prisons, believes that section 5(a) does not impliedly repeal D.C. Code § 24–206(a). Memorandum for Clair Cripe, General Counsel, United States Bureau of Prisons, from Patrick J. Glynn, General Counsel, United States Parole Commission (Sept. 16, 1987). The Commission relies heavily upon the familiar principle of statutory construction that repeals by implication are not favored and will be found only where two statutes are irreconcilable. *Id.* at 2–3. The Commission concludes that section 5(a) is not irreconcilable with D.C. Code § 24–206(a); the former merely states a general principle, namely that time served on parole is credited toward service of the maximum sentence, while the latter states an exception to that general rule, namely that in cases of parole revocation, time spent on parole will not be credited toward the maximum term of imprisonment. *Id.* at 3. Viewed in this light, there is no inconsistency between the two statutes. Indeed, the provision of D.C. Code § 24–206(a) that parole violators will not have time spent on parole credited against their sentence necessarily implies that parolees who successfully complete parole will receive credit against their maximum term of imprisonment.

The District's Corporation Counsel takes a contrary view. He has opined that there is an unavoidable inconsistency between D.C. Code § 24–206(a) and section 5(a) of the Good Time Credits Act and therefore that the latter repeals the former by implication. The Corporation Counsel acknowledges that repeals by implication are disfavored, but notes that a harmonizing interpretation of two arguably inconsistent acts must preserve the sense and purpose of each act. Letter for Patrick J. Glynn, General Counsel, United States Parole Commission, from Frederick D. Cooke, Jr., Corporation Counsel, District of Columbia at 2 (Oct. 30, 1987) ("Cooke letter"). The Corporation Counsel observes that one of the pri-

mary purposes of the Good Time Credits Act was to deal with the "unprecedented overcrowding problem" in the District's prisons "by *shortening* the length of both maximum and minimum sentences through the use of credit," *id.* at 3 (quoting Report of the Committee on the Judiciary, Council of the District of Columbia, on Bill 6–505 at 2 (Nov. 12, 1986) ("Report")), and concludes that giving section 5(a) the meaning suggested by the Parole Commission would not effectuate the purpose of the bill.

Additionally, the Corporation Counsel argues that repeals by implication will be found where the later legislation is intended to cover the field in a comprehensive manner. The Corporation Counsel suggests that the Good Time Credits Act "appears on its face to cover in a comprehensive manner the field of the extent to which time served in custody (*i.e.*, confinement) and on parole shall be credited toward the minimum and maximum sentence." *Id.*

Finally, the Corporation Counsel argues that the construction of section 5(a) proffered by the Parole Commission would render the section meaningless as applied to parole. Since "preexisting law makes quite clear the general rule, namely that time served on parole is time served in fulfillment of the maximum sentence," an interpretation of section 5(a) that limited the section to a restatement of that general proposition would not change the law in any way. *Id.* at 4.

Analysis

It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 618–19 (1980); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 167–68 (1976); *TVA v. Hill*, 437 U.S. 153, 189–90 (1978); *Morton v. Mancari*, 417 U.S. 535, 549–50 (1974); *United States v. Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986); *Samuels v. District of Columbia*, 770 F.2d 184, 194 n.7 (D.C. Cir. 1985); *FAIC Securities v. United States*, 768 F.2d 352, 362 (D.C. Cir. 1985); *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 366–68 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981); *Executive Limousine Serv. v. Goldschmidt*, 628 F.2d 115, 120 (D.C. Cir. 1980). Courts will find an implied repeal only where the earlier and later statutes are irreconcilable. *TVA v. Hill*, 437 U.S. 153 (1978); *Izaak Walton League of America v. Marsh*, 655 F.2d 346 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981). Moreover, the principle that repeals by implication are not favored carries special weight when it is suggested that a specific statute has been impliedly repealed by a more general one. *United States v. United Continental Tuna Corp.*, 425 U.S. 164 (1976). Courts have instead recognized that "[a] statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Bradley v. Kissinger*, 418 F. Supp. 64, 68 (D.D.C. 1976).

Applying these principles to the instant case leads us to conclude that section 5(a) of the Good Time Credits Act did not implicitly repeal the preexisting mandate of D.C. Code § 24-206(a). As has already been noted, D.C. Code § 24–206(a), which provides that parole violators shall not have time spent on parole credited

against their sentences, necessarily implies that other parolees will receive credit for the time spent on parole. Section 5(a) can naturally be read, as the Parole Commission suggests, as doing nothing more than stating this general rule, to which D.C. Code § 24–206(a) is an exception.

The Corporation Counsel argues that section 5(a) cannot be interpreted as simply stating the general rule that time served on parole is time served in fulfillment of the maximum sentence because that principle is already clearly stated in the D.C. Code. The Corporation Counsel points to D.C. Code § 24–204(a), which states in pertinent part:

> While on parole, a prisoner shall remain in the legal custody and under the control of the Attorney General of the United States or his authorized representative until the expiration of the maximum of the term or terms specified in his sentence . . . .

The Corporation Counsel is clearly correct in stating that this provision implies that time served on parole will be credited against the sentence; if that were not the case, it would be impossible for a prisoner to remain on parole until the expiration of his sentence. The Corporation Counsel argues that to interpret section 5(a) in the manner suggested by the Parole Commission would be to render it superfluous in view of D.C. Code § 24–204(a), a violation of the principle that no part of a statute should be presumed superfluous unless such a construction cannot be avoided. That principle, however, is properly limited to consideration of the superfluity of a portion of a statute within the context of the statute itself, not within the context of the entire corpus of the law. It is neither irrational nor unusual for a statute to affirm explicitly a prior practice, particularly when the statute deals comprehensively with a subject. Looking only to the Good Time Credits Act, the provision relating to credit for time spent on parole clearly has some meaning. The fact that it overlaps with another statute does not require that the phrase be given a different meaning than that indicated by the statutory language.

In addition to the general principle disfavoring repeals by implication, there are several specific indications in the legislative history that section 5(a) was not intended to repeal D.C. Code § 24–206(a). As originally introduced, the bill that became the Good Time Credits Act provided, in pertinent part:

> (a) Every person shall be given credit on the maximum term and the minimum period of imprisonment for time spent in custody as a result of the offense for which the sentence was imposed. When entering the final order in any such case, the court shall provide that the person be given credit for the time spent.
>
> (b) In any case in which a person has been in custody due to a charge that resulted in a dismissal or acquittal, the amount of time that would have been credited against a sentence for the charge,

had one been imposed, shall be credited against any sentence that is based upon a charge for which a warrant or commitment detainer was placed during the pendency of such custody.

(c) In any case in which probation is revoked, the time that the person has served under the probation shall be considered time served and shall be credited toward and considered a part of the time the person was originally sentenced to serve.

(d) In any case in which parole is revoked for violations of the conditions of parole and the person is recommitted to serve the remainder of the maximum term, the person shall not forfeit good time credits earned while on parole.

The bill was referred to the District of Columbia Council's Committee on the Judiciary, which held a public hearing on the bill on November 5, 1986. Among those testifying was Hallem H. Williams, Deputy Director of the District's Department of Corrections. Williams testified in support of the bill generally, but noted that subsection (c) would conflict with D.C. Code § 24–104 (Supp. 1986), which provides that "[i]f probation is revoked, the time of probation shall not be taken into account to diminish the time for which he was originally sentenced." Williams also observed that subsection (c) "would tend to weaken the incentive of a probationer to observe the conditions of his probation, especially toward the end of the probationary period, as revocation at such time could mean a significantly shorter period of incarceration than the probation violator might otherwise be required to serve."

Presumably in response to Williams' testimony, the version of the bill reported by the Judiciary Committee eliminated subsection (c) on probation revocations. The bill reported by the Committee provided, in pertinent part:

(a) Every person shall be given credit on the maximum term and the minimum period of imprisonment for time spent in custody or on parole as a result of the offense for which the sentence was imposed. When entering the final order in any case, the court shall provide that the person be given credit for the time spent.

. . . .

(c) When parole is revoked for violations of the conditions of parole and the person is recommitted to serve the remainder of the maximum term, the good time credit shall be computed on the basis of the original maximum sentence and the inmate shall not forfeit good time credit previously earned on the current sentence.

As enacted, the Good Time Credits Act adopted subsection (a) of the committee markup version with only minor stylistic changes,[1] but eliminated the subsection on parole revocations entirely.[2]

The provision on probation revocations, which the D.C. Council refused to enact, would have accomplished explicitly for probation violators precisely what the Corporation Counsel argues the bill as enacted obliquely accomplishes for parole violators. It is not at all clear, however, why the same policy considerations that led the Council to reject credit for time served on probation for subsequent probation violators would not apply equally to parole violators. Moreover, assuming that the Council did discern some policy consideration that would justify differential treatment between probation violators and parole violators, it is puzzling that the Council did not clearly express its desire that parole violators receive credit toward their sentences for time served on parole.[3] Certainly the existence of the probation revocation provision in the original bill suggests that the Council was capable of expressing that idea unambiguously.

A second indication that section 5(a) was not intended to repeal D.C. Code § 24–206(a) is that section 9 of the Good Time Credits Act, D.C. Code § 24–405 (Supp. 1987), explicitly repeals the existing D.C. law on good time credits. In addition, the Judiciary Committee report on the bill, under the heading "Impact of [sic] Existing Law," states that "Bill 6–505 would repeal D.C. Code 24–405, the District's current good time credits statute and create a comprehensive sys-

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[1] The committee markup had referred to "the maximum term and the minimum period of imprisonment," while the enrolled bill speaks of "the maximum and the minimum term of imprisonment." Also, the second sentence of the committee markup referred only to "credit for the time spent," a reference to the "time spent in custody or on parole as a result of the offense for which the sentence was imposed" as set forth in the preceding sentence. The enrolled bill repeats that phrase in the second sentence.

[2] The Corporation Counsel suggests that subsection (d) of the original bill evinces an "unmistakable general intent . . . that, even where parole is revoked, the time served on parole should to some extent be credited against the remainder of the maximum sentence." Cooke letter at 3. The Counsel further argues that the phrase "or on parole" was added to subsection (a) by the Judiciary Committee as a substitute for original subsection (d) thus perpetuating the "unmistakable general intent" of that subsection.

This argument is clearly without merit. Original subsection (d) on parole revocation was not omitted by the Judiciary Committee; it simply became new subsection (c) after the provision on *probation* revocation (to which Hallem Williams had objected) was eliminated from the bill. At the same time the Committee added the phrase "or on parole" to the jail time provision of subsection (a). Thus the phrase "or on parole" in subsection (a) is not a substitute for original subsection (d), since both provisions appear together in the Judiciary Committee markup. The fact that original subsection (d) (subsection (c) of the committee markup) was eliminated from the bill before passage suggests that, whatever the intent of original subsection (d), it cannot be imputed to the bill as enacted.

[3] Section 5(a) is unclear in at least three ways. First, unlike original subsections (c) and (d), it does not explicitly address the issue of revocation. Second, section 5(a) requires time spent on parole to be credited toward both the *minimum* and maximum terms of imprisonment. Since the minimum term of imprisonment means the minimum period of confinement before parole eligibility, a prisoner would always have to serve his minimum period of imprisonment before he could obtain the parole that would then be credited against his minimum eligibility date. In short, the provision is circular as applied to parole. Finally, section 5(a) also requires the court to note the credit for time spent in custody or on parole in its final order. Since prisoners obviously have not served any time on parole at the time of their original sentencing, and since parole revocation is accomplished by administrative rather than judicial action, it is not clear that this provision has any meaning in the parole context. The Corporation Counsel concedes this and recommends that "[T]he words 'or on parole' in the second sentence of § 5(a) should be disregarded." Memorandum for Walter B. Ridley, Acting Deputy Director for Operations, Department of Corrections, from Margaret L. Hines, Deputy Corporation Counsel, District of Columbia at 3 (Apr. 23, 1987) ("Hines memo")

tem of awarding and administering good time credits which will be applied to both the maximum and minimum sentence." Report at 6. The explicit repeal of one section of the D.C. Code suggests that only that section of the code was to be repealed by the law. Similarly, the section of the report stating that the bill would repeal one section of the D.C. Code implies that other sections of the code would be unaffected by the bill.

Finally, subsection (c) of the Judiciary Committee markup version provided that "[w]hen parole is revoked for violations of the conditions of parole and the person is recommitted to serve the remainder of the maximum term, the good time credit shall be computed on the basis of the original maximum sentence." This provision would have been in direct conflict with another part of D.C. Code § 24–206(a), which provides that when a parole violator is returned to prison "[f]or the purpose of commutation for good conduct, the remainder of the sentence originally imposed shall be considered as a new sentence." The Council, however, amended the bill as reported from the Judiciary Committee and this provision was not included in the bill as passed. This action suggests that the Council was aware of potential conflicts with section 24–206(a), and that by rejecting subsection (c) of the committee markup the Council intended to retain the status quo in regard to D.C. Code § 24–206(a).[4]

[4] In the Hines memo the Corporation Counsel argues that subsection (c) on parole revocation was in effect subsumed in section 2(c) of the enrolled bill. That section provides "[g]ood time credits applied to the minimum term of imprisonment shall be computed solely on the basis of the minimum term of imprisonment. Good time credits applied to the maximum term of imprisonment shall be computed solely on the basis of the maximum term of imprisonment." The Corporation Counsel concludes that section 2(c) of the Good Time Credits Act impliedly repeals that portion of section 24–206(a) of the D.C. Code that provides that in cases of recommitment after a parole violation "[t]he remainder of the sentence originally imposed shall be considered as a new sentence." The Corporation Counsel considers this provision to be incompatible with the requirement that good time credits toward the maximum term of imprisonment be computed solely on the basis of the maximum term of imprisonment.

We believe that the Corporation Counsel has misconstrued the import of section 2(c) D.C. Code § 24–206(a) states that the sentence of a recommitted parole violator shall be the remainder of his original term. Section 2(c) of the Good Time Credits Act requires that good time credits toward the maximum term of imprisonment under that sentence be computed solely on the basis of the maximum term of imprisonment This provision of the Act is addressed to the fact that, since the amount of credits earned is based on the length of the sentence, *see* D.C Code § 24-428(a)(1)-(5) (Supp. 1987), a single prisoner earns good time credits at two different rates, a slower rate based on the shorter minimum term of imprisonment and a faster rate based on the longer maximum term of imprisonment Section 2(c) thus ensures that credits earned at the faster maximum term rate will not be used to speed up parole eligibility, and conversely that credits earned at the slower minimum term rate will not be used to delay final release. D.C. Code § 24–206(a) addresses the wholly separate issue of defining the sentence (*i.e* , the maximum term of imprisonment) of a recommitted parole violator. Absolutely nothing in section 2(c) of the Good Time Credits Act requires that the computation of the maximum term of imprisonment be made on the basis of the original sentence; that section merely requires that once the sentence is defined, good time credits be awarded at the rate set for the maximum term of imprisonment under that sentence

Conclusion

For the foregoing reasons, we conclude that section 5(a) of the District of Columbia Good Time Credits Act of 1986 does not effect a repeal by implication of D.C. Code § 24–206(a) and that parole violators subject to that section of the code cannot receive credit toward their maximum sentence for time served on parole.

MICHAEL CARVIN
Deputy Assistant Attorney General
Office of Legal Counsel

Department of Justice Funding of Representation of Victims in Connection with a West German Prosecution

The Department of Justice may use its funds to pay for the representation of non-military American victims of the hijacking of TWA Flight 847, in connection with a West German prosecution, if it is determined that such representation would be in the interest of the United States.

June 8, 1988

MEMORANDUM OPINION FOR THE ACTING ASSOCIATE ATTORNEY GENERAL

The Criminal Division has asked this Office to render an opinion concerning the availability of Department of Justice funds to represent non-military American victims of the hijacking of TWA Flight 847, in connection with the West German government's prosecution of accused terrorist Mohammod Hamadei. Under West German law, victims of a crime can become co-complainants ("Nebenklaeger") with the public prosecutor, and as such are given access to the prosecutor's files and allowed to file pleadings, make arguments, and examine witnesses. As explained more fully below, we believe Department of Justice funds may be made available to pay for Nebenklaeger participation in the Hamadei prosecution, if such participation is determined to be the interests of the United States. Under the circumstances of this case, we believe that you are the appropriate departmental official to make this determination.[1]

I. Background

Mohammod Hamadei is one of several Lebanese terrorists, who in June 1985, hijacked TWA Flight 847, held its passengers and crew hostage, and killed U.S. Navy diver Robert Stethem. In January 1987, Hamadei was arrested in Frankfurt, West Germany. The West German government denied the United States' request for his immediate extradition on grounds that it intended itself to prose-

[1] The determination in this case involves important issues of first impression, which have wide ramifications for our litigating activity in foreign courts. We therefore strongly recommend that it be made at least at the level of the Associate Attorney General. This seems to us particularly necessary here in light of the apparent position previously taken by your predecessor on the general question of the Department's authority to fund Nebenklaeger participation in this case. *See infra* note 3 In making your determmation, you may wish to consult with the Civil Division, which, through its Office of Foreign Litigation, has been chiefly responsible for representing the government's interests in foreign courts. We understand that the Criminal Division has already been in touch with the Department of State respecting the subject matter of this memorandum.

cute him for offenses connected with the hijacking. The Attorney General has stated publicly on numerous occasions that the Department of Justice is committed to doing everything possible to ensure that Hamadei is convicted on all charges and receives the maximum sentence possible. We understand that his trial has now been scheduled to begin on July 5.

The question of this Department's ability to participate in or support the West German government's prosecution of Hamadei first arose last summer. In a letter dated August 17, 1987 Associate Attorney General Stephen S. Trott informed the General Counsel of the Department of Defense that under West German court procedure the United States government itself would not be permitted to intervene directly in the West German criminal case.[2] Moreover, he stated that the Department of Justice did not appear to be authorized to fund individual victims' Nebenklaeger participation.[3] Mr. Trott's letter also stated that the Department believed the Secretary of Defense had authority to fund such participation by the military victims of the hijacking under 10 U.S.C. § 1037,[4] and recommended that this be done. We understand that the Department of Defense has agreed to provide $300,000 for Nebenklaeger participation by the military personnel who were passengers on TWA Flight 847, as well as the parents of Mr. Stethem. A German attorney, Dr. Rainer Hamm, has been retained for this purpose.[5]

The question of this Department's ability to contribute to the funding of Nebenklaeger participation in this case has arisen again because the Criminal Division has apparently determined that Dr. Hamm's ability effectively to assist the Hamadei prosecution would be enhanced if he were able to represent at least some of the non-military American victims of the hijacking as well. Because the Department of Defense has authority to fund only the representation of military personnel, alternative sources would have to be found to pay the additional expense of extending Dr. Hamm's representational role.

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[2] This conclusion was apparently based upon inquiries made in West Germany by the Civil Division

[3] His tentative conclusion appears to have been based upon informal advice received from the Chief of the Criminal Division's General Litigation and Legal Advice Section, based on a construction of 28 U.S.C. § 516. *See* routing and transmittal slip from Lawrence Lippe to Deputy Assistant Attorney General Toensing and Associate Attorney General Trott, dated August 3, 1987 Mr. Lippe addressed the question of the Department's authority more formally in March of this year, and concluded again that the Attorney General had no authority under 28 U.S C. §§ 516–519 to fund Nebenklaeger participation in the Hamadei prosecution. *See* Mr Lippe's Memorandum of March 16, 1988 to Ms. Toensing. In a memorandum sent the same day to the General Counsel of the Justice Management Division, Ms Toensing inquired whether Department funds were available to fund Nebenklaeger participation. JMD's response, dated April 20, 1988, was that funds could be expended under authority of 28 U.S.C. § 516 if it could be determined that "representing private citizens in a foreign tribunal is the type of interest encompassed under [section 516]." JMD disclaimed an ability to make such a determination in this case because of its unfamiliarity with the facts, and advised that the matter should be sent to this Office for construction Ms. Toensing forwarded the matter here on May 4.

[4] Section 1037 authorizes the Secretary of Defense to employ counsel and pay any expenses incident to the representation of military personnel before foreign judicial tribunals and administrative agencies.

[5] The relationship between a Nebenklaeger participant and his or her attorney under West German law is not clear to us In particular, we do not understand their respective roles in making litigation decisions We do not know whether there are in this case any specific arrangements between Dr. Hamm and the Department of Defense in this regard (or, indeed, whether under applicable West German law any such arrangements could be made in derogation of the Nebenklaeger client's wishes)

II. Department of Justice Authority to Fund Nebenklaeger Participation in the Hamadei Prosecution

Under 28 U.S.C. § 516, the Department of Justice has general authority to "conduct" litigation in which the United States is a party "or is interested."[6] Along with the several provisions immediately following it in the Code, section 516 has been regarded as providing authority for the Attorney General to attend to the interests of the United States in any court, including foreign tribunals. *See Litigation Responsibility of the Attorney General in Cases in the International Court of Justice*, 4 Op. O.L.C. 233 (1980). Moreover, using his general authority to contract for services that are necessary to the performance of his statutory functions, the Attorney General may hire private lawyers to do indirectly what it would be awkward or inappropriate for the United States to do directly through departmental lawyers. *See* Memorandum for Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Civil Division's Recommendations Concerning Reimbursement of Legal Expenses* (June 24, 1981); Memorandum for Glen E. Pommerening, Assistant Attorney General for Administration, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Re: Authority for Employment of Outside Legal Counsel* (Mar. 4, 1976). The Attorney General's authority to hire foreign counsel to represent the interests of the United States in the courts of a foreign country is explicitly recognized in 28 U.S.C. § 515(b).[7]

Applying the above principles to this case, we believe that the Department may use its funds to pay Dr. Hamm to represent victims of the hijacking, if it is determined that such representation would be "in the interests" of the United States.[8] Such a determination necessarily involves an analysis of the facts and circumstances involved in this case, and we can therefore give you only general guidance as to factors that might properly be considered. One thing seems clear to us, however: the existence vel non of a governmental interest in this case should not depend on the fact that the counsel we retain will technically be representing a private party, as opposed to the United States government itself. Particular procedural rules imposed by a foreign court will perforce dictate the manner in which the United States expresses its interest in a particular case, and the Department's ability to represent that interest cannot be made dependent upon the restrictions imposed upon our appearance by particular foreign courts. Here the United States apparently is precluded by West German court rules from expressing its interest directly in a criminal prosecution, so that we can support the prosecution only

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[6] Section 516 provides in full as follows:

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

[7] Under section 515(b), "foreign counsel" retained by the Attorney General in "special cases" are not required to take an oath of office.

[8] The Criminal Division's request to us did not extend to which particular sources of departmental funds might be available to pay for Nebenklaeger participation, and we express no views on this issue.

through representation of a victim. Despite the vehicle through which we are constrained to express it, however, the relevant interest remains that of the United States.[9]

That said, there remains the question whether the Department's funding of Nebenklaeger participation by non-military victims in this particular case would in fact serve the interests of the United States. While a court would almost certainly defer to an executive decision maker in this context,[10] there are at the same time no clear legal standards to guide that decision maker. At bottom, the existence of a governmental interest adequate to support Department of Justice funding in this case depends upon two things: the strength of our government's desire to combat international terrorism and to ensure the safety of American citizens overseas by any means available to it (and by this means in particular); and the extent to which further support by this Department for the Hamadei prosecution is likely to serve these goals.

As to the first of these considerations, we express no views.[11] As to the second, we would offer the following observations. The Department of Defense's decision to provide governmental funding to support the Hamadei prosecution may or may not have been based on a determination that this would be in the interests of the United States, as opposed to the personal interests of the military victims and their families.[12] If, upon inquiry, it develops that the representation presently being funded by Defense is perceived as serving the interests of the United States, and does in fact do so, the question would then arise whether further funding of the prosecution by this Department would serve some additional interest of the United States. In this regard, it would be relevant whether and to what extent Dr. Hamm's proposed representation of the non-military victims is

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[9] In a similar situation last year, the United States was permitted to intervene directly, as a *partie civile*, in the French government's prosecution of Lebanese terrorist Georges Ibrahaim Abdallah for the murder of Lt. Col Charles Ray, an Assistant Military Attache at the U.S. Embassy in Paris. The Department paid a French attorney to represent its interests in connection with this prosecution, as well as those of the U.S. Consul General in Strasbourg, who had survived the terrorist attack. The Department of Defense paid this same attorney to represent the interests of Lt. Col. Ray's widow, under authority of 10 U.S.C. § 1037. *See* Memorandum for Stephen S. Trott, Associate Attorney General, from Victoria Toensing, Deputy Assistant Attorney General, Criminal Division (July 2, 1987).

[10] We do not believe that such cases in *United States v City of Philadelphia*, 644 F 2d 187 (3d Cir. 1980) (en banc), and *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977) are relevant in this situation. These cases addressed the government's standing to sue as a jurisdictional matter and did not purport to limit the government's discretion under 28 U.S.C. § 516 Both cases involved the federal government's authority to initiate legal action in federal court to vindicate the rights of individuals, in areas that have traditionally been reserved to the States. The "public interest" asserted by the Executive as justification for the exercise of federal power in those cases was thus subject not only to the recognized limits on the jurisdiction of federal courts, but also to the powerful counterweight of federalism. No similar countervailing considerations are present in this case.

[11] We do not believe the federal government's participation in a foreign criminal justice system which expressly provides for participation of private prosecutors, in furtherance of its interest in combating international terrorism and protecting its citizens abroad, suggests anything about the appropriateness of allowing private prosecutors to control or participate in criminal prosecutions in our own federal courts. *Cf* Brief for the United States as Amicus Curiae in *Morrison v. Olson*, 487 U S. 654 (1988) at 37 and n 31.

[12] 10 U.S.C. § 1037 appears on its face to authorize representation of military personnel in foreign tribunals without regard to whether such representation would serve any interest of the United States We do not know generally how the Department of Defense has interpreted its authority under this provision, or what specific factors were considered in making the decision to provide funding in this particular case.

in fact likely to enhance his ability to support the prosecution through his existing representation of the military victims.[13] You may also wish to consider the degree of control the Department can expect to exercise over the proposed representation.[14] The fact that the individuals whose representation we would be funding are American citizens, and the apparent impossibility of their recovering damages or receiving any other personal benefit from their participation as Nebenklaeger, would tend to support an argument that the representation would serve the interests of the United States. On the other hand, especially in light of the fact that our funds are not unlimited, you may deem it more cost effective to pursue other means of combatting terrorism in this case (such as eventual further pursuit of our extradition efforts).

To assist you in making your determination, you may wish to ask the Criminal Division to provide you with further information relating to the efficacy of the additional representational activity for which funding is being sought, and on the extent to which the Department will be able to control Dr. Hamm's actions.

JOHN O. MCGINNIS
Deputy Assistant Attorney General
Office of Legal Counsel

[13] We are aware of only one specific way in which representation of the non-military victims will add to what Dr. Hamm can accomplish under the existing arrangement with the Department of Defense. he will be able to interview and prepare those non-military victims who he represents prior to their being called as witnesses. *See* Toensing Memorandum to JMD, *supra* note 3 The Criminal Division has also suggested more generally that Dr. Hamm's role in the case would be made more "prominent" if he could represent more victims. We are not entirely sure what connection there might be between the prominence of Dr Hamm's role in the case and his ability effectively to represent the interests of the United States.

[14] For example, we do not know to what extent Dr Hamm's responsibility to his Nebenklaeger clients would preclude his taking direction from officials of the U.S. government that is paying his fees, in the event there were some difference of opinion as to the best way to proceed. Nor do we know whether the U S. government could control or countermand a decision by some or even all of the Nebenklaeger complainants to discontinue their participation in the prosecution The decision to fund representation in this case is thus quite different from that involved in the Abdullah prosecution in France, *see supra* note 4, in which the United States itself was a party and could thus ensure that the private counsel it had retained represented its interests in the proceeding. As noted above, *see supra* note 5, we do not know what if any arrangements the Department of Defense has made or could make with Dr. Hamm to ensure his carrying out the interests of the United States, if it differed from the interests of his individual Nebenklaeger clients. While the Defense Department may have some greater degree of control over some of the Nebenklaeger clients now being represented by virtue of their current military status, not all of these individuals are now subject to military discipline.

Litigating Authority of the Interstate Commerce Commission

The Interstate Commerce Commission lacks authority to intervene in the court of appeals in litigation between a railroad and its employees under the Railway Labor Act, or to file an amicus brief in the case, without the approval of the Attorney General.

The Interstate Commerce Commission also lacks authority to file a petition for certiorari, absent authorization from the Solicitor General.

June 10, 1988

MEMORANDUM OPINION FOR THE SOLICITOR GENERAL

You have asked for the opinion of this Office on several issues relating to the litigating authority of the Interstate Commerce Commission ("ICC"). You wish to know whether the ICC had authority to intervene in the court of appeals in *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives Ass'n*, No. 87–1589 (S. Ct.)* without the Department's approval, and whether the ICC was authorized to file an amicus brief in an earlier phase of this case, also in the court of appeals. A related issue arises from the ICC's assertion of authority to file a petition for certiorari in the Supreme Court in this case, independent of and without the approval of the Department of Justice.

For reasons set forth more fully below, we believe that the ICC had no authority to intervene in the court of appeals in this case independent of the Department of Justice, or to file an amicus brief. Under the circumstances of this case, the only means properly available to the ICC for making its views known in the court of appeals was through an appearance by the Attorney General. Moreover, the ICC has no authority in this case, absent authorization from the Solicitor General, to file a petition for a writ of certiorari, or to make an appearance in any form, in the Supreme Court.

Background

The facts and legal issues involved in this litigation are described in detail in the two decisions of the Third Circuit. *See Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3d Cir. 1987); 845 F.2d 420 (3d Cir. 1988). Briefly, it involves a dispute over whether a railroad has an obligation under the Railway Labor Act ("RLA") to bargain with its employees over the effect of a sale of rail assets, where the sale has been approved by the ICC

* After this opinion was written, the Supreme Court granted certiorari, 488 U.S 965 (1988), and thereafter vacated the judgment, 491 U.S. 490 (1989).

under the Interstate Commerce Act ("ICA"). The rail unions take the position, with which the court of appeals agreed, that the railroad must comply with the collective bargaining requirements of the RLA in connection with the proposed sale, even if, as a practical matter, compliance with those requirements will delay and may even frustrate the sale entirely. The railroad, supported by the ICC, argues that the ICC has plenary and exclusive jurisdiction over all aspects of the sale, and that the provisions of other laws must give way to the extent necessary to consummate it. The ICC's position is that the ICA preempts the Norris-LaGuardia Act and the collective bargaining provisions of the RLA. The facts of the case are these. In the summer of 1987, Pittsburgh & Lake Erie R.R. ("P & LE") entered into an agreement to sell its rail assets to Railco, a newly formed non-carrier subsidiary of the Chicago West Pullman Corporation. Informed of the proposed sale, P & LE's unions demanded that the railroad bargain over its effect on the railroad's employees, pursuant to the requirements of the RLA.

P & LE refused, and the Railway Labor Executives Association ("RLEA") filed suit in district court to enforce the employees' bargaining rights under the RLA.[1] Several weeks later, on September 15, 1987, P & LE's employees went on strike. On September 19, Railco filed a "notice of exemption" with the ICC, seeking an exemption from the otherwise applicable requirement of ICC approval for the sale. The ICC validated the effectiveness of the acquisition by denying RLEA's request to refuse or stay the exemption. The sale became effective on September 26.[2] In the meantime, P & LE had asked the district court to enjoin its employees' strike, on grounds that it was an illegal attempt to interfere with the ICC's exclusive jurisdiction over the sale. In the wake of the ICC's refusal to stay its exemption, the district court issued an injunction, on the grounds advanced by P & LE. The Third Circuit summarily reversed, holding that section 4 of the Norris-LaGuardia Act deprived the district court of jurisdiction to issue the injunction. It remanded for a determination whether the ICA operated to relieve P & LE of its obligation to comply with the RLA bargaining procedures ("*P & LE-I*"). P & LE sought certiorari in March of this year. On remand, the district court held that P & LE was obligated to bargain, and the Third Circuit affirmed ("*P & LE-II*"). P & LE filed a second petition for certiorari on May 17, 1988.

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[1] RLEA sought a declaration that the provisions of the RLA were applicable to this transaction, a declaration that the sale could not be consummated until all RLA dispute resolution procedures had been exhausted, and an injunction prohibiting P & LE from completing the transaction until that time. *See* 831 F.2d at 1233.

[2] The Railroad Revitalization and Regulatory Reform Act of 1976, Pub L. No. 94–210, 90 Stat. 31, and the Staggers Rail Act of 1980, Pub. L. No. 96–448, 94 Stat 1895, reduced the amount of federal involvement in rail mergers and acquisitions, in an effort to implement a congressional policy favoring expedited approval of sales of railroads, particularly those that are failing. *See* H.R. Conf. Rep No. 1430, 96th Cong., 2d Sess (1980). It broadened the power of the ICC to approve various transactions, including acquisitions, involving rail carriers. When an acquisition involves two existing rail carriers, the ICC must impose certain labor protective conditions. 49 U.S.C. § 11347 However, where a rail carrier's assets are being acquired by a non-carrier, the imposition of labor protective provisions is discretionary *See* 49 U.S C. § 10901 In 1985, the ICC exempted from regulation the entire class of acquisitions of railroad lines by non-carriers. *See Ex Parte 392 (Sub. No 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), *review denied mem. sub nom Illinois Commerce Comm'n v ICC*, 817 F.2d 145 (D.C. Cir. 1987). Such acquisitions are effective seven days after the seller files a "notice of exemption," unless the ICC acts to refuse or stay the transaction No labor protective conditions are generally imposed on a sale in such cases, *see* 1 I C.C.2d at 815, and none were imposed in this case.

The ICC entered an appearance in the court of appeals in both *P & LE-I* and *P & LE-II*. In *P & LE-I* the ICC filed an amicus brief supporting the position of P & LE, after having been denied intervenor status. The ICC sought and was granted intervenor status in *P & LE-II*. It is our understanding that in neither instance did the ICC ask the Department of Justice to take any action in its behalf. As matters now stand, the ICC has asked that the Department of Justice join it in seeking certiorari in *P & LE-II*, but has also asserted a right to petition the Supreme Court independently if the Department declines to do so. *See* Memorandum for the Solicitor General, from Robert S. Burk, General Counsel, ICC (May 23, 1988).

I. The ICC's Authority to Intervene or Appear as Amicus Curiae in the Court of Appeals

We start with the premise, as to which there appears to be no disagreement in this situation, that the ICC could not appear in district court or the court of appeals in its own name, either as intervenor or amicus curiae, absent statutory authorization. This is because the Attorney General has plenary authority and responsibility for all litigation in which the United States or one of its agencies is a party or is interested, "[e]xcept as otherwise authorized by law." *See* 28 U.S.C. §§ 516, 519. *See generally The Attorney General's Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47 (1982). In addition, it has been the consistent position of this Department that, where Congress has not given an agency authority to litigate through its own attorneys, the Attorney General may not transfer or delegate to it his own litigating power. While attorneys employed by agencies that have no independent authority to conduct litigation may assist Department of Justice attorneys, their role is restricted to so-called "agency counsel" functions. *See Representation of the United States Sentencing Commission in Litigation*, 12 Op. O.L.C. 18, 20 (1988). In a few words, sections 516 and 519 require that, absent statutory direction to the contrary, attorneys of the Department of Justice under the direction of the Attorney General represent an agency of the United States in court.

Amicus participation in a case requires the same clear and specific statutory exception to sections 516 and 519 as does appearance as a party in litigation.[3]

[3] *See* Memorandum for the Attorney General, from Theodore B Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Authority of the Equal Employment Opportunity Commission to Participate as Amicus Curiae in Williams v. City of New Orleans* (Mar. 24, 1983); Memorandum for J. Paul McGrath, Assistant Attorney General, Civil Division, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re Amicus Curiae Role of the Small Business Administration's Chief Counsel for Advocacy under the Regulatory Flexibility Act* (May 17, 1983). In the highly limited and distinguishable circumstance of litigation challenging its sentencing guidelines, we did not move to strike the separate views of the United States Sentencing Commission, with respect to fundamental questions pertaining to its very existence and authority within the constitutional structure. Most importantly, in the Sentencing Commission litigation the Department never relinquished in any manner the representation of the interests of the United States, including those of the Sentencing Commission as a party defendant. *See* 12 Op. O.L.C. at 24–25. Again, no similar compelling considerations relating to the ICC's very existence are presented by the instant litigation, and the ICC's independent participation in the lower courts obviously thwarted the Department's control over representation affecting the interests of the United States.

We do not understand the ICC to dispute these basic principles of representation. Rather, the ICC contends that both its amicus appearance in *P & LE-I* and its intervention in *P & LE-II* were authorized by statute. Specifically, the ICC relies upon 28 U.S.C. § 2323 for its authority both to intervene and to appear as amicus in this litigation.[4] Section 2323 provides, inter alia, that the Attorney General shall represent the government in "actions specified in section 2321 of this title" and in certain other enforcement actions. It also provides that the ICC itself, and any party in interest to a proceeding before the ICC in which an order is made, may appear as parties "in any action involving the validity" of that order. Because section 2323 is central to the ICC's argument, we reprint it in full in the margin.[5] The ICC takes the position that the authority given it under the second paragraph of section 2323 authorizes it to intervene or appear as amicus not only in enforcement actions originated by the Attorney General under the first paragraph of this section, but also in any other action in which the "validity" of a Commission order is arguably drawn into question, whether or not the United States is a party.[6]

We disagree. The language of section 2323 on which the ICC relies admits of the proffered construction only if read entirely in isolation. When viewed in the context of the section as a whole, and the scheme of two preceding statutory provisions, it is clear that the intervention authority given the ICC in the second paragraph of section 2323 is confined to the enforcement actions brought by the Attorney General under the first paragraph of that section.

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[4] *See* Mr. Burk's May 23 memorandum at 4 In an earlier memorandum dealing with essentially this same issue in another case, Mr Burk appears also to rely on the provision of the ICA that authorizes the ICC to employ attorneys "to represent the Commission in any case in court." 49 U.S C. § 10301(f)(1). *See* Memorandum for the Solicitor General, from Robert S. Burk, General Counsel, ICC, at 6–11 (Apr. 13, 1988), discussing the ICC's authority to file an amicus brief in *Deford v Soo Line R R.*, 867 F.2d 1080 (8th Cir), *cert. denied*, 492 U.S. 927 (1989). Such general provisions have never been understood in and of themselves to constitute grants of litigating authority to an agency Rather, they simply provide for the employment of attorney personnel to carry out an agency's otherwise authorized litigating functions

[5] Section 2323 provides in full as follows:

> The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in enforcement actions and actions to collect civil penalties under subtitle IV of title 49.
>
> The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.
>
> Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof
>
> The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein

[6] The ICC argues that the RLEA's action constitutes a "collateral attack[]" on its exemption order in this case, suggesting that it would limit its assertion of authority to intervene under section 2323 to cases whose result potentially would render an ICC order invalid or ineffective. *See* Mr Burk's May 23 memorandum at 4. *See also* Mr. Burk's April 13, 1988 memorandum on the *Deford* case at 6–11. But no such limiting principle is embodied in the broad language ("any action involving the validity") of the second paragraph of section 2323. Moreover, we note the court of appeals' rejection of the ICC's argument that the RLEA's suit constituted "a forbidden collateral attack on the ICC's order approving the sale transaction." 845 F.2d at 437. *See also id.* at 438 ("We do not view a judicially-enforced delay as an attack on the ICC's order.")

Looking first at section 2323 alone, it seems clear that its several paragraphs were intended to be read together, and understood to cover the same universe of court proceedings. Indeed, its separate paragraphs are not even demarcated as separate subsections. This textually evident construction of section 2323 is supported by sections 2321 and 2322, the provisions which, along with section 2323, constitute chapter 157 of title 28, entitled "Interstate Commerce Commission Orders; Enforcement and Review." Section 2321 describes the procedures for judicial review of ICC orders: actions by private parties to enjoin or suspend an order are to be brought in the court of appeals, in accordance with chapter 158 (the Hobbs Act); actions to enforce ICC orders other than for the payment of money or the collection of fines, are to be brought in district court "as provided in this chapter." 28 U.S.C. § 2321(b). Section 2322 provides that all actions specified in section 2321 shall be brought "by or against the United States." Reading all three provisions of chapter 157 together confirms that the second paragraph of section 2323 was intended to give the ICC authority only in the actions that are described in and governed by its first paragraph.

The legislative history of section 2323 bears out this interpretation. Originally enacted in 1910, *see* 36 Stat. 539, 543, its very purpose was to give the Attorney General control over litigation under the ICA that had previously been conducted wholly by the ICC through its own attorneys. *See* H.R. Rep. No. 923, 61st Cong., 2d Sess. 3 (1910). At the same time, the ICA was amended to delete the authority for the ICC to apply "in its own name" for enforcement of its orders. The ICC's entitlement to intervene in an action brought by the Attorney General was relegated to a proviso following the description of the Attorney General's primary role. The caselaw interpreting the ICC's power to litigate under section 2323 confirms that it is activated in the enforcement context only after the Attorney General himself has initiated the enforcement action. *See ICC v. Southern Ry. Co.*, 543 F.2d 534 (5th Cir. 1976), *aff'd*, 551 F.2d 95 (5th Cir. 1977) (en banc).[7]

In summary, we believe that the ICC's power under the second paragraph of section 2323 to intervene or appear as amicus curiae in litigation is limited to those enforcement actions brought by the Attorney General under its first paragraph. This means that the ICC is without authority to become directly involved in litigation between two private parties over the effect of one of its orders, even

[7] The ICC suggests its doubt as to the continuing validity of the Fifth Circuit's decision in the *Southern Railway* case, citing the Seventh Circuit's decision in *Carothers v. Western Transp. Co*, 563 F.2d 311, 313 (7th Cir. 1977). Whatever the merits of that doubt, it is inapposite to this case. *Carothers* dealt with the ability of a private party to initiate an action against another private party to enforce an ICC order under 49 U.S.C. § 16(12)(1976), and the court's statement respecting the ICC's authority was thus dictum. (The authority of a private party to bring an enforcement action is now separately codified at 49 U.S.C. § 11705.) The *Carothers* court simply held that the United States was not an indispensable party to a private action to enforce an ICC order under section 16(12), and did not question the Attorney General's authority to initiate a suit brought by the government under section 2323. The ICC apparently recognizes that its title 49 authority, now codified in section 11702, has no applicability in this situation, since that section plainly deals only with actions to enjoin statutory violations or to enforce Commission orders. There is thus no occasion for revisiting the question decided in the *Southern Railway* case against the ICC, whether the ICC's title 49 authority repeals sections 2321–2323 by implication. *See* 543 F.2d at 539.

if the result of this litigation could effectively reverse or render invalid the order.[8] This Department cannot remedy an agency's lack of litigating authority by delegating its own power to intervene in an action in the name of the United States. Thus the ICC would have had no authority to intervene or file an amicus brief in the court of appeals in this litigation even if this Department had agreed to permit it to do so.[9]

II. ICC Authority to Appear in the Supreme Court

In his memorandum of May 23, 1988, the General Counsel of the ICC takes the position that his agency has authority in this case to seek a writ of certiorari from the Supreme Court without this Department's authorization. Again, we disagree.

Section 518(a) of title 28 gives the Attorney General exclusive power to represent the interests of the United States and its agencies in the Supreme Court, whether or not Congress has given an agency authority to litigate in the lower courts. Section 518(a) provides that the Attorney General and the Solicitor General shall conduct and argue all suits and appeals in the Supreme Court, "[e]xcept when the Attorney General in a particular case directs otherwise."

In allowing the Attorney General to "direct[] otherwise," section 518 does not appear to compel the same exclusivity of representation in the Supreme Court that sections 516 and 519 require for lower court litigation. And on occasion the Attorney General has elected, in the exercise of his discretionary authority under section 518(a), to permit an agency to file a brief in the Supreme Court in its own name, rather than having the Solicitor General represent it. But the existence of the discretionary authority to allow exceptions simply underscores the firmness of the otherwise applicable rule of exclusivity.[10]

In asserting the ICC's right to appear in the Supreme Court in this case without the authorization of the Attorney General, the ICC General Counsel cites as authority 28 U.S.C. § 2350. But this provision on its face is applicable only to

[8] The ICC may litigate entirely independent of any action by this Department only in proceedings initiated by a private party to enjoin or suspend its rules or orders *See* 28 U S C § 2348. In these Hobbs Act cases, the ICC (like the several other regulatory agencies subject to its provisions) is entitled to participate in its own name, without regard to whether the Department decides to participate in the matter. The Attorney General of course remains responsible for and controls the interests of the United States in Hobbs Act cases *Id*

[9] In a memorandum discussing the ICC's ability to intervene in the *Deford* case, *see supra* note 4, the Civil Division reached the same conclusion respecting the scope of the ICC's litigating authority under 28 U.S C § 2323. *See* Memorandum for the Solicitor General, from Richard K Willard, Assistant Attorney General, Civil Division (Feb. 18, 1988). Our only apparent difference with the Civil Division is that we do not believe that the ICC's lack of independent statutory litigation authority in the lower federal courts can be supplied simply by this Department giving its consent. Rather, its attorneys may appear in court or otherwise carry out duties reserved to "officers of the Department of Justice" under section 516 only if they are given special appointments in the Department of Justice. *See* 12 Op. O.L.C at 20

[10] Just this Term the Supreme Court reaffirmed the power of the Attorney General and the Solicitor General over all Supreme Court litigation. *See United States v Providence Journal Co.*, 485 U.S. 693 (1988)

proceedings under the Hobbs Act for the review of agency orders.[11] Assuming arguendo that section 2350 does give the ICC, and the other agencies whose orders are subject to review under the Hobbs Act, independent authority to file a petition for a writ of certiorari in the Supreme Court in Hobbs Act cases,[12] it plainly does not constitute a general authorization for these agencies to appear in the Supreme Court in any case that they believe affects their interests. Thus, entirely without regard to the merits of the ICC's argument that its intervention in this case was authorized under 28 U.S.C. § 2323, section 2350 would certainly not overcome the rule of exclusivity imposed by section 518(a) in a non-Hobbs Act case.

CONCLUSION

In summary, we conclude that the ICC was not authorized to file an amicus brief in *P & LE-I* or to intervene in *P & LE-II*. Nor is the ICC authorized to seek a writ of certiorari or otherwise appear in the Supreme Court in either case, without the permission of the Attorney General.

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

[11] Section 2350 applies only to orders granting or denying an injunction under section 2349(b), or a final judgment of the court of appeals "under this chapter." The "chapter" in question is chapter 158 of title 28, 28 U.S.C §§ 2341–2351.

[12] It is not entirely clear to us that the general language of section 2350 was intended to have the effect of repealing section 518(a), even in the Hobbs Act cases to which it applies. We note in this regard that the Fifth Circuit in *Southern Railway* rejected an argument that similar disjunctive wording in 49 U.S.C. § 16(12) (1976) had the effect of repealing the otherwise applicable requirement of 28 U S C. § 2323 that the Attorney General rather than the ICC initiate an action to enforce an ICC order. *See* 543 F.2d at 538–39.

Applicability of Interest and Penalty Provisions of the Criminal Fine Enforcement Act to Fines Imposed as a Condition of Probation

Application of the interest and penalty provisions of the Criminal Fine Enforcement Act of 1984 is mandatory in the case of late payment or nonpayment of a fine imposed strictly as a condition of probation.

June 15, 1988

MEMORANDUM OPINION FOR THE DIRECTOR
EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

This memorandum responds to your office's inquiry as to whether the interest and penalty provisions of the Criminal Fine Enforcement Act of 1984, 18 U.S.C. §§ 3565(b)(2), 3565(c)(1)-(2), apply in the case of late payment or nonpayment of a fine imposed strictly as a condition of probation. As set forth below, we conclude that the Criminal Fine Enforcement Act does mandate application of those provisions to fines imposed strictly as a condition of probation.

Background

The Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, 98 Stat. 3134 ("Act"), contains a series of provisions relating to the imposition and collection of fines in federal criminal cases.[1] Generally, these provisions (1) establish stan-

[1] As a preliminary matter, it is important to note that the federal fine provisions have an unusual and complicated legislative history. Two different bills, both pertaining to the imposition and collection of criminal fines and penalties, were passed by Congress and signed into law by the President during the same month. The first of these two bills, the Comprehensive Crime Control Act of 1984 ("Crime Control Act"), Pub. L. No. 98-473, 98 Stat. 1837, 1976, was enacted October 12, 1984. Title II of the Crime Control Act added three new chapters to title 18 of the United States Code that pertained to criminal fine collection: chapter 227 (Sentences), chapter 228 (Imposition, Payment and Collection of Fines), and chapter 229 (Postsentence Administration). Chapter 228 was to become effective immediately, while chapters 227 and 229 were to become effective on November 1, 1986. However, on December 26, 1985, Congress enacted the Sentencing Reform Amendments Act of 1985, Pub. L. No. 99–217, 99 Stat. 1728, which delayed the effective date of chapters 227 and 229 until November 1, 1987. On October 30, 1984, the President signed a separate fine collection measure, the Criminal Fine Enforcement Act of 1984 ("CFEA"), Pub. L. No. 98–596, 98 Stat. 3134, which, among other things, restored the text of chapters 227 and 229 with language identical to text existing prior to passage of the Crime Control Act In addition, the CFEA repealed section 228, which, under provisions of the Crime Control Act, was to become effective immediately.

Under the terms of the CFEA, restored chapters 227 and 229 became effective January 1, 1985, and apply to offenses committed on or after that date. As mentioned above, chapters 227 and 229 of the Crime Control Act took effect on November 1, 1987. Accordingly, the interest and penalty provisions found in the Criminal Fine Enforcement Act of 1984, which are pertinent to this discussion, effect only those crimes committed after December 31, 1984 and prior to November 1, 1987.

dards for the imposition of fines by federal judges; (2) increase fine levels for all federal offenses; (3) provide improved fine collection procedures; and (4) create incentives to the timely payment of fines. Section 3565(b)(1)(A) provides that a judgment imposing the payment of a fine or penalty "shall . . . provide for immediate payment unless, in the interest of justice, the court specifies payment on a date certain or in installments." Section 3565(b)(2) states that "[i]f the judgment specifies other than immediate payment of a fine or penalty, the period provided for payment shall not exceed five years, excluding any period served by the defendant as imprisonment for the offense. The defendant shall pay interest on any amount payment of which is deferred under this paragraph." In addition, the statute requires the defendant to pay interest on any amount of a fine or penalty that is past due. 18 U.S.C. § 3565(c)(1).

Federal district courts "may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best." 18 U.S.C. § 3651.[2] The court may require the defendant to "pay a fine in one or several sums." *Id.* If, at the end of the period of probation the defendant has not paid the fine, the defendant is still obligated to pay the fine, which is to be collected in the manner set forth in section 3565. *Id.*

The Executive Office for United States Attorneys ("EOUSA") contends that if the court enters a judgment of conviction, suspends imposition or execution of a sentence and, as a condition of probation, requires the defendant to pay a fine as provided under 18 U.S.C. § 3651, the collection and payment of the fine, including the imposition of interest and penalties, is governed by section 3565.[3] The EOUSA construes section 3565 to treat a fine imposed as a condition of probation (probation fine) in the same way in which it treats a "straight" fine, that is, a fine imposed as a sentence.[4] *See* 18 U.S.C. § 3565(b)(1).

The Administrative Office for the United States Courts ("AOUSC"), on the other hand, contends that the interest and penalty provisions of the CFEA do not apply to probation fines.[5]

The AOUSC notes that, historically, probation fines have always been treated somewhat differently from straight fines and argues that the CFEA contemplates a continuation of dual interest and penalty procedures.[6]

For the reasons outlined below, we conclude that the Criminal Fine Enforcement Act of 1984 mandates application of the interest and penalty provisions of section 3565 in the case of late payment or nonpayment of a fine imposed as a condition of probation.

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[2] The court does not have such discretion when the judgment of conviction is of an offense punishable by death or life imprisonment. 18 U.S.C. § 3651.

[3] *See* Memorandum for Douglas W Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel, from Laurence S. McWhorter, Acting Director, Executive Office for United States Attorneys (Apr 9, 1987).

[4] *Id.*

[5] *See* letter from David N. Adair, Jr, Assistant General Counsel, Administrative Office of the United States Courts, to William D. Andrews, United States Probation Officer (Nov. 21, 1986).

[6] *Id.*

Discussion

We look first to the words of the statute to determine congressional intent.[7] It appears on the face of the statute that the CFEA's interest and penalty provisions are mandatory and apply to all fines. As previously mentioned, subsection 3565(c)(1) states that the defendant shall pay interest on "any amount of a fine or penalty . . . that is past due." Subsection 3565(c)(2) states that if an amount owed by the defendant "as a fine or penalty" is past due for more than ninety days, the defendant shall pay a penalty equal to twenty-five percent of the amount past due. There is no specific indication in either of those two subsections that Congress intended the words "a fine or penalty" to exclude probation fines. Indeed, none of the subsections of section 3565 that make a reference to fines use language that can be interpreted on its face to be exclusionary in nature. On the contrary, these subsections use all-inclusive language. For example, subsection (a)(1) pertains to "all criminal cases in which judgment or sentence is rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment." Subsection (a)(2), provides that a "judgment imposing the payment of a fine or penalty" shall, with specified exceptions, be a lien in favor of the United States upon all property and rights of property belonging to the defendant. Subsection (b)(1) states that a "judgment imposing the payment of a fine or penalty shall . . . provide for immediate payment" unless the court specifies payment on a date certain or in installments.[8] In sum, on its face section 3565 applies to all fines, a class which includes probation fines.

The probation sections of the CFEA do not provide further enlightenment as to whether Congress intended to treat probation fines in the same manner as straight fines with respect to the interest and penalty provisions of section 3565. Section 3651 empowers the court to "suspend the imposition or execution of sentence and place the defendant on probation for such period and upon [further] terms and conditions as the court deems best." That section further provides that the court may require the defendant to pay a fine in a lump sum or in several sums. Section 3655 describes the duties of probation officers, including the requirement to report to the court any failure of a probationer under his supervision to pay an amount due as a fine or as restitution. None of the sections pertaining to conditions of probation make any mention of monetary penalties, including interest payments, in the case of a failure to pay a probation fine.[9] Nor do those sections make any references to the interest and penalty provisions em-

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[7] *See, e g , Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979).

[8] *See also* subsection (d)(1), providing that except under specified circumstances the defendant shall pay to the Attorney General "any amount due as a fine or penalty;" subsection (f), which applies in circumstances in which "a fine or penalty is imposed on an organization" and "a fine or penalty is imposed on a director, officer, employee, or agent of an organization;" and subsection (g), which sets forth procedures to be followed when "a fine or penalty is satisfied as provided by law."

[9] The current law governing probation is embodied in chapter 231 of title 18. Pub. L. No. 98–473, tit. II, ch. II, § 212(a)(1),(2), 98 Stat 1987 (1984), repealed chapter 231 effective Nov 1, 1987, pursuant to section 235 of Pub L No. 98–473, and amended by Pub. L. No. 99–217, § 4, 99 Stat 1728 (1985).

bodied in section 3565;[10] section 3561's only specific reference to section 3565 is the statement that the fines shall be collected in the manner provided by section 3565.

It also has been suggested that the CFEA's identical treatment of straight fines and probation fines for certain purposes should be read as a manifestation of Congress' intent that the two types of fines be treated identically throughout the Act for other purposes, including application of the interest and penalty provisions of section 3565.[11] For example, section 3561 of the CFEA provides that, like straight fines, probation fines do not expire with the conclusion of criminal proceedings.[12] Likewise, the two types of fines are handled identically with respect to collection.[13] Although certainly not dispositive of the issue, the Act's parallel treatment of the two categories of fines could be read to manifest an overall congressional approach to fines and penalties.

In light of the fact that the CFEA does not explicitly include or except probation fines from application of its interest and penalty provisions, we look next to the legislative history of the CFEA. Research reveals, however, that although it is clear from the legislative history that a primary purpose of the statute was to encourage the prompt and full payment of fines[14] and that the interest and penalty provisions were created to encourage timely payment,[15] neither the congressional debates nor the report accompanying the legislation provides a definitive statement as to Congress' intent with respect to this issue. There is some indication in the legislative history that Congress recognized that an incentive for payment of fines already existed with respect to probation fines. One could infer from that recognition that Congress saw a need for an incentive in the case of straight fines. We do not believe, however, that merely because Congress recognized the need for a monetary incentive for straight fines it follows that Congress intended that there was to be no monetary incentive for the defendant to comply with probation fines above and beyond the ever-present threat of termination of the probation and the resulting imposition of a prison sentence. Indeed, section 3651 of the CFEA provides that the defendant's obligation to pay a fine imposed or made a condition of probation is not extinguished when the court terminates the proceedings against the defendants; accordingly, there would still be a need for an

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[10] In contrast, the probation sections contained in the Comprehensive Crime Control Act of 1984 give the court discretion to require the defendant to "pay a fine imposed pursuant to the provisions of subchapter C " 18 U.S.C. § 3563(b)(2). Subchapter C contains the general fine provisions, the implementation of which are governed by the provisions of subchapter B of chapter 229, which contains the interest and penalty provisions. Accordingly, by specific reference, the interest and penalty provisions apply to fines imposed strictly as a condition to probation.

[11] *See* Memorandum for Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel, from Laurence S McWhorter, Acting Director, Executive Office for United States Attorneys (Apr. 9, 1987).

[12] With respect to straight fines, the CFEA provides that the obligation to pay a fine or penalty ceases only upon the death of the defendant or the expiration of twenty years after the date of the entry of the judgment, whichever occurs earlier. 18 U.S.C. § 3565(h)

[13] The collection of straight fines is governed by 18 U.S.C. § 3565(d)-(h). Probation fines "shall be collected in the manner provided in section 3565 of this title " 18 U.S.C. § 3651.

[14] H.R Rep. No 906, 98th Cong., 2d Sess. 1 (1984). *See also* 130 Cong. Rec. 31,946–48 (1984) (statement of Sen. Percy).

[15] *Id.* at 3.

incentive once the proceedings were terminated.[16] In sum, we find no conclusive statement in the legislative history as to Congress' intent with respect to whether the interest and penalty provisions apply to probation fines.

Finally, the only case law addressing the application of the interest provisions of sections 3565(b)(2) and 3565(c)(1),(2) to probation fines holds that probation fines are governed by these provisions. Indeed, the United States Court of Appeals for the Third Circuit found that where restitution was ordered as a condition of probation, postjudgment interest was properly ordered despite the fact that the Federal Probation Act, 18 U.S.C. § 3651, makes no reference to the payment of interest in connection with restitution. *United States v. Sleight*, 808 F.2d 1012 (3rd Cir. 1987). The court found a parallel between court-ordered restitution and criminal fines, stating that "[a] judgment for restitution can be viewed as a debt to the victim just as a judgment for a fine is considered to be a debt to the sovereign. Congress has provided that fines and penalties can be enforced in the same manner as civil judgments, and that postjudgment interest must be paid on any fine or penalty that is past due." *Id.* at 1020. The court further noted that should the defendant not be required to pay postjudgment interest, he (the defendant) would have an economic incentive to "delay such payment until the last possible opportunity." *Id.* at 1021. In finding that postjudgment interest was properly ordered where the defendant failed to pay restitution imposed a condition of probation, the *Sleight* court read section 3565(c)(1) to mandate payment of postjudgment interest on *any* fine or penalty that is past due, including fines imposed as condition for probation. *Id.* at 1020. Thus, the court's interpretation of the CFEA's interest and penalty provisions supports our conclusion that those provisions apply to probation fines.[17]

Conclusion

We conclude that application of the interest and penalty provisions embodied in sections 3565(b)(2) and 3565(c)(1)-(2) of the Criminal Fine Enforcement Act of 1984 is mandatory in the case of late payment or nonpayment of all fines imposed in criminal cases in which judgment or sentence is rendered. Accordingly, we find that application of the interest and penalty provisions is mandatory where the defendant has failed to pay a fine imposed as a condition of probation pursuant to 18 U.S.C. § 3651.

JOHN O. MCGINNIS
Deputy Assistant Attorney General
Office of Legal Counsel

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[16] In its discussion of the problem with collecting straight fines, Congress noted that, apparently in contrast, "[a] defendant who fails to pay a fine that is a condition of probation can have probation revoked." H.R. Rep. No. 906, 98th Cong., 2d Sess. 3 (1984). During the debates, Senator Percy noted that "the new law takes away the economic incentive for avoiding fine payment as long as possible by providing for interest and penalties on unpaid fines." 130 Cong. Rec. 31,947 (1984). He went on to note in the same paragraph that "[a]ll fines will be due at once, unless a definite payment schedule is established at the time of sentencing." *Id* The Senator did not appear to make a distinction between straight fines and probation fines

[17] We note that the effect of our opinion is limited in that under 18 U.S.C. § 3651 the court "may revoke or modify any condition of probation, or may change the period of probation."

The Status of the Smithsonian Institution Under the Federal Property and Administrative Services Act

The Smithsonian Institution is an "independent establishment in the executive branch" and is therefore an "executive agency" for purposes of the Federal Property and Administrative Services Act.

June 30, 1988

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
GENERAL SERVICES ADMINISTRATION

Introduction and Summary

You have asked for the opinion of this Office concerning the status of the Smithsonian Institution. In particular, you are interested in the status of the Smithsonian under the Federal Property and Administrative Services Act ("Property Act" or "Act"), 40 U.S.C. §§ 471–544, and under the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. I, §§ 1–15, both of which are administered by the General Services Administration ("GSA"). For the reasons stated below, we conclude that the unique nature of the Smithsonian counsels in favor of determining the status of the Smithsonian on a statute-by-statute basis. In this instance, we adhere to our prior opinion that the Smithsonian is not covered by the FACA, and we conclude that the Smithsonian is an "executive agency" within the meaning of the Property Act.

Background

The Smithsonian Institution is "an establishment . . . for the increase and diffusion of knowledge among men." 20 U.S.C. § 41. Congress founded the Smithsonian in 1846 to accomplish the purposes of a bequest to the United States by James Smithson, an English scholar and scientist. The original bequest is now supplemented by private donations and congressional appropriations in financing the activities of the Smithsonian. These activities include the operation of numerous museums, the sponsorship of research, and the direction of educational and other public service programs. A Board of Regents composed of the Vice President, the Chief Justice, six Members of Congress, and nine other persons appointed by Congress conducts the business of the Smithsonian. 20 U.S.C. §§ 42–43.

The Smithsonian Institution has long been regarded as having a special relationship to the federal government. The precise nature of that relationship, however, is the subject of some disagreement. The Smithsonian perceives itself as "not a government agency in any ordinary use of the term, but [as] a charitable trust for the benefit of humankind whose trustee is the United States. As such, it cannot carry out the functions of any of the three branches of government, but must be devoted exclusively to its educational and scientific purposes 'for the increase and diffusion of knowledge among men.'" Letter for Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel, from Peter G. Powers, General Counsel, Smithsonian Institution at 1 (Apr. 10, 1987) (quoting 20 U.S.C. § 41) ("Powers Letter"). The Smithsonian further relates that "the Smithson charitable trust is not part of the government itself. The basic legal nature of the Institution as a unique trust instrumentality of the United States separate from the three main branches of government has not been altered by the fact that the government has chosen to support the trust with substantial appropriations and Federal property, largely in response to major benefactions and collections from the private sector." *Id.* at 5.

Chief Justice Taft, speaking as Chancellor of the Smithsonian Board of Regents, also asserted "that the Smithsonian Institution is not, and never has been considered a government bureau. It is a private institution under the guardianship of the Government." Taft, "The Smithsonian Institution—Parent of American Science" 16, *quoted in* Memorandum for Peter Powers, General Counsel, the Smithsonian Institution, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel at 8 (Feb. 19, 1976) ("Ulman Memorandum"). At least in some instances, though, the Smithsonian is covered by federal statutes that are applicable to certain instrumentalities of the United States. *See, e.g., Expeditions Unlimited Aquatic Enters., Inc. v. Smithsonian Inst.*, 566 F.2d 289, 296 (D.C. Cir. 1977) (Smithsonian is a federal agency for purposes of the Federal Tort Claims Act), *cert. denied*, 438 U.S. 915 (1978); 45 Comp. Gen. 685, 688 (1966) (the use of funds appropriated to the Smithsonian must be in accordance with federal law).

The Office has previously described the Smithsonian Institution as a "historical and legal anomaly," Memorandum for the Attorney General, from Theodore B. Olson, Assistant Attorney General at 1 (May 23, 1983), "a very unusual entity," *id.*, "*sui generis*", 3 Op. O.L.C. 274, 277 (1979), and "unique unto its own terms," Ulman Memorandum at 9. We have said that the Smithsonian enjoys an "anomalous position in the Government," Memorandum for Drew S. Days, III, Assistant Attorney General, Civil Rights Division, from Leon Ulman, Deputy Assistant Attorney General at 2 (Mar. 20, 1978), and a "unique status in the eyes of the Supreme Court," Letter for Robert H. Simmons, from Robert B. Shanks, Deputy Assistant Attorney General at 3 (Feb. 13, 1984). In short, "the hybrid and anomalous character of the Smithsonian Institution is proverbial." Memorandum for Fred F. Fielding, Counsel to the President, from Theodore B. Olson, Assistant Attorney General at 8 (Aug. 8, 1983).

The unique nature of the Smithsonian counsels reluctance toward a sweeping

declaration of the Smithsonian's status within the federal government. The wiser course, which we and others have followed, is to focus upon the position of the Smithsonian within a precise statutory scheme. We therefore limit our advice to the status of the Smithsonian under the specific statute—the Property Act—in which you are interested.

Analysis

As you are aware, this Office has previously advised that the Smithsonian is not covered by the FACA. In the Ulman Memorandum, *supra*, we considered the status of the Smithsonian under the FACA, the Administrative Procedure Act ("APA"), and the Privacy Act. Under the FACA, "[t]he term 'agency' has the same meaning as in" the Administrative Procedure Act. 5 U.S.C. app. I, § 3(3). The APA, in turn, defines "agency" as "each authority of the Government of the United States" except for Congress, the courts, territorial governments, the District of Columbia government, and certain military authorities. 5 U.S.C. § 551(1). Applying this definition to the Smithsonian, we observed that "[t]he Smithsonian performs none of the purely operational functions of government which have been given such significant weight in determinations of agency status in other cases." Ulman Memorandum at 10. Moreover, "[t]he nature of the Smithsonian Institution is so widely different from the kinds of agencies otherwise included that it is apparent Congress could not have intended to place it [under] the same category." *Id.* at 5. Therefore, we advised, the Smithsonian is not an "agency" within the meaning of the APA and FACA definition. *Id.* at 10.[1] Your request suggests no basis to re-examine our previous opinion that the FACA does not apply to the Smithsonian Institution.

The Property Act establishes procedures for the management of governmental property. The Act applies to "executive agencies" and to "federal agencies." These terms are defined in section 3 of the Act as follows:

> (a) The term "executive agency" means any executive department or independent establishment in the executive branch of the Government, including any wholly owned Government corporation.
>
> (b) The term "Federal agency" means any executive agency or any establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction).

[1] In the Ulman Memorandum, we also suggested that it appears from the legislative history of the APA definition of "agency" that the term applies only to entities within the executive branch. Ulman Memorandum at 2–5. We then said that the Smithsonian "cannot be viewed as an establishment within the Executive branch of government." *Id.* at 10. However, we stressed that the nature of the Smithsonian in comparison to the nature of agencies covered by the definition provides "a still more compelling argument" for our conclusion that the Smithsonian is not covered by the APA definition of agency. *Id.* at 5. We agree that the unique nature of the Smithsonian is decisive to resolve the present issue of statutory interpretation, and for the reasons stated above, we express no opinion on whether the Smithsonian could be considered to be in the executive branch for any other purpose.

40 U.S.C. § 472. You believe that the Smithsonian is an "independent establishment in the executive branch" and thus an "executive agency".[2] The Smithsonian considers itself to be a "Federal agency" but not an executive agency.

Congress did not expressly specify the status of the Smithsonian under the Property Act. Nor does the legislative history of the Property Act elaborate on the definitions of "executive agency" and "Federal agency" contained in the Act. *See* H.R. Rep. No. 670, 81st Cong., 1st Sess. 8 (1949), *reprinted in* 1949 U.S.C.C.A.N. 1475, 1481–82 (section-by-section analysis of section 3 does not discuss these definitions). Moreover, unlike those instances in which Congress has specified the status of an entity for the purpose of federal law, *e.g.*, 39 U.S.C. § 201 (the United States Postal Service is "an independent establishment of the executive branch of the Government of the United States"); 31 U.S.C. § 9101(2) (listing ten "mixed-ownership Government corporation[s]"), Congress has not specified the general status of the Smithsonian. Thus, we must determine whether Congress intended the Property Act to apply to the Smithsonian at all, and if so, whether Congress intended the Smithsonian to be treated as an "executive agency" or as a "Federal agency" for the purposes of the Act.

The GSA and the Smithsonian both assert that the Property Act applies to the Smithsonian. *See* Letter for Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, from Clyde C. Pearce, Jr., General Counsel, GSA at 3–5 (Oct. 27, 1986); Powers Letter at 10–12. The legislative history of the Act supports this conclusion.[3] Indeed, it has long been understood that transactions with the Smithsonian involving federal property or appropriated funds are subject to federal property and contract law. *See, e.g.*, Act of Dec. 30, 1982, Pub. L. No. 97–394, 96 Stat. 1966, 1991–92 (1982) (provisions for appropriations to the Smithsonian presume the applicability of the procurement provisions of the Property Act); 45 Comp. Gen. at 686–88; 12 Comp. Gen. 317 (1932). We therefore agree that the Property Act does apply to the Smithsonian.

As to whether Congress intended the Smithsonian to be treated as an "executive agency" or as a "Federal agency" for the purposes of the Property Act, we

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[2] The GSA has held this position since 1952. *See* Op. Gen. Couns No. 39 (Oct. 13, 1952) (GSA No. 53–10011).

[3] Two aspects of the passage of the Property Act suggest that Congress intended the act to apply to the Smithsonian. First, as discussed more fully below, the Property Act replaced federal property sale and exchange authority that had previously been granted to the Smithsonian. Second, Congress relied upon the recently published recommendations of the Hoover Commission on Organization of the Executive Branch of the Government in drafting the Property Act in 1949. *See, e g*, H R Rep. No. 670, at 3–5, *reprinted in* 1949 U.S C.C.A.N. at 1476–78; 95 Cong Rec. 7441 (1949) (statement of Rep. Hohfield). In turn, the Hoover Commission's report on the management of the property, supplies, and records of the federal government anticipated that federal property law should apply to the Smithsonian. For example, the Commission proposed the creation of the General Services Administration and recommended the placement of "[c]ertain relations with the Smithsonian Institution" in that agency. 1 U.S. Commission on Organization of the Executive Branch of the Government, *Office of General Services: A Report to the Congress by the Commission on Organization of the Executive Branch of the Government, February 1949* at 5 (1949) ("Office of General Services Report"), *quoted in* H.R. Rep. No. 670, 81st Cong., 1st Sess., pt. 2, at 2 (1949). The report also recommended that "when [the Smithsonian's] officials need assistance from the Chief Executive or the departments, it is recommended that they consult with the Director of the Office of General Services." Office of General Services Report at 12. Thus, the Hoover Commission recognized the Smithsonian's need to deal with the federal government regarding property transactions.

believe that the best evidence the Smithsonian is an "executive agency" is that the Property Act repealed the Smithsonian's prior statutory authority for certain property exchanges and replaced it with a provision applicable only to executive agencies. The Act of Mar. 3, 1915, ch. 75, 38 Stat. 822, 838–39 (1915), provided specific exchange and sale authority to the Smithsonian. Section 502(a)(19) of the Property Act repealed the 1915 act and a number of other provisions that had granted similar authority to other agencies and substituted general sale and exchange authority for executive agencies. As a 1956 analysis prepared by GSA and printed by the Senate Committee on Government Operations observed, section 201(c)

> authorizes executive agencies to exchange or sell personal property and apply the trade-in allowance or proceeds of sale in whole or part payment for property acquired. This is an expansion of authority given under a number of previous statutes to specific agencies or with respect to specific types of property. While these statutes are repealed by section 602[sic](a)(8) to (28), the language here is intended to be sufficiently broad to preserve all such existing authority.

Senate Comm. on Government Operations, 85th Cong., 2d Sess., *Federal Property and Administrative Services Act of 1949, As Amended* 22 (Comm. Print 1959). *See also* H.R. Rep. No. 670, at 28, *reprinted in* 1949 U.S.C.C.A.N. at 1504 (section 502(a) of the Property Act repeals "some 20 statutes relating to use of trade-in allowances which will be superseded by section 201(e)[sic]").[4] Section 201(c) applies to "any executive agency"—it does not apply to a "Federal agency."[5] Therefore, because the Smithsonian's previous authority for sales and

[4] The House report's reference to section 201(e), rather than section 201(c), appears to be a mistake. The House report describes the repeal of "statutes relating to use of trade-in allowances which will be superseded by section 201(e)." H.R. Rep. No. 670, at 28, *reprinted in* 1949 U.S.C.C.A.N. at 1504. Section 201(e), however, governs the transfer of medical materials and supplies held for national emergency purposes. 40 U.S.C. § 481(e). It is section 201(c) that governs exchange allowances. 40 U.S.C. § 481(c). The analysis of section 201(c) in the House report confirms that section 201(c) preserves the existing statutory authority repealed by section 502(a). H.R. Rep No. 670, at 12, *reprinted in* 1949 U.S C.C A.N. at 1486.

[5] The Smithsonian denies that section 201(c) applies only to executive agencies. Powers Letter at 11–12. We disagree. Including several different provisions for the sale and exchange of government property, section 201 carefully distinguishes between different types of agencies: subsection (a) refers to executive agencies; subsection (b) refers to "any other Federal agency" than those in subsection (a), mixed ownership corporations, and the District of Columbia; subsection (c) refers to "any executive agency", subsection (d) refers to executive agencies; and subsection (e) refers to executive agencies and any other federal agencies. 40 U S C. § 481 In short, different types of agencies enjoy different authority under the Act. The Smithsonian's contention that "executive agency" in section 201(c) is "not restrictive or exclusive," Powers Letter at 12, disregards the distinction within section 201 and the legislative history of that section. *See* H.R. Rep No 670, at 11, *reprinted in* 1949 U.S.C C.A.N. at 1486 (paraphrasing "federal agency" in section 201(b) as "the legislative and judicial branches, and mixed-ownership corporations"). When the Property Act repealed the Smithsonian's specific sale and exchange authority but "preserve[d] all such existing authority" of executive agencies under section 201(c), Congress must have considered the Smithsonian an executive agency for purposes of the Act.

exchanges is superseded by a provision that applies only to executive agencies, we conclude that Congress must have intended the Smithsonian to be considered an executive agency for the purposes of the Property Act.[6]

Conclusion

For the reasons stated herein, and solely for the purposes of the Federal Property and Administrative Services Act, we conclude that the Smithsonian Institution is an "independent establishment in the executive branch" as Congress intended the term to be construed.

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

[6] President Truman considered the Smithsonian an "executive agency" for the purposes of the Property Act at the time of the act's passage in 1949. On the day after the Property Act was approved, President Truman sent a letter "To All Executive Agencies" concerning the implementation of the act. 14 Fed. Reg. 3699 (1949). The letter described the responsibilities of "Executive agencies" under the Property Act. *Id.* at 3701. The President sent a copy of the letter to the Smithsonian, thereby indicating the contemporaneous executive branch interpretation of "executive agency" as including the Smithsonian. *See* Letter for John Nagle, Office of Legal Counsel, Department of Justice, from Benedict K. Zobrist, Director, Harry S. Truman Library (May 13, 1988) (confirming President Truman sent the letter to the Smithsonian). Although this letter may not be determinative of the congressional intent in enacting the Property Act, it does suggest that our conclusion that the Smithsonian is an "executive agency" was hardly a novel interpretation even at a time contemporary with the Act's enactment. *See generally* Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements"*, 40 Admin. L. Rev. 209, 232 (1988) (suggesting that "[j]udicial deference to contemporaneous statutory constructions . . . provides reason for ascribing importance to the [contemporary] views expressed [by the president]").

The President's Veto Power

Article I of the Constitution does not vest the President with the inherent power to veto portions of a bill while signing the remainder of it into law.

July 8, 1988

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

In the past few months, several commentators have suggested that Article I of the Constitution vests the President with an inherent item veto power. According to these commentators, this power is supported by the text of the Constitution, the experience in the Colonies and the States prior to the adoption of the Constitution, and other relevant constitutional materials. In our view, the text of Article I requires that any analysis of this question focus on the meaning of the term "Bill." If this term was intended to mean a legislative measure limited to one item of appropriation or to one subject, then it may be argued that the President properly may consider measures containing more than one such item or subject as more than one "Bill" and, therefore, may approve or disapprove of each separately. Under this approach, the President would have the functional equivalent of an item veto. Our review, however, of the relevant constitutional materials persuades us that there is no constitutional requirement that a "Bill" must be limited to one subject. The text and structure of Article I weigh heavily against any such conclusion. Moreover, historically "Bills" have been made by Congress to include more than one item or subject, and no President has viewed such instruments as constituting more than one bill for purposes of the veto. Indeed, the Framers foresaw the possibility that Congress might employ "the practice of tacking foreign matter to money bills," but gave no indication that this practice was inconsistent with their understanding of the term "Bill." Nor, we are constrained to conclude, does the recent commentary on this question provide persuasive support for an inherent item veto power in the President.

I. Text and Structure

Article I, Section 7, Clause 2 of the Constitution sets forth the constitutional procedure for enacting "Bills" into law—passage by both houses of Congress and approval by the President subject to override:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign

> it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively.

U.S. Const. art. I, § 7, cl. 2.

After debate concerning Clause 2 was completed, James Madison proposed an amendment to ensure that Congress would not attempt to circumvent the presentment requirement by passing legislation in forms other than bills. Thus, the all-inclusive language of Clause 3:

> Every Order, Resolution, or Vote to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

U.S. Const. art. I, § 7, cl. 3.

Article I, Section 7 thus sets forth a straightforward procedure for enacting legislation, with well-defined roles for each of the political branches. After both houses of Congress have passed a bill or any other instrument intended to become law, Congress must present it to the President. The President then has two, but only two, options with respect to the instrument presented: to "approve . . . it" or "not."

This scheme seems clearly to envision that Congress plays an active role in lawmaking, while the President's role, although quite formidable, is essentially passive and receptive at the veto stage. To use a literary analogy, Congress acts as the author, the President as the publisher: absent an extraordinary consensus in Congress, the President retains the ultimate authority to decide whether to "publish" the law. The question presented by the item veto is whether Article I can be understood to give the President a more active and powerful role in that process, *i.e.*, that of an editor who may delete various parts of the instrument presented without the approval of the author. Is the President limited to approving or disapproving the entire instrument presented to him, or may he pick and choose among various provisions of the instrument, signing some into law and returning the rest to Congress?

We can discern nothing in the text or structure of the Constitution suggesting that the President possesses such enhanced authority. With respect to enrolled

bills or any other completed legislative instrument, the Constitution authorizes the President only to "approve . . . *it*" or "not." (emphasis added). The Constitution does not suggest that the President may approve "parts of it" or indicate any presidential prerogative to delete or alter or revise the bill presented. Nor does the text contain any precise definition of the term "Bill" or place any restriction on the form of legislative instrument Congress may present to the President for his approval. Specifically, there is no suggestion in the Constitution that bills or other forms of congressional votes cannot contain unrelated matters in a single instrument. The absence of such provisions is particularly telling in this context since the veto clauses of the Constitution are the lengthiest, and among the most specific, provisions in the document.

Moreover, the genesis and language of Article I, Section 7, Clause 3 further reinforce the conclusion that the President does not possess item veto authority. As the debates make clear, the Framers required that "Every Order, Resolution or Vote" be presented to the President on the same terms as bills, to prevent Congress from circumventing the veto powers established in Clause 2 by enacting legislation in forms other than bills.[1] In particular, by requiring in Clause 3 the presentment to the President of "every vote to which the concurrence of the Senate and House of Representatives may be necessary," the Framers appear to have been referring to any measure, regardless of what unrelated provisions it combines, on which both houses of Congress have voted their approval. If so, Congress could avoid any limitations on the contents of "bills" by simply legislating in the form of "votes." Clause 3 thus provides particularized evidence that the Framers were well aware that Congress might seek to evade the President's veto authority through various machinations. Indeed, as we show below, in the debates during the Constitutional Convention, the Framers expressly contemplated that a bill might contain unrelated items and provisions. Significantly, therefore, the safeguard found in Clause 3 was neither a prohibition against aggregating unrelated items in a single bill nor a grant of item veto authority but rather an express requirement that *all* legislative instruments be subject to the veto. Accordingly, Clause 3 weighs against rather than supports reading into Article I an implicit prohibition against legislation that does not comport with the ideal of a single item addressing a single subject.

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[1] It is fair to conclude that during most of the consideration of the veto power, the Convention assumed that bills would be the exclusive means of passing laws since the veto provision under discussion referred only to "Bills." On August 15, 1787, however, after all other debate concerning the veto power had been concluded, Madison "proposed that [']or resolve' should be added after '*bill*' in the beginning of [the veto clause] with an exception as to votes of adjournment &c." James Madison, *Notes of Debates in the Federal Convention of 1787* at 465 (1984) ("Madison's Notes"). Madison's argument in favor of the proposal was "that if the negative of the President was confined to *bills*: it would be evaded by acts under the form and name of Resolutions, votes &c." *Id* Madison reports that "after a short and rather confused conversation on the subject," the Convention rejected his proposal. *Id.*

Upon reconvening the next day, the Convention took up a motion by Edmund Randolph to reconsider Madison's suggestion, which Randolph had since "thrown into a new form " *Id.* at 466. Randolph's proposal was substantially identical to what is now Article I, Section 7, Clause 3, thus subjecting to the President's veto power not only "Every Bill," but also "Every order resolution or vote, to which the concurrence of the Senate & House of Rep's may be necessary." *Id.* Although Roger Sherman "thought it unnecessary," Randolph's proposal was overwhelmingly approved by the Convention without further debate *Id*

Nonetheless, Mr. Steven Glazier relies exclusively on Clause 3 in arguing in a recent article that the Constitution "grants the line item veto to the President." Stephen Glazier, *Reagan Already Has Line-Item Veto*, Wall St. J., Dec. 4, 1987, at 14. Mr. Glazier begins his analysis by correctly noting that the Framers added Clause 3 to guard against the entirely foreseeable prospect that Congress would attempt to circumvent the President's veto authority by simple semantic expedient of denominating bills as orders, resolutions, or votes. From this unassailable premise, however, Mr. Glazier leaps to the conclusion that the Constitution prohibits the aggregation of numerous items of appropriation in a single bill. But Clause 3 merely requires that any measure, however denominated, be presented to the President before it can become law; it says nothing about what may or may not be contained in the measure. In other words, a requirement of presentment of all legislative measures simply does not imply, let alone compel, any sort of limitation concerning the content of the measures presented.

More generally, the absence of a constitutionally prescribed limitation on the form of legislation subject to presidential disapproval is fully consistent with the powerful role that the Framers envisioned for the President in the lawmaking process and with their general approach to separation of powers questions. The debate in the Convention concerning the nature of the President's veto—whether it would be absolute or qualified, and if qualified, whether an override would require two-thirds or three-fourths vote in both houses—is instructive.

The debate over giving the President an absolute veto—like the King of England—was essentially a debate over whether to place the President on precisely the same footing in the lawmaking process as the other two participants. For example, the House has an absolute veto over measures originated in the Senate—no bill goes beyond the House until it is satisfied. If it is not satisfied with a measure, it can in effect send it back to the Senate with its recommendations (in the form of amendments). In similar fashion, the Senate has an absolute veto over the House; if it adds anything to or deletes anything from a bill originated in the House, it must send the amended measure back to the House for its concurrence in the change before the measure can go to the President. An absolute veto in the President would have placed him on precisely the same footing as House and Senate, able to block enactment of any law until satisfied with it.

Although the Framers gave the President and the Congress many of the same tools,[2] the Framers refrained from giving the President a full one-third partner-

[2] For example, if Congress presents a bill to the President containing unrelated matters, the President is faced with the same choice as is either house when presented with a bill containing unrelated matters: accept, reject, or propose amendments to the bill. The President may accept a bill by signing it, or by failing to return it to Congress within ten days U.S Const. art. I, § 7, cl. 2. Conversely, the President may reject a bill (subject to override) by returning it with his objections to the house in which it originated, or by failing to sign it when Congress prevents its return by its adjournment *Id.* Finally, the President may propose amendments to a bill by rejecting it and including proposed amendments in his veto message to Congress. In addition, like both houses of Congress, the President has the power to "recommend to [Congress'] Consideration such Measures as he shall judge necessary and expedient" U.S Const art II, § 3.

ship in the lawmaking process, qualifying his veto by a two-thirds override in both houses. Thus, while the Founders intended the President to have a powerful role in the lawmaking process, they did not intend his role to be as powerful as the House and Senate. But an item veto, and especially a line item veto, would place the President in a much more powerful position than either house of Congress, for it would enable him to delete portions of a measure and sign the remainder into law; he would not have to send the entire measure with his recommended deletions back to Congress for its reconsideration before any part of it could become law.

Is it possible that the Founders, while debating the nature of the Presidential veto, would refrain from giving him an absolute veto, and yet simply assume that he would be able to veto portions of a measure and sign the remainder into law? It seems inconceivable that such a feature of the President's veto power would have gone unremarked at the Constitutional Convention.

More important for present purposes, the funneling safeguard contained in Clause 3, in conjunction with the veto power itself, provides a potent, albeit burdensome, defense against any procedural manipulations employed by Congress to evade or dilute the presidential veto. If the President is presented with legislative instruments of unreasonable form, scope, or length, he can do what either house can do when the other house attempts to coerce its acquiescence through the attachment of unrelated riders—accept, reject, or propose amendments to, the entire measure.

To be sure, reliance on the veto itself, rather than a precise definition of a term "Bill," renders permissible a practice—tacking of unrelated riders—that has been subject to much congressional abuse, particularly in recent years. But, by granting each party in the lawmaking process a "veto" (subject to the override in the case of the President) over the proposals of the others, and the power to propose amendments to such proposals, the Framers believed that each party in the lawmaking process would have an adequate check on the other and be capable of defending its role. Alexander Hamilton made this clear in The Federalist:

> In the case for which it is chiefly designed, that of an immediate attack upon the constitutional rights of the executive, or in a case in which the public good was evidently and palpably sacrificed, a man of tolerable firmness would avail himself of his constitutional means of defense, and would listen to the admonitions of duty and responsibility. In the former supposition, his fortitude would be stimulated by his immediate interest in the power of his office; in the latter, by the probability of the sanction of his constituents who, though they would naturally incline to the legislative body in a doubtful case, would hardly suffer their partiality to delude them in a very plain case. I speak now with an eye to a magistrate possessing only a common share of firmness. There are men who, under any circumstances, will have the courage to do their duty at every hazard.

The Federalist No. 73, at 445 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

In short, the veto acts as its own best defense against congressional efforts to dilute the President's approval authority.

It should be noted that the decision to subject all legislative forms to the external check of a presidential veto, rather than to direct governance of internal legislative processes, is but one of many examples of the means by which the Framers sought to prevent all aggrandizement of power by any of the three branches: a system of checks and balances. The purpose—and genius—of a tripartite system of government with interdependent powers is that attempts by one branch to invade another's sphere are to be dealt with through the exercise of countervailing power by the branch whose prerogatives are being invaded, rather than through explicit procedural rules governing the internal operations of each branch. As a general premise, then, the Framers relied on the *structural* solution of competing institutional interests to ensure the integrity of governmental operations, and eschewed detailed rules directed towards the activities within each branch. The manifestation of this general trend in the context of congressional processes is Article I, Section 5, Clause 2, which provides that "[e]ach House may determine the Rules of its proceedings." The Framers' reluctance in this regard was particularly acute with respect to internal rules not susceptible of precise definition, for these would inevitably lead to time-consuming and divisive political disputes over whether a procedural norm has been followed. For example, as we discuss more fully below, Madison strenuously opposed the original versions of Article I, Section 7, Clause 1 because they contained "ambiguous" terms that would inevitably lead to futile political disputes over meaning. Moreover, such procedural disputes might ultimately be brought to the judiciary for resolution, a forum the Framers clearly viewed as ill-suited to resolve disputes between the political branches.

Any definitional limitations on bills would, of course, constitute precisely the kind of nebulous internal guideline that the Framers generally sought to avoid in preference to granting the President an institutional check such as the counterbalancing power of "veto." Accordingly, the incongruity between such an internal safeguard and the Framers' general approach to the separation of powers casts even further doubt on the implicit existence of any such constitutional limitation.

Moreover, while the protection contained in Clause 3 is consistent with the substantial symmetry of powers among the parties to the lawmaking process, restricting the form of a permissible "Bill" is not. Clause 3 ensures that nothing become law, regardless of the label affixed, unless presented to the President for his approval. An item veto or a restriction on the type of "Bill" presented, however, serves a distinct and more ambitious purpose. Rather than ensuring that all legislation is presented to the President, it directly intrudes into the legislative process by fixing the proper form that presented bills must take. Accordingly, any such restriction would be different in degree and in kind from that contained in Clause 3.

In sum, the text and structure of Article I, the intended roles of the House, the Senate, and the President in the lawmaking process, Hamilton's conclusion

that the veto power is its own best defense, and the inconsistency between any precise definition of "Bill" and the Framers' general attempt to provide structural safeguards against encroachments establish that the combination of unrelated matters in a single bill, although objectionable as a policy matter, neither transgresses constitutional norms nor affords a basis for exercising an item veto. The only conceivable basis for making a plausible contrary argument would be that longstanding and pervasive historical practice at the time of the American Founding clearly established that all legislation could encompass only one subject, and, consequently, the Framers must have intended that only such instruments could be presented to the President for his approval. Moreover, even if it could be shown that the Constitution places severe restrictions on the permissible contents of a "Bill," that showing would not establish item veto authority in the President. To the contrary, such a showing would suggest that a bill containing unrelated provisions would be void ab initio, and that the President would have no constitutional power to approve or disapprove such a bill in whole or in part. In any event, a review of the historical materials reveals that no such compelling evidence exists.

II. Historical Evidence

As is clear from the foregoing discussion, the veto clauses of the Constitution do not expressly define the term "Bill." Rather, the original understanding of that term must be determined by examination of historical materials.

In analyzing those materials, it is first helpful to distinguish three conceptually distinct congressional practices. First, Congress aggregates numerous items of appropriation in a single appropriations bill, such as the so-called "Continuing Resolutions." Second, Congress attaches substantive provisions as "riders" to appropriations bills. Third, Congress combines unrelated substantive provisions, apart from appropriations, in a single bill. The question is whether a bill, as that term is used in the Constitution, may be constituted in these ways.

The historical evidence suggests that a bill may be so constituted, and that the Framers did not understand the Constitution to require an itemized presentment of legislation to the President or to establish some type of "germaneness" criterion for bills. These practices were known to the Framers, and have historical antecedents in the colonial and British experiences, and there is no persuasive evidence that the Framers intended to prohibit them. And, while failure to limit the contents of a bill may restrict the efficacy of the President's veto power, we are aware of no persuasive historical evidence that the Constitution authorizes the President to exercise an item veto.

A. Constitutional Convention

The delegates to the Constitutional Convention of 1787 did not consider the meaning of the term "Bill" as an abstract or universal construct. Rather, in the context of considering the power of the House of Representatives to originate

money bills, and the power of the Senate to amend money bills, the Framers' discussions shed some light on what was meant to be conveyed by the term.

Specifically, we discuss the Convention's consideration and adoption of Article I, Section 7, Clause 1, giving to the House of Representatives the exclusive right to originate bills for raising revenue, but permitting amendments of such bills in the Senate. These discussions do not reveal that the Framers understood the term "Bill" to preclude the practice of including unrelated provisions in a single bill. Moreover, their discussion of that practice, and failure to object to it generally, suggest that the Framers left each house of Congress free to determine the form and contents of legislation.

1. *Adoption of Article I, Section 7, Clause 1*—A recurring topic of debate at the Convention was whether the House of Representatives should be given the exclusive right to originate money bills, and if so, whether the Senate should be permitted to propose amendments to such bills. In the British system, the House of Commons possessed the exclusive privilege of originating money bills, and the House of Lords was denied even the power to amend such bills. Some delegates to the Convention urged adoption of a similar rule, arguing that the long experience of the British should not be lightly discarded. *See* Madison's Notes at 113 (Remarks of Mr. Gerry); *id.* at 447 (Remarks of Mr. Dickenson). Others thought the British analogy inapposite in light of the Senate's distinct composition and character. *See id.* at 113 (Remarks of Messrs. Butler and Madison); *id.* at 249 (Remarks of Mr. Wilson).

Most important for present purposes, however, were discussions relating to the objection that adoption of the British model would lead the House to tack unrelated provisions to money bills. *See id.* at 113 (Remarks of Mr. Butler) ("[I]t will lead the [House of Representatives] into the practice of tacking other clauses to money bills . . . ."); *id.* at 443 (Remarks of Col. Mason) ("[I]t would introduce into the House of Rep.s the practice of tacking foreign matter to money bills . . . ."); *id.* at 444 (Remarks of Mr. Wilson). Opponents of the British model argued that by denying the Senate the power to amend *money* bills originating in the House—combined with the tacking of non-money provisions to such bills by the House, thereby depriving the Senate of its distinct power to propose amendments to the *non-money* provisions—the proposal would destroy the "deliberative liberty of the Senate," requiring it to vote up or down on the combination as originated. *See id.* at 444 (Remarks of Mr. Wilson) ("The House of Rep.s will insert other things in money bills, and by making them conditions of each other, destroy the deliberative liberty of the Senate."); 2 *The Records of the Federal Convention of 1787* at 210–11 (Max Farrand ed., 1987) ("M. Farrand") (Notes of James McHenry) ("[L]odging in the house of representatives the sole right of raising and appropriating money, upon which the Senate had only a negative, gave to that branch an inordinate power in the constitution, which must end in its destruction."). The Convention sought to obviate this objection by permitting the Senate to propose amendments to money bills as in the case of other bills. Although opponents of the proposal conceded that this relieved some of the diffi-

culties, they insisted that others remained. In the end, however, the Convention adopted a similar proposal.

Originally, it was proposed that "all bills for raising or appropriating money . . . shall originate in the 1st branch of the Legislature, and shall not be altered or amended by the 2d branch." Madison's Notes at 237. Building on the earlier argument that this provision would lead to tacking, James Madison, among others, observed that it would be "a source of injurious altercations between the two Houses." *Id.* at 414 (Remarks of Mr. Madison); *see also id.* at 238 (Remarks of Mr. Madison) (referring to the provision as "a source of frequent & obstinate altercations"); *id.* at 251 (Remarks of Gov. Morris) ("It will be a dangerous source of disputes between the two Houses."); *id.* at 444 (Remarks of Mr. Wilson) ("[A]n insuperable - objection agst. the proposed restriction of money bills to the H. of Rep.s [is] that it would be source of perpetual contentions where there was no mediator to decide them . . . ."); *id.* at 449 (Remarks of Mr. Rutledge) ("The experiment in S. Carolina, where the Senate cannot originate or amend money bills, has shewn that it answers no good purpose; and produces the very bad one of continually dividing & heating the two houses.").

"[I]n order to obviate the inconveniences urged agst. a restriction of the Senate to a simple affirmative or negative," Edmund Randolph proposed that the clause be changed to permit the Senate to amend money bills except as to "increase or diminish the sum." *Id.* at 436–37. Col. Mason argued in favor of this change, stating: "By authorizing amendments in the Senate it got rid of the objections that the Senate could not correct errors of any sort, & that it would introduce into the House of Rep.s the practice of tacking foreign matter to money bills." *Id.* at 443. James Madison, a consistent opponent of the proposals to restrict the Senate in favor of the House, admitted that "[t]he proposed substitute . . . in some respects lessened the objections agst. the section," but also thought that "[i]t laid a foundation for new difficulties and disputes between the two houses." *Id.* at 445 (Remarks of Mr. Madison). Of particular relevance for our purposes, Madison made the following observation:

> The words *amend or alter*, form an equal source of doubt & altercation. When an obnoxious paragraph shall be sent down from the Senate to the House of Reps—it will be called an origination under the name of an amendment. The Senate may actually couch extraneous matter under that name. In these cases, the question will turn on the *degree* of connection between the matter & object of the bill and the alteration or amendment offered to it. Can there be a more fruitful source of dispute, or a kind of dispute more difficult to be settled? His apprehensions on this point were not conjectural. Disputes had actually flowed from this source in Virga. where the Senate can originate no bill.

Id. at 446. Randolph did not respond to this new objection. Rather, he reiterated his support for the proposal, stating that "[h]is principal object . . . was to pre-

vent popular objections against the [constitutional] plan, and to secure its adoption." *Id.* at 448. After some additional discussion, the Convention rejected the proposal to vest in the House the exclusive right to originate money bills, even though it would have permitted some amendment in the Senate. *Id.* at 449–50.

Although the Convention finally had acted to reject the proposal, some members continued to feel strongly that some form of it was necessary, given that the States were to be equally represented in the Senate. For example, in discussing a proposal making members of Congress ineligible to hold other offices, Hugh Williamson referred "to the question concerning 'money bills.'"

> That clause he said was dead. Its ghost he was afraid would notwithstanding haunt us. It had been a matter of conscience with him, to insist upon it as long as there was hope of retaining it. He had swallowed the vote of rejection, with reluctance. He could not digest it.

Id. at 453–54.

Immediately upon reconvening the next day, the Convention took up a motion by Caleb Strong to adopt a new proposal relating to money bills. Mr. Strong suggested that the House be given the exclusive right to originate money bills, but that the Senate be permitted to "propose or concur with amendments as in other cases," thus permitting the greatest role yet for the Senate. *Id.* at 460. Col. Mason and Mr. Ghorum strongly supported the proposal and urged its adoption. Gouverneur Morris, however, "opposed it as unnecessary and inconvenient." *Id.* Mr. Williamson then gave the last significant speech to the Convention on the merits of adopting a provision on money bills, which appears to have been instrumental in the ultimate decision to adopt such a provision:

> [S]ome think this restriction on the Senate essential to liberty, others think it of no importance. Why should not the former be indulged. [H]e was for an efficient and stable Govt. but many would not strengthen the Senate if not restricted in the case of money bills. The friends of the Senate would therefore lose more than they would gain by refusing to gratify the other side. He moved to postpone the subject till the powers of the Senate should be gone over.

Id. at 460–61. Mr. Williamson's motion to postpone "passed in the affirmative." *Id.* at 461.

Three weeks later on September 5, 1787, the Committee on Unresolved Matters reported the following proposal:

> All bills for raising revenue shall originate in the House of Representatives, and shall be subject to alterations and amendments by the Senate: no money shall be drawn from the Treasury, but in consequence of appropriations made by law.

Id. at 580. This proposal represented a significant change. The proposal gave the Senate the right to propose amendments of any sort, and this provision referred only to "bills for raising revenue" rather than "bills for raising or appropriating money,"[3] in defining the extent of the House's exclusive right of origination. Gouverneur Morris moved to postpone consideration of the proposal, stating: "It had been agreed to in the Committee on the ground of compromise, and he should feel himself at liberty to dissent to it, if on the whole he should not be satisfied with certain other parts to be settled." *Id.* at 581 (footnote omitted). "Mr. Sherman was for giving immediate ease to those who looked on this clause as of great moment, and for trusting to their concurrence in other proper measures." *Id.* The Convention then voted to postpone. *Id.*

In the final days of the Convention, the proposal was again taken up. Without debate, the Convention adopted a motion to substitute "the words used in the Constitution of Massachusetts" for those used by the Committee to permit amendments by the Senate. *Id.* at 607. The proposal was then adopted as amended, by a vote of nine to two, providing as follows:

> All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as in other bills. No money shall be drawn from the Treasury but in consequence of appropriations made by law.

Id. at 606–07.[4] James McHenry subsequently described the compromise that led to the adoption of the clause as follows: "The Larger States hoped for an advantage by confirming this privilege [of originating revenue bills] to that Branch where their numbers predominated, and it ended in a compromise by which the Lesser States obtained a power of amendment in the Senate." *See* 3 M. Farrand at 148 (Remarks of James McHenry before the Maryland House of Delegates, Nov. 29, 1787).

2. *Analysis of Article I, Section 7, Clause 1*—Those in favor of inherent item veto authority may argue that the history of the adoption of Clause 1 of Article I, Section 7 indicates that the Constitution adopts as the meaning of the term "Bill" a legislative proposal limited to one subject. From this premise, as noted earlier, it might be argued that the President is entitled to treat any legislative instrument containing more than one subject as more than one bill.[5] The difficulty, however, is that the Framers gave no indication that they meant to limit the term "Bill" to legislative instruments relating to only one subject. Rather, as previ-

[3] Several of the earlier proposals also would have given the House the exclusive right to originate bills "for fixing the salaries of the officers of Government." *See, e.g.*, Madison's Notes at 386.

[4] The clause was subsequently altered only by moving the second sentence to Article I, Section 9. *Id* at 619.

[5] Moreover, as previously discussed, even if the latter understanding had been adopted by the Convention, item veto authority would not necessarily follow Rather, it might be concluded that such proposals could not be passed or presented to the President, and that even if the President signed such a proposal, it would have no legal force or effect.

ously discussed, their apprehension concerning the possible content of the bills originating in the House and resulting from amendment in the Senate arose solely out of their concern that neither house be in a position to encroach upon the constitutional prerogatives of the other.

That the Constitution does permit bills to contain unrelated provisions is reflected by the objection of some Convention delegates that the House might engage in "the practice of tacking foreign matter to money bills." *E.g.*, Madison's Notes at 443 (Remarks of Col. Mason). To be sure, it might be argued that these objections imply that the Framers did not understand the term "Bill" to permit the tacking of foreign matter. This inference is unwarranted. Rather, these comments reflect an explicit recognition by the Framers that a bill could contain unrelated provisions, for the Framers recognized the practice, yet took no steps to prevent the houses from engaging in it. *See* 3 M. Farrand at 202 (Remarks of Luther Martin delivered to the Maryland legislature on November 29, 1787) (objecting to Article I, Section 7, Clause 1 on the ground "[t]hat it may, and probably will, be a future source of dispute and controversy between the two branches, what are or are not revenue bills, and the more so as they are not *defined* in the constitution").

Moreover, the Framers' objection was not to tacking as such. The Convention delegates were agreed that the House and Senate should be given equal authority to originate and amend all bills other than those dealing with money. The objection to tacking arose only in reaction to the proposal to give the House exclusive power to originate bills raising and appropriating money. The objection was quite specific: the tacking of non-money riders to money bills by the House of Representatives would enable the House to use its power to originate money bills to encroach upon the constitutional prerogative of the Senate to amend non-money proposals. *See* 2 M. Farrand at 210–11 (Notes of James McHenry) (arguing against "lodging in the house of representatives the sole right of raising and appropriating money, upon which the Senate had only a negative," on the ground "[t]hat without equal powers they were not an equal check upon each other"). This view is confirmed by the fact that once Randolph proposed to change the proposal to permit the Senate to amend non-money provisions of bills originated in the House, Col. Mason remarked that the change "got rid of the objection[] . . . that it would introduce into the House of Reps. the practice of tacking foreign matter to money bills." Madison's Notes at 443. Thus, although either or both houses remained free to combine unrelated non-money provisions, it is not surprising that no one at the Convention objected to, or even raised, that possibility, since the practice did not threaten to permit one house to enlarge its power at the expense of the other. Nor were there references in the debates to the possibility that the House might combine two unrelated money provisions in a single bill, because no prerogative of the Senate thereby would have been encroached. This, in turn, suggests that the Convention would have had no reason to object to, let alone consider, the practice of tacking when both houses stood on equal footing—namely, when the House tacks unrelated non-money matters to non-money bills. *Accord* Madison's Notes at 114 (Remarks of Mr. Sherman)

("In Cont. both branches can originate in all cases, and it has been found safe & convenient.").[6]

That the Constitution does not adopt a definition of the term "Bill" that either authorizes or prohibits unrelated provisions is also consistent with Article I, Section 5, Clause 2, which provides that "[e]ach House may determine the Rules of its Proceedings." By this provision, the Constitution appears to leave it to each house to permit or prohibit tacking under any or all circumstances.

Madison's remarks in response to Randolph's compromise are not to the contrary. As noted, Madison acknowledged that "[t]he proposed substitute . . . in some respects lessened the objections agst. the section," but stated that "[t]he words *amend or alter*, form an equal source of doubt & altercation." Madison's Notes at 445–46. Madison stated that the question whether an amendment is properly characterized as an origination "will turn on the *degree* of connection between the matter & object of the bill and the alteration or amendment offered to it." *Id.* at 446. Proponents of inherent item veto authority might argue that this statement evinces an understanding that only a germane amendment properly may be characterized as an "amendment," and therefore that a bill may not be amended to contain unrelated provisions.

Madison's observation does not appear to have been designed to state a constitutional definition of "amendment," but rather to persuade the Convention that *any* proposal that placed the houses on an unequal footing with respect to money bills would lead to disputes and altercations between them. Thus, Madison predicted that when the Senate proposed an amendment "obnoxious" to the House, the houses would enter into a dispute over whether the Senate had proposed "an origination under the name of an amendment." *Id.* at 446. Read in context, it is clear that Madison's statement of the considerations upon which "the question will turn" was not intended as a statement of a constitutionally required definition of "amendment," but rather to demonstrate the inevitability of disputes that would be difficult to resolve. Thus, immediately after making this statement, Madison asked rhetorically: "Can there be a more fruitful source of dispute, or a kind of dispute more difficult to be settled?" *Id.* Any other reading would require one to reach the strange conclusion that Madison was simultaneously proposing a constitutional test and criticizing it as incapable of being successfully applied.

That Madison's purpose was limited to pointing out the weakness of Randolph's proposal is confirmed by an examination of his entire statement. Madison begins by pointing out that "[t]he word *revenue* was ambiguous," and that "no line could be drawn between" revenue and non-revenue provisions. *Id.* at 445–46. Next, Madison made his argument that "[t]he words *amend or alter*, form an equal source of doubt & altercation." *Id.* at 446. Finally, Madison states that other terms in Randolph's proposal "were liable to the same objections." *Id.* Accordingly, Madison's point was not that non-germane amendments would be

[6] Similarly, no delegate suggested that tacked matters were two bills, or that a legislative proposal relating to more than one subject would not be a proper bill.

unconstitutional, but simply that giving the House and Senate unequal power over money bills would invariably lead to political disputes.

Thus, we believe that the debates in the Convention concerning the adoption of Clause 1 are informative primarily because of the absence of discussion concerning tacking outside the context of the money bill proposal. If the Framers truly believed that a bill could relate to only one subject, then it is remarkable that they did not state this belief even when tacking was discussed. Under these circumstances, rather than indicating a restriction on the contents of a bill, the Framers' discussions concerning the adoption of Clause 1 actually suggest that a bill may contain unrelated matters.

The Framers' discussion of Clause 1 has obvious relevance for interpreting the veto clauses. The Framers used the term "Bill" in both instances, raising a textual presumption that the term was intended to have the same meaning throughout. Moreover, there is no evidence suggesting that the Framers had different conceptions of the term "Bill" as used in these clauses. Rather, the fact that the revenue clause immediately precedes the veto provisions in the Constitution, and that all are part of the same section, Article I, Section 7, provide additional and persuasive evidence that the Framers did not intend to limit the contents of bills to a single subject.

B. Ratification Debates

Although the veto clauses of the Constitution were not widely discussed in the state ratifying conventions, the little discussion that occurred, and the fact that no one suggested that the President had item veto authority, indicate that the ratifiers did not understand the Constitution to grant the President item veto authority.

Most of the comments were limited to a recitation of the mechanics of the veto. For example, in the Pennsylvania ratifying convention, James Wilson quoted from the veto clauses and stated that "[t]he *effect* of this power, upon this subject, is merely this: if he disapproves a bill, two thirds of the legislature become necessary to pass it into a law, instead of a bare majority." 2 *Debates on the Adoption of the Federal Constitution* 473 (Jonathan Elliot, ed., 1836) ("Elliot's Debates"). Wilson's understanding confirms what is evident on the face of the Constitution—the President has two choices when presented with a bill: to approve or disapprove the bill. Of course, this understanding leaves open to discussion what may constitute a bill for constitutional purposes, but Mr. Wilson did not address this question.

James Iredell's discussion of the veto power in the North Carolina ratifying convention evinces a similar understanding. Responding to criticism that the veto power gave the President too great a role in legislation, Iredell stated:

> After a bill is passed by both houses, it is to be shown to the President. Within a certain time, he is to return it. If he disapproves of it, he is to state his objections in writing; and it depends on Con-

> gress afterwards to say whether it shall be a law or not. Now, sir, I humbly apprehend that, whether a law passes by a bare majority, or by two thirds, (which are required to concur after he shall have stated objections,) what gives active operation to it is, the will of the senators and representatives. *The President has no power of legislation.* If he does not object, the law passes by a bare majority; and if he objects, it passes by two thirds. *His power extends only to cause it to be reconsidered,* which secures a greater probability of its being good.

4 Elliot's Debates at 27 (emphasis added). Iredell's defense of the veto power indicates his understanding that the power was limited in nature. The President was to have no power to adopt or alter legislation on his own. Rather, his role was limited to initiating reconsideration and requiring greater consensus in Congress by withholding his consent, and to proposing alterations by communicating his objections to Congress. Congress might assent to his objections and amend the bill, but this would be done by Congress and not be any unilateral action of the President. Moreover, although Iredell's comments do not speak to whether there are any constitutional limitations on what Congress may include in a single bill, his remarks indicate that he would have found it worthy of comment if he understood the Constitution to permit the President to exercise, in effect, an item veto by conferring upon him the power to decide what does and does not constitute a bill.

C. British Experience

An examination of the British experience indicates that legislative instruments containing unrelated provisions were treated as one bill. Appropriations bills regularly contained multiple items, and there was no objection to such bills. The practices of including unrelated substantive provisions in a single legislative instrument, and attaching substantive riders to money bills, were sometimes engaged in, but met with objections. On several notable occasions, these objections led the Crown and the House of Lords to refuse their assent to such measures. There was, however, no suggestion by either the Crown or the Lords that these measures could be treated as more than one bill and approved or vetoed separately.

A review of British supply bills, as they were called, enacted prior to the revolutionary war indicates that it was not unusual for a single bill to contain numerous items of appropriation. For example, a bill enacted in 1765 contained thirty-one separate sections and at least as many items of appropriation. *See* An act for granting to his Majesty a certain sum of money out of the sinking fund; for applying certain moneys therein mentioned for the service of the year one thousand seven hundred and sixty five; for further appropriating the supplies granted in this session of parliament; for allowing to the receivers general of the duties on offices and employments in Scotland a reward for their trouble; and for

allowing further time to such persons as have omitted to make and file affidavits of the execution of indentures of clerks to attorneys and solicitors, 1765, 5 Geo. 3, ch. 40. This bill included appropriations "towards discharging such unsatisfied claims and demands, for expenses incurred during the late war in *Germany*," *id.* § 12, for "defending, protecting, and securing, the *British* Colonies and plantations in *America*," *id.* § 13, for maintaining "his Majesty's navy," *id.* § 15, "for paying of pensions to the widows" of deceased officers and marines, and "towards defraying the charge of out-pensioners of *Chelsea* hospital," *id.* § 20, "for defraying the charges of the civil establishment of his Majesty's colony of *West Florida*, . . . and . . . for defraying the expense attending general surveys of his Majesty's dominions in *North America*," *id.* § 22. In addition, we are aware of no secondary sources that call this practice into question. Thus, a British bill of supply might properly contain numerous items of appropriation.

Historical evidence also suggests that the practice of combining unrelated matters in a single bill occurred with some frequency, and gave rise to considerable controversy and debate. According to one commentator:

> A very objectionable course was sometimes adopted by the Commons in the reign of Charles II which, if it had not been subsequently exploded, would have been a blemish in the constitution, namely, *the practice of tacking bills of supply, with an intention of thereby compelling the Crown or the Lords to give their consent to a bill which they might otherwise disapprove of and reject.* The practice of tacking indicates that the mode of passing bills between the two Houses was unsettled in the reign of Charles II. . . . [The practice] survived the revolution, but is now deemed unconstitutional.

Amos, *The Constitutional History of England in the Time of Charles II, quoted in* 9 Cong. Rec. 235 (1879) (emphasis added).

An authoritative four-volume treatise by John Hatsell on parliamentary practice details many of the relevant events.[7] Hatsell's general observations on the subject are as follows:

> It is much to be wished that every question, which is brought either before the House of lords or Commons, should be as simple and as little complicated as possible. *For this reason, the proceeding, that is but too often practised, of putting together in the*

[7] In the preface to his Manual on Parliamentary Practice, Thomas Jefferson refers to Hatsell's work, stating "I could not doubt the necessity of quoting the sources of my information, among which Mr. Hatsel's [sic] most valuable book is preeminent." H.R Doc. No. 279, 99th Cong., 2d Sess. 113 (1987).

According to another commentator, "Hatsell's collection of parliamentary precedents is the highest authority in parliamentary law known either in Great Britain or the United States, and the work from which Jefferson's Manual, or hand-book, is chiefly compiled." 21 Cong. Globe, 31st Cong., 1st Sess. 794 (1850) (remarks of Senator Benton).

> *same Bill clauses that have no relation to each other, and the subjects of which are entirely different, ought to be avoided.* Even where the propositions are separately not liable to objection in either House, the heaping together in one law such a variety of unconnected and discordant subjects, is unparliamentary; and tends only to mislead and confound those who have occasion to consult the Statute Book upon any particular point. But to do this in cases where it is known that one of the component parts of the Bill will be disagreeable to the Crown, or to the Lords; and that, if it was sent up alone, it would not be agreed to—for this reason, and with a view to secure the Royal assent, or the concurrence of the Lords, to tack it to a Bill of Supply which the exigencies of the State make necessary is a proceeding highly dangerous and unconstitutional. It tends to provoke the other branches of the legislature, in their turn, to depart from those rules to which they ought to be restrained by the long and established forms of Parliament; and can have no other effect than finally to introduce disorder and confusion.

3 J. Hatsell, *Precedents of Proceedings in the House of Commons* 221–22 (1818) (emphasis added).

For our purposes, it is important that the practice of combining unrelated matters in a single bill, however objectionable, was widely known. For example, Hatsell quotes a speech on the subject by Lord Chancellor Finch made to both houses on May 23, 1678, which admonished:

> The late way of tacking together several independent and incoherent matters in one Bill, seems to alter the whole frame and constitution of Parliaments, and consequently of the government itself. It takes away the King's negative voice in a manner, and forces him to take all or none; when sometimes one part of the Bill may be as dangerous for the kingdom, as the other is necessary.

3 J. Hatsell, at 224 n.+. The difficulty reached such proportions that in 1702, the House of Lords was moved to adopt the following resolution, to be included among their standing orders: "That the annexing of any clause or clauses to a Bill of Aid or Supply, the matter of which is foreign to, and different from, the matter of the said Bill of Aid or Supply, is unparliamentary, and tends to the destruction of the constitution of this government." *Id.* at 218 n.+.

Although the practice of combining unrelated matters in a single bill was the subject of much criticism and recognized to be contrary to the proper constitution and functioning of the British government, it also appears to have been common ground that the House of Commons could (and often did) combine such matters in a single bill, and that the only recourse of the House of Lords and the Crown was to withhold their assent. Given this understanding, the Framers' ex-

plicit recognition that the House of Representatives might adopt a similar practice to coerce the Senate, and their failure to adopt a provision prohibiting the practice (such as a constitutional limitation on the contents of bills), it appears that the Framers believed that each branch had adequate tools at its disposal to defend itself against attempts at coercion by another.

D. Colonial Experience

Legislation by the American Colonies was subject to review by both the colonial governors and the Crown. Bills passed by the colonial legislatures required the approval of the governor in order to become laws. After being enacted, however, colonial laws were also sent to England to be reviewed by the Crown. Although the practice of the governors and the Crown was not entirely uniform, evidence indicates that they did not exercise an item veto, but instead approved or disapproved an entire legislative measure.

1. *Review of Colonial Legislation by the Colonial Governors*—Legislative power in most of the Colonies was exercised jointly by the assembly, the governor's council and the governor. Bills passed by the assembly and the governor's council were presented to the governor, who had an absolute veto over them.[8] The Crown expected the governor to represent its interests, and issued instructions requiring him to disapprove certain bills. The governor's position in the legislative process was supported by his council, whose members were usually appointed upon his recommendation. *Id.* at 72.

In a recent article in the *Wall Street Journal*, Professor Forrest McDonald, an eminent constitutional historian, argues that the Framers understood the veto power as incorporating the power to disapprove parts of a bill because "in each of the forms in which Americans had encountered it, the veto was of a 'line-item' nature."[9] Professor McDonald cites three principal uses of the veto with which the Framers had experience: the veto of the colonial governors, the review of colonial legislation by the Privy Council, and the veto as exercised in the States after independence. Concerning the veto of the colonial governors, Professor McDonald states that this veto was "exercised selectively" to disapprove parts of a bill and cites two examples.[10]

Our review of historical materials, however, reveals that colonial governors did not have the power to veto parts of a bill. Rather, according to Evarts B. Greene's *The Provincial Governor in the English Colonies of North America* 122 (1966), the governor "had himself only a right of veto upon appropriation bills as a whole."[11] Moreover, in *Royal Government in America* 219 (1930), Leonard

[8] *See* E.B. Greene, *The Provincial Governor in the English Colonies of North America* 162 (1966).

[9] Forrest McDonald, *Lane-Item Veto: Older Than Constitution*, Wall St. J., Mar. 7, 1988, at 16.

[10] Professor McDonald's Wall Street Journal article does not provide any citations for its claims or even its quotes. On February 20, 1988, approximately two weeks before the article was published, Professor McDonald sent a letter to Lewis Uhler of the National Tax-Limitation Committee, which closely tracks the article and does provide sources. We shall refer to this letter at appropriate points.

[11] In Professor McDonald's letter, he states that "[t]he authority on the veto power of the colonial governors is Evarts B. Greene," and does not cite any other works.

Labaree states that the governor "had very little to do with bills until they had been passed by the council and assembly and then he could only accept or reject them as they stood."[12]

The relationship between the governor and the legislative assemblies also suggests that the governor could not exercise an item veto. In their efforts to resist the power of the Crown, the assemblies sought to coerce the governor to approve bills to which the Crown objected. Greene writes that the assemblies engaged in the "practice, pursued in direct defiance of the royal instructions, of inserting items entirely foreign to the main body of the bill, of attaching legislative riders to bills appropriating money."[13] Another commentator states:

> The most serious difficulty in colonial government was one growing out of the gradual revolution which was taking pace in the Colonies due to the rising power of the assemblies. This movement had scarcely begun in 1696 when the Board was organized, but it developed rapidly and was almost complete by 1765. The assemblies, through their assumed power over what they chose to call a money bill, were able to usurp the chief legislative powers of the council by denying to that body the right to amend proposed financial measures, thus rendering it powerless to assist the governor in carrying out his instructions. With the council eliminated and with full control of the purse in their own hands, the assemblies proceeded to force the governors to sign forbidden legislation and to strip them of their executive functions. By designating officers by name in the appropriation bills the assemblies forced the governors to appoint such persons to office as were pleasing to itself, extraordinary and even ordinary executive duties were delegated to committees of the lower house, and finally the control of the military was assumed, so that the governors were reduced to little more than figureheads.

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[12] *Accord*, Paul R Q. Wolfson, *Is a Presidential Item Veto Constitutional?*, 96 Yale L.J. 838, 842–43 (1987) ("Unamendability meant that the colonial governors and upper houses had to accept all items of appropriation in money bills or reject them all ").

[13] E.B. Greene, *The Provincial Governor in the English Colonies of North America* 164 (1966) Robert Luce writes that "[i]n the colonial assemblies of America the obnoxious practice [of combining unrelated subjects in a single bill] became familiar " Although he notes that some examples of this practice were due to "indifference or carelessness" or "unfamiliarity with the canons of correct law-drafting," he states that "[t]here is, however, good ground for suspicion that most of the mischief was deliberately planned, in order to compel the home authorities to approve dubious items attached to proposals evidently desirable and important." Indeed, Luce notes that "[w]ith the quarrels of the period leading up to the Revolution, the colonists resorted to the practice with provoking frequency and boldness." Robert Luce, *Legislative Procedure* 549–50 (1922). In *The Review of American Colonial Legislation by the King in Council* 207 (1915) ("Russell"), Elmer Russell notes the practice of the Colonies including "provisions upon unrelated subjects within the same enactment," but places a different emphasis upon it than do Greene and Luce. Russell states that "[i]n the majority of cases [the practice] was due to ignorance or carelessness." *Id* However, "[w]hen, in rare instances, this expedient was used to circumvent the [Crown], the objectionable provision was usually inserted as a rider to a supply act." *Id* at 208.

Oliver Morton Dickerson, *American Colonial Government 1696–1765* at 361–62 (1962). If the governor had the authority to veto parts of a bill, however, the devices described could not have coerced the governor.

The two examples of an item veto offered by Professor McDonald do not lead to a contrary conclusion. Professor McDonald first claims that the "best known examples" of item vetoes exercised by the colonial governors "are those of the proprietary governors of Pennsylvania and Maryland, who repeatedly vetoed specific provisions of military appropriations bills during the French and Indian War of 1756–63."[14] In McDonald's letter to Lewis Uhler, he cites E.B. Greene's *The Provincial Governor in the English Colonies of North America* as specific authority for this claim.

As quoted above, both Greene and Labaree state that the governor had only a general negative. Moreover, with respect to this incident, a review of Greene's book reveals only the statement that during the period of the French and Indian wars, the assemblies of Pennsylvania and Maryland "passed supply bills which included taxes on the estates of the proprietors," and the proprietors' "refusal . . . to permit such taxes led to prolonged and angry deadlocks."[15] E.B. Greene, *The Provincial Governor in the English Colonies of North America* 13 (1966). This certainly does not expressly state that the governors had item veto authority, nor does it suggest an inference that they did. Indeed, to the extent one were to engage in conjecture, the most plausible inference is that the deadlocks were the result of the governor's opposition to the entire supply bills, for item veto authority would have permitted him to approve the parts of the bills of which he approved.

As his second example, Professor McDonald claims that colonial governors exercised item veto authority with respect to the appointment of members of their councils. McDonald asserts that the governors councils were selected by legislative enactment, but that the governors had "the power to reject individual selections, even though all the choices were presented together in the same bill." Forrest McDonald, *Line Item Veto: Older Than Constitution*, Wall St. J., Mar. 7, 1988, at 16. Greene's book states, however, that except for Pennsylvania and Massachusetts, council members were chosen by the Crown, usually upon the recommendation of the governor. In Pennsylvania, moreover, council members were chosen by the governor, subject to some participation by the council itself, but not the assembly.

McDonald's claim that council members were selected by legislative enactment is only plausible in Massachusetts, where the council members were elected by the assembly and the council, subject to the governor's veto. Greene's book does not state that the results of the elections were transmitted to the governor

[14] Forrest McDonald, *Line-Item Veto Older Than Constitution*, Wall St J , Mar. 7, 1988, at 16.

[15] Greene also states that "during the years 1753–1759," there was "a stormy period of conflict [in Maryland politics] between the governor and the assembly over supply bills " However, "during the six years there is no record of any veto by the governor: all bills presented to him were approved, and this fact clearly indicates that obnoxious legislation was blocked by the upper house " *Id.* at 87

together as a single legislative enactment. Even if the names of those elected were communicated to the governor in a group, it does not follow that the assembly voted to elect the appointees as a group. Moreover, even if the assembly did vote on appointees collectively rather than individually, there is no reason to conclude that the governor possessed an item veto with respect to legislation even though the governor often, if not always, rejected fewer than all the elected candidates. Enactments presenting the results of a legislative election are quite distinct from legislation passed in the form of bills. In any event, whatever its precise nature, the practice occurred in only one state. Thus, neither example provided by Professor McDonald presents evidence of the existence of item veto authority in the colonial governors over legislation.

Finally, the colonists' practice, noted above, of combining unrelated items in a single bill also suggests that they did not understand the term "Bill" to mean a legislative measure relating to only one subject. Despite the Crown's objection to laws containing unrelated provisions, the colonists did not share this understanding of legislation. Rather, as previously discussed, they included unrelated subjects in a single bill as a result of indifference, carelessness, and the desire to coerce the crown's approval. It is particularly clear, moreover, that the colonists believed that items of appropriation could be aggregated in a single bill. Greene writes that "a glance at the statute books of almost any colony will show that, by the close of the colonial era, the general rule consisted in making detailed appropriations for short periods of time." Greene at 122. Our independent review of colonial appropriations laws confirms that the colonists aggregated items of appropriation in a single law.[16]

In sum, we are aware of no evidence indicating that a colonial governor exercised an item veto with respect to colonial legislation. Rather, the uniform practice appears to have been that the governor "could only accept or reject bills as they stood."[17]

2. *Review of Colonial Legislation by the Privy Council*—In addition to its authority over colonial legislation exercised through the governors, the Crown also reviewed colonial laws through the Privy Council.[18] This review permitted the Crown to exercise central control over the Colonies, and was mainly conducted to ensure the conformity of colonial laws with the laws of England, to protect the prerogatives of the Crown, and to further colonial policy.

In his recent article in the *Wall Street Journal*, Professor McDonald states that the "American colonists' most extensive experience with a veto had been through the British government's power to review acts passed by the colonial legislatures." He writes that the Board of Trade, on behalf of the Crown, disallowed—

[16] *See, e.g.*, 5 New York Colonial Laws 27 (passed 1770).

[17] Leonard Woods Labaree, *Royal Government in America* 219 (1930).

[18] Over the years, the Privy Council relied upon numerous committees and boards to review, and make recommendations concerning, colonial legislation. The most important of these boards was the Board of Trade, established in 1696. For ease of exposition, we will usually refer to the actions of the Privy Council, omitting the role of the subordinate boards, except when relevant.

"in whole or in part"—469 acts passed by the Colonies. Professor McDonald claims that the Board of Trade "exercised such a line-item veto many times," and cites as an example the alleged item veto in 1764 of a clause in a Massachusetts revenue act.[19]

The veto exercised by the Privy Council, however, differed in significant respects from examples of the veto power in the Colonies, States, and Federal Government. The Privy Council generally reviewed laws that were already in effect rather than approving bills as part of the legislative process.[20] The Council's review power therefore did not strictly involve the exercise of a veto, but was similar to a power of repeal. Moreover, as there was no requirement in most cases that the Privy Council review legislation within any time period, a majority of the laws reviewed by the Board of Trade were never formally acted upon by the Council and some laws were reviewed many years after their enactment. Russell at 54. These distinguishing characteristics of the veto exercised by the Privy Council preclude significant reliance upon any particular feature of it as a model for the President's veto power.[21] While the Framers were familiar with the exercise of the Crown's veto, they conferred a substantially different veto power upon the President.

To the extent that the nature of the Crown's veto is instructive of the Framers' understanding, however, examination of its use supports the conclusion that the President does not have authority to disapprove parts of a bill. A review of historical materials indicates that, for the nearly one hundred years between the late 1680s and the American Revolution—the period most revealing of the colonists' understanding of the nature of a veto—the Council never vetoed part of a legislative enactment. Although the Council did exercise two item vetoes prior to that time, in 1665 and 1680, these incidents were not repeated and appear to have

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[19] Forrest McDonald, *Line-Item Veto Older Than Constitution*, Wall St J., Mar. 7, 1988, at 16. In his letter to Lewis Uhler, Professor McDonald states that "[t]he authority on this subject is Elmer B. Russell, The Review of American Colonial Legislation by the King in Council (New York, Columbia Univ , 1915) " Russell's book, upon which we also rely heavily, is based on a review of the actual vetoes exercised by the Crown, as described in the journals of the board of Trade, located in the Public Record Office in London. It is therefore a work that is particularly suited to our purposes. Other important sources, however, include Oliver Morton Dickerson, *American Colonial Government 1696 - 1765. A Study of the British Board of Trade in its Relation to the American Colonies, Political, Industrial, Administrative* (1962); Leonard Woods Labaree, *Royal Government in America* (1930)

[20] Certain kinds of colonial legislation, however, were suspended from taking effect until receiving the approval of the Crown. Examples include private acts and legislation repealing other laws. Leonard Woods Labaree, *Royal Government in America* 227 (1930), Russell at 214

[21] If, contrary to our research, there is evidence that the Privy Council had the power to veto parts of a bill, the differences between that body and the President would argue against recognizing a similar power in the President. Since the colonial laws would have already been in operation and relied upon by the colonists, there would be an additional reason to sever only those parts considered objectionable by the Council Moreover, the fact that the laws were in operation and that the council exercised the (judicial) power to reject the laws as contrary to the charters of the Colonies, would suggest that the Council was exercising a power analogous to judicial review rather than the veto, permitting the Council to sever objectionable parts of the statute. *See* Russell at 227 (Privy Council's review precedent for power of judicial review); Oliver Morton Dickerson, *American Colonial Government 1696–1765* at 365 (1962) (same). We discuss at greater length below why the availability of judicial review fails to support the existence of item veto authority.

been regarded as isolated departures from the rules governing the exercise of the Council's proper review power.

Systematic review of legislation by the Privy Council began after 1660, but the practice governing this review appears not to have been finalized until some years later.[22] Thus, in the late 1670s the Crown sought to limit the power of the Jamaican Assembly to approving or disapproving laws drafted in England. The successful resistance of the Jamaican Assembly to approving or disapproving laws drafted in England. The successful resistance of the Jamaican Assembly to this attempt helped clearly to establish the power of colonial assemblies to initiate legislation.[23]

At approximately the same time, the Privy Council exercised two item vetoes. In 1665, the Council objected to a proviso exempting certain lands in a Barbados impost act. The objectionable clause was "'disallowed and made void'" by the Council, "although the act itself they confirmed."[24] Similarly, in 1680 the Council reviewed a Virginia revenue act which contained a clause exempting Virginia ships from the taxes imposed. Citing the Barbados act as precedent, the Council confirmed the law but disallowed the exemption.[25]

These two early examples of the exercise of an item veto do not appear to have been repeated. Although Russell does not expressly state that item vetoes were not exercised again, neither he,[26] nor the other authors reviewed by us, mentions any other examples of parts of bills being vetoed.[27] Moreover, Russell states:

> Attempts to impose laws unaltered upon the assemblies, or to repeal acts except in their entirety . . . , were a natural outworking of the policy of Charles II. Both ceased, for the most part, with his reign; while after the "Glorious Revolution" there was a complete tolerance of the assemblies and a fairly scrupulous respect for their autonomy.

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[22] It should be noted that the Board of Trade first began to review colonial legislation in 1696. Russell at 44

[23] *Id.* at 26–27, Leonard Woods Labaree, *Royal Government in America* 219–22 (1930).

[24] Russell at 21.

[25] *Id.* at 31.

[26] An example stated by Russell of the disapproval of a clause is not properly interpreted as an item veto, but rather as the suspension of the operation of a statute. In discussing several Virginia laws of the early 1680s that were not vetoed but merely suspended in operation while being returned to the colony for reconsideration, Russell describes an act for "Encouragement of Trade and Manufacture" that was returned to Virginia "with an order that the clause fixing the time of its enforcement as to the landing of goods and shipment of tobacco 'be immediately suspended.'" We do not interpret the suspension of the act's effective date as the exercise of an item veto as much as the means by which the act was suspended. Russell explains the suspension of these laws by the fact that the acts involved the important area of trade and were only to take effect in the future. In any event, Russell notes that "the more legitimate course [for the Privy Council], and the one which ultimately prevailed, was that taken in 1685," under which the Council permitted a law to remain in force but instructed the governor to propose an amendment to the assembly. *Id.* at 42–43.

[27] *See e.g.*, Oliver Morton Dickerson, *American Colonial Government 1696–1765: A Study of the British Board of Trade in its relation to the American Colonies, Political, Industrial, Administrative* (1912), Leonard Woods Labaree, *Royal Government in America* (1930), Ronald C Moe, *The Founders and Their Experience with the Executive Veto*, 17 Pres. Stud. Q. 413 (1987); Paul R.W. Wolfson, *Is a Presidential Item Veto Constitutional?*, 96 Yale L J 838, 842 n 20 (1987) ("The Privy Council exercised no item veto but always either approved legislation in full or disallowed it in full.").

Russell at 43.[28]

Russell also suggests that item vetoes were viewed unfavorably, and perhaps as illegitimate.[29] He states:

> The governor's commissions and instructions—the nearest approach to a fundamental law in the royal colonies—empowered the governor, council and assembly, under varying restrictions, to make laws which should be subject to royal disallowance. The subsequent demand of the English authorities that the Jamaica assembly adopt unaltered acts drafted in England, constituted a violation of a previous concession which rendered the government's position politically, if not legally, untenable. Other acts of the king in council prior to 1696 were contrary to the fair implications of this grant, if not precluded by its express terms. Such, for example, were the disallowance of clauses in the revenue acts of Barbados and Virginia . . . .

Id. at 40–41.

That the few instances of item vetoes were legally problematic and that there is no evidence that they were asserted again suggests that, like the attempt of the Crown to assert the initiative in colonial legislation, the two examples of item vetoes are most appropriately interpreted as novel attempts of the Crown to control colonial assemblies made prior to the firm establishment of rules allocating authority between colonial legislatures and the Crown.[30] Under this interpretation of the historical evidence, the subsequent practice of the Crown until the American Revolution constitutes a significant precedent for a veto power that may be exercised only with respect to an entire legislative enactment.

While there is no evidence that the Crown engaged in the practice of vetoing parts of a bill, Russell's book describes the Crown's use of its power to veto an entire law as a means of inducing the colonial legislatures to remove objectionable provisions. This was accomplished in two different ways. Instead of making a recommendation of confirmation or disallowance to the Privy Council, the Board of Trade might permit a law containing some objectionable provisions to

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[28] The proposition that item vetoes were not exercised again is also supported by statements made by the Privy Council, discussed below, that laws combining unrelated provisions were objectionable because elimination of part of the law required a veto of the entire enactment. We should note, however, that there are statements in Russell's book that are to some extent ambiguous, and could possibly be poorly articulated references to item vetoes. For example, Russell writes that a committee of the Privy Council took exception to a provision in the bill of rights passed by the first assembly of New York. Russell at 140; *see also id* at 185. Although we believe that the best interpretation of this statement is not as a reference to an item veto, but rather as an explanation of the grounds for the Privy Council's opposition to the enactment as a whole, we mention it in the interest of thoroughness.

[29] In the case of the item veto of Virginia's revenue exemption, Russell asserts that although the partial disallowance of the act did not violate the immediate instructions from the Crown to the colonial governor, that the Crown "nevertheless felt the weakness of their position is shown by the care with which they cited the Barbadoes act as a precedent." *Id* at 31.

[30] *See* Paul R Q. Wolfson, *Is a Presidential Item Veto Constitutional?*, 96 Yale L J. 838, 842 n.20 (1987).

"lye by probationary." The law would be "allowed to stand provisionally while the governor either was instructed to procure an amendment remedying its defects, or to obtain the repeal of the old law and the enactment of a new."[31] Alternatively, the Board of Trade "sometimes secured the same result [as permitting a law to lye by probationary] by disallowing the law and stating specifically in an instruction the modifications which would serve to make it acceptable to the government." *Id.* at 91.[32]

The one example of an item veto cited by Professor McDonald did not involve an item veto, but instead involved an attempt by the Board of Trade to secure an amendment upon a threat of vetoing the entire law. In discussing the Board of Trade's power to permit a law to "lye by probationary," Russell discusses the very example cited by Professor McDonald. According to Russell: "A Massachusetts act of 1764, for example, the Board found objectionable 'in no other respect . . . than as it directs a double Impost . . . for all goods . . . imported by inhabitants of other Colonies.' They accordingly proposed 'an instruction to the Governor for procuring the amendment of this particular clause.'" *Id.* at 55 (ellipsis in original).[33]

The mechanisms employed by the Crown for preventing objectionable measures in otherwise acceptable legislation are analogous to powers that the Constitution clearly confers on the President. If the President objects to objectionable provisions in a law, he may "return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal." U.S. Const. art. I, § 7, cl. 2. Similarly, the President may warn Congress before passage of a bill that it will be vetoed if objectionable provisions are included. This suggests that if the Framers relied on any aspects of the Crown's power to review colonial legislation, it was its power to induce amendments of a law through the threat of a veto.

The Crown's power to veto an entire act was also used to enforce formal requirements on laws passed by the Colonies. The Crown believed that "each separate act should deal with but one subject, and contain no clause foreign in its ti-

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[31] Russell at 55. Russell states that "[i]n some cases it was stated that, if the request for an amendment were not complied with, the act would be immediately disallowed." *Id.*

[32] Dickerson also discusses the Board's use of its power to disapprove an entire law to induce the Colonies to amend their laws. *See* Dickerson, *supra*, at 232, 237 n.538, 243 n.556, 245 & 263.

[33] Another piece of evidence suggested by Professor McDonald may also be explained as an instance of the Council's practice of using its power to disapprove an entire enactment to induce the colonial legislators to alter parts of it. In his Wall Street Journal article, Professor McDonald states that the Board of Trade "[i]n 1702 . . . declared its basic policy: Bills 'might be altered in any part thereof.'" We have not found this proposition in Russell's book, but we did find a similar statement In discussing the practice of some Colonies of submitting bills to the Crown for prior approval rather than including a suspension clause in the law, Russell states that "[t]hough such bills were approved, amendments were sometimes suggested by the Board. In 1704 they considered the draft for a revision of the laws of Virginia prepared by the governor and a committee of the council, and suggested many changes to be made before its final enactment " Russell at 92. In a footnote, Russell writes that the "Board informed the attorney and solicitor that these bills might '*be altered in any part thereof* as Bills transmitted from Ireland.'" *Id.* at 92 & n.3 (emphasis added) We do not believe that this is a statement by the Board that it had the authority to veto parts of bills, but rather an assertion of the Board's power to condition prior approval of a bill on alteration of the bill.

tle." Russell at 87. The Colonies nonetheless included "provisions upon unrelated subjects within the same enactment." *Id.* at 207. The Crown's response to these practices, however, was to veto the entire measure. Thus, "attempts of the assemblies to re-enact English statutes, or to declare the laws of England wholly or partially in force, were discouraged, lest they operate . . . to deprive the crown of its right to veto each individual enactment." *Id.* at 139–40. A New York law extending several acts of Parliament to the colony

> was disallowed, although it introduced nothing in itself objectionable, because it did not seem fitting that laws should 'be adopted in *Cumulo*, and that, too, without stating more of the acts than the titles and sections adopted. [This] deprives both the Crown and the Governor of that distinct approbation or disapprobation that is essential to the constitution of the Province.

Id. at 140 (brackets in original). Moreover, one of the reasons stated by the Crown for objecting to unrelated provisions in an act was that the elimination of part of the act required a veto of the entire measure:

> In 1695 the committee [of the Privy Council] complained that diverse acts of Massachusetts were "joined together under ye same title, whereby it has been necessary for the repealing of such of them as have not been though fit to be confirmed to vacate such others as have been comprehended under such titles."

Id. at 207. Thus, even though the Crown believed that laws containing unrelated provisions burdened its power to veto, it did not attempt to exercise its veto over only part of these laws. Rather, the generally accepted view required the Crown to reject the entire piece of legislation.

In conclusion, to the extent that the Privy Council's review of colonial legislation supports any interpretation of the President's veto power, it is that the constitutional provisions enabling the President to threaten to veto, or to veto, an entire legislative measure are his only legitimate response to bills containing objectionable or unrelated provisions.

E. Experience of the States from 1776 to 1789

We have also sought to review the experience of the States during the period between the Declaration of Independence and ratification of the Federal Constitution. During that period, only the constitutions of Massachusetts and New York provided for vetoes.[34] The experience of these two States, however, is particu-

[34] South Carolina's temporary constitution of 1776 provided the State president and commander-in-chief with an absolute veto on legislation. The permanent constitution of 1778, however, did not include the veto power. *See generally* Joseph E. Kallenbach, *The American Chief Executive* 24 (1966)

larly important. Both States' constitutions provided for a strong executive, and were relied on as models by the Federal Convention of 1787.[35] Exercise of the veto in these States, moreover, represents the most recent and proximate example of the veto power known to the Framers, and the only example of a veto that had been drafted and adopted by Americans. Finally, a comparison of the veto provisions in these State constitutions with Article I, Section 7, Clause 2, of the United States Constitution suggests that the delegates to the Philadelphia Convention used the New York, and particularly the Massachusetts, provisions as models in drafting the federal veto provision.[36]

In his article in the *Wall Street Journal*, Professor McDonald refers to the examples of Massachusetts and New York for support. Although Professor McDonald states that the "phraseology of the [veto] provision" in Massachusetts as the power of "revisal" suggests that the veto "could be exercised selectively," he notes that "we cannot be sure because no governor exercised it before 1787." Professor McDonald states, however, that the very first exercise of the veto in New

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[35] *Id* at 32–33

[36] Article III of the New York State Constitution of 1777 provides.

> And whereas laws inconsistent with the spirit of this constitution, or with the public good, may be hastily and unadvisedly passed Be it ordained, that the governor for the time being, the chancellor and the judges of the supreme court, or any two of them, together with the governor, shall be, and hereby are, constituted a council to revise all bills about to be passed into laws by the legislature And for that purpose shall assemble themselves, from time to time, when the legislature shall be convened; for which, nevertheless, they shall not receive any salary or consideration under any pretence whatever And that all bills which have passed the senate and assembly shall, before they become laws, be presented to the said council for their revisal and consideration, and if, upon such revision and consideration, it should appear improper to the said council, or a majority of them, that the said bill should become a law of this State, that they return the same, together with their objections thereto in writing, to the senate or house of assembly, in whichsoever the same shall have originated, who shall enter the objections sent down by the council at large in their minutes, and proceed to reconsider the said bill. But if, after such reconsideration, two-thirds of the said senate or house of assembly, shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and, if approved by two-thirds of the members present, shall be a law.
>
> And in order to prevent any unnecessary delays, be it further ordained, that if any bill shall not be returned by the council, within ten days after it shall have been presented, the same shall be a law, unless the legislature shall, by their adjournment, render a return of the said bill within ten days impracticable; in which case the bill shall be returned on the first day of the meeting of the legislature after the expiration of the said ten days.

The Massachusetts Constitution of 1780, ch. I, § 1, art. 2, states:

> No bill or resolve of the Senate or House of Representatives shall become a law, and have force as such, until it shall have been laid before the Governor for his revisal, and if he, upon such revision, approve thereof, he shall signify his approbation by signing the same. But if he have any objection to the passing of such bill or resolve, he shall return the same, together with his objections thereto, in writing, to the Senate or House of Representatives, in whichsoever the same shall have originated, who shall enter the objections sent down by the Governor, at large, on their records, and proceed to reconsider the said bill or resolve: But, if, after such reconsideration, two-thirds of the said Senate or House of Representatives shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and if approved by two-thirds of the members present, shall have the force of law: But in all such cases, the vote of both houses shall be determined by yeas and nays; and the names of the persons voting for, or against, the said bill or resolve shall be entered upon the public records of the Commonwealth
>
> And in order to prevent unnecessary delays, if any bill or resolve shall not be returned by the Governor within five days after it shall have been presented, the same shall have the force of law.

York "established the precedent that it could [be used to] reject particular clauses as well as whole bills."[37]

The experience of New York State does not support the existence of an item veto. Until 1822, a Council of Revision, composed of the governor, justices of the state supreme court and the chancellor of equity, exercised the veto power in New York. Although Professor McDonald cites the first veto of the Council of Revision as an example of the exercise of an item veto, a review of that veto reveals the Council did not disapprove part of a bill. In fact, the Council rejected the bill as a whole, objecting in its veto message to certain of its provisions.

The Council of Revision exercised its first veto on February 4, 1778, by rejecting a bill entitled, "An act requiring all persons, holding offices or places under the Government of this State, to take the oaths therein prescribed and directed." The Council objected to the bill on various grounds, and returned it to the Senate, where it "was passed again with various amendments, and became a law . . . on the 5th of March, 1778." C. Lincoln, *State of New York, Messages of the Governors* 21 (1909). Lincoln's book, compiling the messages of the Council, states:

> The possible effect of a veto on the powers of the Legislature was considered by the Senate on this occasion, and while consenting to an amendment to obviate the objections presented by the Council of Revision, the Senate declared that neither the concession hereby made to the Council's objection, "nor the amendment aforesaid to be thereon made, shall be drawn into precedent; so as in any wise to impeach, impair, or diminish the freedom of legislation vested in this Senate by the Constitution."

Id. Thus, it appears clear that the Council vetoed the entire bill, and it was only after the legislature acquiesced in the Council's views, that the bill was approved and became a law.[38] Rather than providing an example of an item veto, then, the first veto of the Council of Revision demonstrates how the power to veto an entire enactment may be used to induce the legislature to modify objectionable portions of a bill.

A review of the history of the Council of Revision also reveals no evidence that the Council exercised an item veto at any other time. Prescott and Zimmerman's review of the vetoes exercised by the Council of Revision does not mention a single instance in which part of a bill was vetoed, but the article does note

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[37] Forrest McDonald, *Line-Item Veto: Older Than Constitution*, Wall St. J., Mar. 7, 1988, at 16.

[38] One objection made by the Council was that the Oath of office prescribed for Sheriffs and Under-Sheriffs should not impose a "prohibition to the taking [of] undue fees" merely for certain services, "but ought to extend to all acts which sheriffs, or under-sheriffs, are bound to perform." Lincoln at 22. The bill that was passed into law was amended to take account of this objection by inserting in the Oath of office that Sheriffs or Under-Sheriffs should not take undue fees "for any other service whatsoever, in [the] said office of sheriff (or under-sheriff . . .)." 1778 N.Y. Laws 14.

examples of entire bills that were vetoed because the Council objected to particular provisions.[39]

Moreover, the veto provision of the Massachusetts Constitution provides no evidence that the Framers intended the President to have item veto authority. First, although the provision in the Massachusetts Constitution conferring veto power upon the governor uses the terms, "revision," and "revisal," this does not suggest that the Governor of Massachusetts could exercise an item veto. While the term, "revision," and its variants, "revise" and "revisal," today imply the act of correcting or altering an original, two centuries ago these terms meant either the act of (1) simply reviewing something or (2) reviewing and amending it.[40] It seems clear that the Framers of the Massachusetts Convention used the term "revision" in the former sense because the veto provision makes sense as a whole only with this understanding of the term. The provision provides, in relevant part, that "[n]o bill . . . shall become a law . . . until it shall have been laid before the Governor for his *revisal*; and if he, upon such *revision*, approve thereof for he shall signify his approbation by signing the same. But if he have any objection to the passing of such bill," he is to return the bill and his objections to the legislature. Massachusetts Const. ch. I, sec. 1, art. 2 (emphasis added). If "revise" is interpreted to mean alteration, then the clause provides the Governor with the power to alter bills, and denies the legislature the opportunity to override the altered bills. The legislature may, however, override the Governor's veto (*i.e.*, rejection without modification) of the entire bill. To avoid this obviously incorrect interpretation of the Massachusetts veto provision,[41] the terms "revision" and "revisal" must be understood to mean only the power to review.[42]

Moreover, even if the power of "revision" was intended to permit the Governor of Massachusetts to modify bills, the President would not possess this power. Early versions of Article I, Section 7, Clause 2 did use the term "revision," but the Framers ultimately adopted the clause without it.[43] The Framers did not state

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[39] Frank W. Prescott & Joseph F Zimmerman, *The Council of Revision and the Veto of Legislation in New York States 1777-1822* at 53 n.61 (Occasional Paper 1972). The authors note the veto in 1815 of an appropriations bill that "contained a rider providing a new apportionment of senate districts." After the veto was sustained, the "appropriations act minus the rider was enacted on the day of final adjournment." *Id.*

[40] The 1828 version of Webster's American Dictionary, defines "revision" as "[t]he act of reviewing, review, re-examination for correction." The verb "revise" has two meanings "1. to review, to re-examine, to look over with care for correction . . 2. To review, alter and amend." N. Webster, *An American Dictionary of the English Language* (1828)

[41] The overall structure of the veto provision in the New York Constitution of 1777 (as well as that of early versions of the veto clause proposed at the Philadelphia Convention) indicates that the term should also be given the meaning "review" in these provisions.

[42] Although Professor McDonald states that the Governor failed to exercise a veto prior to adoption of the United States Constitution, experience in Massachusetts in the years following adoption of the United States Constitution would also have provided evidence of the meaning of the Massachusetts veto provision to the Framers. The veto, however, was not exercised in Massachusetts until after the Governor was inaugurated in 1825. *See* A Nevins, *The American States During and After the Revolution 1775-1789* at 182 (1969)

[43] Madison's Notes at 388 It should also be noted that there is no suggestion in the debates that the power of revision would permit modification of a bill

[44] In addition to the evidence of vetoes exercised under the Massachusetts and New York constitutions, it should be noted that the legislatures in both states passed appropriations bills that aggregated individual items. Therefore, it cannot be argued that the term "Bill" was understood to mean a single item of appropriation

that the President had the power of revision, but merely that he could "approve" or "not" the bills presented to him. Thus, arguments based on the power of revision cannot be used to provide the President with item veto authority.[44]

In conclusion, the history of the veto power in the States of Massachusetts and New York prior to the adoption of the Constitution reveals that item veto authority was not exercised. In our view, this is a significant historical precedent, which constitutes persuasive evidence that the Framers did not intend, or even implicitly assume, that the veto power included the authority to disapprove parts of a bill.

F. Post-Ratification Experience

In this section, we review the historical practices of Congress and Presidents as related to the question of whether the Constitution adopts a limited definition of the term "Bill." On balance, the evidence indicates that the Framers did not intend to limit the contents of a bill. The early historical practice of Congress was to pass bills containing numerous items of appropriation. Although Congress did not begin the practice of aggregating unrelated matters in a single bill until the Civil War, since that time it has occurred regularly. Moreover, although Presidents have exercised the veto power differently, they have been unanimous in the view that they were without authority to approve or disapprove parts of a bill.

1. ***Appropriations***—A review of appropriations bills passed by the First Congress reveals that numerous items were included within a single appropriations bill. For example, on March 26, 1790, Congress passed "An Act making appropriations for the support of government for the year one thousand seven hundred and ninety." *See* 1 Stat. 104 (1790). Among other things, the act contains appropriations for the payment of pensions, for building a lighthouse on Cape Henry in Virginia, for funding the Department of War, for the expenses of the late office of foreign affairs, for the services and office expenses of Roger Alden, and for the services of Jehoiakim M'Toksin as an interpreter and guide. This bill was by no means unusual, and the statute books are replete with additional examples. Moreover, we are aware of no debates in Congress questioning this practice at the time. Thus, to the extent that the current commentators suggest that a bill may not contain more than one item of appropriation, their claims are contradicted by the highly probative and consistent practice of Congress since its inception; and, as we have already explained, the text of the Constitution forecloses finding item veto authority in the President through any route other than an interpretation of the term "Bill."

2. ***George Washington***—This understanding of the veto clauses also appears to have been held by President Washington. During his first term, Washington discussed in a letter why he approved "many Bills with which [his] Judgment is at variance." President Washington explained: "From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto." 33 *Writings of*

George Washington 96 (1940). Although Washington was never presented with an appropriations bill with substantive riders, the fact that he was presented with appropriations bills containing multiple items suggests his belief that he did not have authority to veto individual items of appropriation.

3. ***Subsequent Congressional Practice***—The meaning to be drawn from Congress' practice concerning the inclusion in a single bill of unrelated substantive provisions and substantive riders on appropriations bills is more equivocal. It does not appear that substantive legislation was passed by both houses and presented to the President as part of an appropriations bill for the first seventy years following the Constitution's adoption. Attempts to vary from this practice were met with a significant skepticism and debate in Congress, which we briefly describe below.

The issue of combining unrelated provisions was discussed in the Senate in 1850 when Senator Benton moved that the Committee of Thirteen be instructed not to tack any other bill or foreign matter to the bill admitting California as a State. Senator Benton introduced the following resolution:

> That the said committee be instructed to report separately upon each different subject reported to it; and that the said committee tack no two bills of different natures together nor join in the same bill any two or more subjects which are in their nature foreign, incoherent, or incongruous to each other.

Cong. Globe, 31st Cong., 1st Sess. 793 (1850). Senator Benton cited authority for the proposition that in the British system it was considered unparliamentary to tack unconnected bills, and admonished that "the evil of joining incongruous measures together by one House, to coerce the assent of the other, or the approval of the President . . . is just the same." *Id.* at 794. Although the bill in question was not an appropriations bill, Senator Benton cited the parliamentary law of Great Britain in support of his motion. Discussing the British distinction between the tacking of substantive riders to appropriations bills and the tacking of unrelated substantive provisions to each other, Senator Benton observed:

> The case before the Senate is not that of a tax or appropriation bill: if it was, the British argument of unconstitutionality and danger to the country would equally apply; for, by our Constitution, the House of Representatives has the exclusive constitutional right to originate such bills; and to thwart or impede them, by tacking on extraneous amendments in this body, would be to impede the free working of the Constitution; and, in the case of disagreement between them, might deprive the Government of the support necessary to its existence.

Cong. Globe, 31st Cong., 1st Sess. 794 (1850).

It is important for our purposes to emphasize that Senator Benton's remarks were not addressed to what constitutes a "Bill" for constitutional purposes. Rather, he appears to have shared the Framers' concern that one house might tack together two unrelated matters in a single bill. Senator Benton's objection was a different one: the tacking of unrelated matters together would prevent all "part[s] of the legislative power [from acting] freely and fairly—neither the individual members of the two Houses, nor the Houses collectively, nor the President himself. This would be destructive to all fair and wise legislation." *Id.* at 796. Thus, Senator Benton considered tacking to be objectionable precisely because he believed that the President's only recourse was to veto the whole, stating:

> If the two Houses shall agree in the conjunction, the President may not, and may see cause for a veto in one part, and not in the other; but must disapprove all, in order to get rid of the objectionable part.

Id.

Confrontation with the House and President was avoided when the Senate tabled Senator Benton's resolution as premature and the Compromise of 1850 permitted the bill admitting California to be passed without the inclusion of unrelated matters.[45]

The question arose again in 1856 when the Republican-controlled House attached to the army appropriations bill a rider prohibiting the employment of the United States military to execute the laws passed by the Kansas territorial legislature. *See* Cong. Globe, 34th Cong., 1st Sess. app. 1089 (1856). The debate focused primarily on the validity of those laws, although some senators viewed the act of tacking on the rider as "revolutionary," again citing parliamentary precedent. *See e.g., id.* at 1103 (Mr. Hunter). Other Senators viewed the rider as merely a condition on the expenditure of funds appropriated by the bill. *See e.g., id.* at 1107 (Mr. Seward). The Senate refused to agree to inclusion of the rider and the Congress adjourned without enacting appropriations for the army.

4. ***The Civil War Period***—By the time of the Civil War, however, substantive measures were frequently passed and presented to the President as "riders" on appropriations bills. The Republicans' control of both Congress and the White House, as well as the necessity of quick action, may account for the commencement of the practice. By 1867, however, Congress and the President were frequently at odds, primarily over Reconstruction. In that year, the Radical Republicans in Congress passed an army appropriations bill that included a section purporting to remove the President's authority to control the Army and placing

[45] An earlier attempt to tack unrelated bills had occurred in 1820 when the Senate tacked its bill admitting Missouri as a slave State to the bill admitting Maine After the House protested, a compromise was worked out, and the bills were passed separately.

its management with General Grant. Perhaps because his opponents controlled more than two-thirds of both houses, President Johnson signed the bill. In a special message accompanying the bill, Johnson stated that the substantive provisions of the bill interfered with his constitutional functions as Commander-in-Chief. "Those provisions are out of place in an appropriation act. I am compelled to defeat these necessary appropriations if I withhold my signature to the act. Pressed by these considerations, I feel constrained to return the bill with my signature, but to accompany it with my protest against the sections which I have indicated." 6 James D. Richardson, *Messages and Papers of the Presidents* 472 (1898). This episode shows that neither Congress nor the President believed that a bill could not contain both appropriations and substantive provisions, even though the President recognized that this practice burdened his veto power.

By 1873, the practice apparently had become so common that President Grant called on Congress to propose to the States a constitutional amendment "[t]o authorize the Executive to approve of so much of any measure passing the two Houses of Congress as his judgment may dictate, without approving the whole, the disapproved portion or portions to be subjected to the same rules as now." 7 *Id.* at 242. Again, the fact that President Grant sought an amendment to establish presidential authority to exercise an item veto indicates that he did not believe that the Constitution already provided such authority.

5. ***The Hayes Vetoes***—The question arose again at the end of the forty-fifth Congress when the House, now controlled by Democrats, attempted to tack onto certain appropriations a provision repealing part of an election law authorizing the use of federal troops to "keep the peace at the polls." The Republican Senate refused and the Congress adjourned without passing several requisite appropriations. In March 1879, President Hayes called a special session of the forty-sixth Congress to reconsider the needed appropriations. Though the now Democrat-controlled Senate agreed to pass the desired rider as part of the army appropriations bill, considerable debate took place in both houses about the propriety of tacking substantive legislation to appropriations bills. The Democrats argued that it was the Republicans who initiated the practice during the Civil War and that they should not now be heard to object to its use. The Republicans responded that tacking was not unconstitutional unless used to exact presidential approval of a measure that otherwise would be disapproved. According to the Republicans, during their control of Congress, riders were employed only for convenience and not to coerce the President since President Lincoln did not object to the substantive measures attached and the Republicans had the votes in Congress to override any decision by President Johnson to veto such bills. Thus, the Republicans argued that President Hayes' objection to the substance of the rider and the Democrats' inability to override his veto were the precise reasons for the unconstitutionality of the current attempt.

Despite these arguments, the Democrats passed the army appropriations bill with the rider. President Hayes vetoed the bill on the ground that it would establish the principle that the House of Representatives "has the right to withhold ap-

propriations upon which the existence of the Government may depend unless the Senate and the President shall give their assent to any legislation which the House may see fit to attach to appropriation bills. To establish this principle is to make a radical, dangerous, and unconstitutional change in the character of our institutions." 7 *Id.* at 530. President Hayes elaborated:

> The Executive will no longer be what the Framers of the Constitution intended—an equal and independent branch of Government. It is clearly the constitutional duty of the President to exercise his discretion and judgment upon all bills presented to him without constraint or duress from any other branch of the Government. To say that a majority of either or both of the Houses of Congress may insist upon the approval of a bill under the penalty of stopping all of the operations of the Government for want of the necessary supplies is to deny to the Executive that share of the legislative power which is plainly conferred by the second section of the seventh article of the Constitution. It strikes from the Constitution the qualified negative of the President.
>
> . . . .
>
> Believing that this bill is a dangerous violation of the spirit and meaning of the Constitution, I am compelled to return it to the House in which it originated without my approval.

7 *Id.* at 531–32. The rider was then passed separately and vetoed on the merits by President Hayes on May 12, 1879.

Undeterred, Congress tacked similar legislation to a general appropriations bill for the legislative, executive, and judicial departments, which was then vetoed on May 29, 1879. President Hayes stated:

> The objections to the practice of tacking general legislation to appropriations bills, especially when the object is to deprive a coordinate branch of the Government of its right to the free exercise of its own discretion and judgment touching such general legislation, were set forth in the special message in relation to [the army appropriation bill], which was returned to the House of Representatives on the 29th of last month. I regret that the objections which were then expressed to this method of legislation have not seemed to Congress of sufficient weight to dissuade from this renewed incorporation of general enactments in an appropriation bill, and that my constitutional duty in respect of the general legislation thus placed before me can not be discharged without seeming to delay, however briefly, the necessary appropriations by Congress for the support of the Government.

7 *Id.* at 537.

Taking a slightly different approach, Congress next included in an appropria-

tions bill for the judiciary a provision prohibiting the use of appropriated funds "to pay any salaries, compensation, fees, or expenses" to enforce the election laws to which it objected. 7 *Id.* at 542. On June 23, 1879, President Hayes vetoed the bill, maintaining that he would not concede "the right of Congress to deprive the Executive of that separate and independent discretion and judgment which the Constitution confers and requires." 7 *Id.* at 544.

Again, on June 30, 1879, President Hayes vetoed a bill making appropriations to pay fees of United States Marshals and their deputies since it would have forbade the executive from making any contract or incurring any liability for the future payment of money that was necessary to enforce certain provisions of the election laws. The President maintained his original position: "The object, manifestly, is to place before the Executive this alternative: Either to allow necessary functions of the public service to be crippled or suspended for want of the appropriations required to keep them in operation, or to approve legislation which in official communications to Congress he has declared would be a violation of his constitutional duty." 7 *Id.* at 546–47.

Finally, on May 4, 1880, Congress again attempted to amend the election laws in "An Act making appropriations to supply certain deficiencies in the appropriations for the service of the Government for the fiscal year ending June 30, 1880, and for other purposes." 7 *Id.* at 591. President Hayes' veto message, in part, was as follows:

> The necessity for these appropriations is so urgent and they have been already so long delayed that if the bill before me contained no permanent or general legislation unconnected with these appropriations it would receive my prompt approval.
>
> . . . [T]he dangerous practice of tacking upon appropriations bills general and permanent legislation . . . opens a wide door to hasty, inconsiderate, and sinister legislation. It invites attacks upon the independence and constitutional powers of the Executive by providing an easy and effective way of constraining Executive discretion. . . . The public welfare will be promoted in many ways by a return to the early practice of the Government and to the true rule of legislation, which is that every measure should stand upon its own merits.

7 *Id.* at 591–92. Having only a bare majority in each house and realizing that the President would not yield, the Democrats abandoned their attempt and passed the necessary appropriations bills free of substantive riders.

Significantly, although President Hayes characterized Congress' attempts to coerce his approval of objectionable riders as "a violation of the spirit and meaning of the Constitution," his actions demonstrate his belief that his only recourse was to veto the entire bill. The fact that President Hayes subsequently called for

a constitutional amendment to grant the President a line item veto confirms that this was his view.[46]

6. ***William Howard Taft***—Writing thirty-five years after the Hayes vetoes, former President and Chief Justice William Howard Taft confirmed that President Hayes followed the only course open to him under the Constitution. Discussing the President and his role in the enactment of laws, Taft observed:

> [The President] has no power to veto parts of the bill and allow the rest to become a law. He must accept it or reject it, and even his rejection of it is not final unless he can find one more than one-third of one of the houses to sustain him in his veto.

William Howard Taft, *The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations* 11 (1916). Taft, of course, was not known for taking a niggardly view of executive prerogatives; and that he did not believe that the President possesses an item veto suggests just how extraordinary the exercise of such authority would be.

7. ***Woodrow Wilson***—On July 12, 1919, President Wilson vetoed an appropriations bill because he objected to an unrelated provision of the bill that would have repealed the act establishing daylight savings time. The appropriations were necessary to fund the Department of Agriculture during the current fiscal year, which had already begun. In his message, Wilson states, "I realize, of course, the grave inconvenience which may arise from the postponement of this legislation at this time, but feel obliged to withhold my signature because of the clause which provides" for repeal of daylight savings time, a step Wilson believed "would be a very grave inconvenience to the country." 58 Cong. Rec. 2492 (1919). Congress attempted, but failed, to override the President's veto, *see* 58 Cong. Rec. 2551-52 (1919), and subsequently passed the appropriations bill free of the offending rider, *see* Pub. L. No. 66–22, 41 Stat. 234 (1919).

Similarly, in 1919, Wilson exercised the constitutional equivalent of an item veto when he vetoed an appropriations bill on the stated ground that he objected to "certain items of the bill." Specifically, Wilson objected to a section of the bill that appropriated $6,000 for the rehabilitation and support of disabled veterans. According to Wilson, that section "would probably . . . nullify the whole purpose of the [rehabilitation] act and render its administration practically impossible," as "a sum approximating $8,000,000 will be required for the mere support of these men." 58 Cong. Rec. 2493 (1919). Congress subsequently amended the bill to appropriate $8,000,000 for the rehabilitation of veterans, and President Wilson signed it into law. *See* Pub. L. No. 66–21, 41 Stat. 163 (1919).

On each of these occasions, President Wilson demonstrated that if Congress

[46] Of course, the Constitution gives the President only a qualified veto, subject to override upon a vote of two thirds of the members in each house. Thus, had the Democrats possessed larger majorities in Congress during their struggle with President Hayes, they might have succeeded in overriding his vetoes.

is unable to override the President's veto, then the President's disapproval of the whole bill may induce Congress to revise legislation according to the President's views. In this way, the exercise of a general veto power may be as effective as an item veto.

8. ***Gerald Ford***—On October 14, 1974, President Ford vetoed a continuing appropriations bill because of his opposition to "an amendment requiring an immediate cut-off of all military assistance to Turkey." 10 Weekly Comp. Pres. Doc. 1282, 1283 (Oct. 14, 1974). Although Congress failed to override the President's veto, *see* 120 Cong. Rec. 35,609 (1974), it quickly passed another appropriations bill containing a similar provision. On October 17, 1974, President Ford again disapproved the bill, and again Congress failed to override his veto. Finally, Congress adopted a compromise provision, and the President signed the bill. Although still troubled by the provision, President Ford observed in his signing statement: "As a result of my vetoes of two earlier versions of this continuing resolution, the Congress has eased the most troublesome of the earlier restrictions." 10 Weekly Comp. Pres. Doc. 1321 (Oct. 18, 1974).

9. ***Ronald Reagan***—President Reagan has recently had occasion to object to the practice of combining unrelated matters in a single bill. In 1986, he signed H.R. 5363 even though it contained an unrelated and unconstitutional provision that he would have vetoed if it had been presented separately. In his signing statement, the President explained:

> Although I am signing this bill, I am very troubled by the inclusion of an unrelated, last-minute amendment to the Bankruptcy Code. The Congress' decision to link such provisions to otherwise desirable and useful legislation is but one example of the highly objectionable practice of combining unrelated legislation in a single bill. This practice, at a minimum, violates the spirit of the Constitution by restricting the President's veto power.

22 Weekly Comp. Pres. Doc. 1567 (Nov. 14, 1986).

President Reagan has also been presented with numerous appropriations bills which contained objectionable items and riders. Last year's continuing resolution presents many examples. For example, on March 10, 1988, President Reagan asked Congress to consider repealing or rescinding a 46-page list of "wasteful, unnecessary, or low priority spending projects that were included in the full-year fiscal 1988 Continuing Resolution," stating that "[t]hese are projects that, if I were able to exercise line item veto authority, I would delete." President's Message to Congress on Revisions to the 1988 Fiscal Year Appropriations, 24 Weekly Comp. Pres. Doc. 326–27 (Mar. 10, 1988). In his most recent State of the Union Address, President Reagan called on Congress to reform its budget process and avoid presenting him with enormous appropriations bills filled with numerous riders, sometimes just hours before the government is to

run out of money. In fact, President Reagan declared that if Congress presented him with a bill of that sort this year, he would not sign it. 24 Weekly Comp. Pres. Doc. 87 (Jan. 25, 1988).

III. Alternative Arguments: Analogies to Judicial Review and Impoundment

Some commentators have suggested that item veto authority derives support from the Supreme Court's exercise of judicial review or the President's authority to refuse to spend, or "impound," funds.[47] We discuss each argument in turn.

A. *Judicial Review*

The fundamental flaw in the judicial review analogy is that it relates to an entirely different kind of constitutional action which, unlike the item veto, has absolutely nothing to do with the *lawmaking* process. The veto power is a constitutionally prescribed step in enacting a bill into law. In contrast, judicial review is a power which neither derives from any lawmaking authority nor which can have any possible effect on whether something becomes law. Rather, it concerns only a separate and distinct power of the judiciary to determine whether a duly enacted law already in effect comports with constitutional norms and can be subsequently executed or enforced. Accordingly, the judicial power to interpret existing laws says nothing about the President's ability to make law.

Moreover, closer examination of the argument reveals additional, subsidiary problems. In its entirety, Professor McDonald's argument on judicial review appears to be that because the Framers considered vesting the veto power jointly in the President and the Supreme Court, and because when it first exercised judicial review in *Marbury v. Madison*, the Supreme Court struck down unconstitutional portions of the law without invalidating the whole, the President's veto power must also permit him to strike out objectionable portions of a bill without vetoing the whole. The Supreme Court's invalidation of a duly enacted law—or, in certain circumstances, parts of the law—is but a concomitant of the fact that the Court may disturb congressional enactments only to the extent they conflict with the Constitution. While this action provides support for the view that the President may refuse to enforce the unconstitutional portion of a law while executing the remainder, it hardly suggests that the President may enhance his veto authority by striking down, on policy or constitutional grounds, particular provisions of a bill presented. Conversely, if Professor McDonald's analogy to judicial review *were* accepted, then this would suggest that the President may exercise his veto power only on constitutional, and not policy, grounds.

Moreover, defining an item veto by reference to judicial review would permit Congress to circumvent that power. Once the Supreme Court decides that a pro-

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[47] *See* Stephen Glazier, *Line-Item Veto Hides Under an Alias*, Wall St. J., Mar. 18, 1988, at 26; Forrest McDonald, *Line-Item Veto Older Than Constitution*, Wall St. J , Mar. 7, 1988, at 16.

vision of a statute is unconstitutional, it does not necessarily invalidate only that provision of the statute. Rather, it will uphold the remainder of the statute only upon finding that the offending provision is severable from the rest. *See Alaska Airlines v. Brock*, 480 U.S. 678 (1987). To make this finding, the Court must inquire into whether Congress would have passed the statute absent the offending provision. If the Court concluded that Congress would not have, then the law must be struck down in its entirety. *Id.* at 684–85. Thus, if the analogy between judicial review and the veto is complete, then Congress could easily evade the item veto thus recognized by including a non-severability provision in every bill presented to the President. In that event, the President would be forced to choose between approving or vetoing the bill as a whole—the same choice he has now.

B. Impoundment

The commentators also suggest that the President's historical exercise of impoundment authority was unchecked until enactment of the Impoundment Control Act of 1974, and, therefore, that past Presidents' failure to exercise item veto authority is explained, not by the absence of such authority, but by their reliance on the somewhat narrower, but more effective, power of impoundment.[48] This argument, however, provides no affirmative support for inherent item veto authority. Rather, at most, it partially rebuts any negative inference to be drawn from the fact that no President has ever asserted or exercised inherent item veto power. Indeed, since impoundment relates only to appropriations, the availability of impoundment does not explain why no President in 200 years has exercised an item veto with respect to non-appropriations matters.

Moreover, to the extent that the commentators are suggesting that the President has inherent, constitutional power to impound funds, the weight of authority is against such a broad power in the face of an express congressional directive to spend.[49] This Office has long held that the "existence of such a broad power is supported by neither reason nor precedent."[50] Virtually all commentators have reached the same conclusion, without reference to their views as to the scope of executive power.[51]

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[48] The impoundment power is narrower than item veto authority because the former has no application beyond appropriations. The impoundment power is more effective because it is not subject to override.

[49] As discussed below, the President may in some instances decline to spend funds appropriated by Congress in the absence of an express directive to spend. In such cases, however, the President is not exercising an inherent impoundment power, but rather his discretion to direct the manner of executing a law in the absence of a specific congressional mandate.

[50] Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools* at 8 (Dec. 1, 1969) ("Rehnquist Memorandum"); *see also* Memorandum for Clark MacGregor, Counsel to the President, from Ralph E. Erickson, Acting Assistant Attorney General, Office of Legal Counsel, *Re Constitutional Power of Congress to Compel Spending of Impounded Funds* (Jan. 7, 1972); Memorandum for the Attorney General, from Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Legal Authority to Take Action to Forestall a Default* (Oct. 21, 1985)

[51] *See, e.g.*, Cathy S. Neuren, *Addressing the Resurgence of Presidential Budgetmaking Initiative*, 63 Tex. L. Rev. 693 (1984); Timothy R. Harner, *Presidential Power to Impound Appropriations for Defense and Foreign Relations*, 5 Harv. J. Law & Pub. Pol. 131 (1982); Note, *Impoundment of Funds*, 86 Harv. L. Rev. 1505 (1973); David A. Martin, *Protecting the Fisc: Executive Impoundment and Congressional Power*, 82 Yale L.J. 1636 (1973).

There is no textual source in the Constitution for any inherent authority to impound. It has been argued that the President has such authority because the specific decision whether or not to spend appropriated funds constitutes the execution of the laws, and Article II, Section 1 of the Constitution vests the "executive Power" in the President alone. The execution of any law, however, is by definition an executive function, and it seems an "anomalous proposition" that because the President is charged with the execution of the laws he may also disregard the direction of Congress and decline to execute them.[52] Similarly, reliance upon the President's obligation to "take Care that the Laws be faithfully executed," Article II, Section 3, to give the President the authority to impound funds in order to protect the national fisc, creates the anomalous result that the President would be declining to execute the laws under the claim of faithfully executing them.[53] Moreover, if accepted, arguments in favor of an inherent impoundment power, carried to their logical conclusion, would render congressional directions to spend merely advisory.

In addition, because an inherent impoundment power, as indicated above, would not be subject to the limitations on the veto power contained in Article I, Section 7, an impoundment would in effect be a "superveto" with respect to all appropriations measures. The inconsistency between such an impoundment power and the textual limits on the veto power further suggests that no inherent impoundment power can be discovered in the Constitution.[54]

Nor has an inherent power to impound been recognized by the courts. Although we are aware of no Supreme Court cases directly on point, *Kendall v. United States*, 37 U.S. 524 (1838), can be read to support the proposition that the executive's duty faithfully to execute the laws requires it to spend funds at the direction of Congress. Further, one lower court, in a decision arising out of the Nixon impoundment controversy, held that at least with respect to the programs before it, the President had no inherent constitutional authority to impound funds in the face of a congressional directive to spend. *National Council of Community Mental Health Ctrs., Inc. v. Weinberger*, 361 F. Supp. 897, 900–02 (D.D.C. 1973), *rev'd sub nom. National Council of Community Health Ctrs. v. Matthews*, 546 F.2d 1003 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 954 (1977).[55] *See also International Union, United Auto, Aerospace and Agric. Implement Workers of Am. v. Donovan*, 746 F.2d 855, 863 (D.C. Cir. 1984) (noting that several courts had rejected either explicitly or implicitly the existence of "inherent constitutional power to decline to spend in the face of a clear statutory intent and directive to do so"), *cert. denied*, 474 U.S. 825 (1985); *State Highway Comm'n v. Volpe*, 479

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[52] *See* Rehnquist Memorandum, *supra* note 51, at 11; Martin, *supra* note 51, at 1640

[53] Rehnquist Memorandum, *supra* note 50, at 11.

[54] Note, *Impoundment of Funds*, *supra* note 51, at 1514.

[55] In several other cases, although the issue was not always clearly presented, the courts implicitly found that the President has no inherent impoundment authority. *E g , Train v City of New York*, 420 U.S. 35 (1975); *City of Los Angeles v Adams*, 556 F.2d 40 (D C. Cir 1977); *Sioux Valley Empire Electric Ass'n v. Butz*, 504 F.2d 168 (8th Cir. 1974).

F.2d 1099, 1106 (8th Cir. 1973) (concession by government that congressional directive to spend must be followed).[56]

We recognize, of course, that Presidents have historically impounded funds, starting at least with Thomas Jefferson.[57] Although we have not independently reviewed the circumstances surrounding each such incident, it appears that of those impoundments not based upon the President's foreign policy powers, most occurred under statutes that did not contain a directive to spend, thereby permitting the President to impound in the face of congressional silence. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).[58] Determining whether a statute contains or reflects a congressional directive to spend is a complex question of statutory construction, to be determined on a case-by-case basis.[59]

V. Recommendation

In this section we outline the ways in which the President may use his existing authority in the lawmaking process to achieve some of the effects of item veto authority. The President has many tools at his disposal. The President may propose legislation to Congress; he may threaten to veto objectionable proposals prior to passage; he may veto legislation and, in effect, offer amendments in stating his objections to Congress, which must be entered at large on the legislative journals of Congress; and he may call Congress into special session on extraor-

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[56] Although the President has no general inherent authority to impound funds, we believe that there may be instances in which he may impound even in the face of a congressional mandate to spend For example, Congress does not have the power to compel the spending of funds for an unconstitutional purpose or in violation of specific provisions of the Constitution. Accordingly, the President may impound funds where to spend such funds would infringe upon his constitutional responsibilities as Commander-in-Chief or his duties in the area of foreign affairs.

Moreover, when a congressional directive to spend conflicts with another congressional directive not to spend—as, for example, where Congress has established a debt ceiling that would be violated if the expenditure were made—the President must determine which statute controls in accordance with ordinary principles of statutory construction and, accordingly, in making that determination may conclude that appropriated funds not be spent. *See* Memorandum for the Attorney General, from Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, *Re Legal Authority to Take action to Forestall a Default* (Oct. 21, 1985)

[57] *See* Martin, *supra* note 50, at 1644

[58] *See also* Note, supra note 51, at 1507–08, 1510. As noted above, however, in such a case the President is not exercising an inherent impoundment power, but his discretion in the execution of the laws in the absence of a specific congressional mandate

[59] *See, e g.*, 42 Op. Att'y Gen. 347 (1967), Martin, *supra* note 51, at 1645–53.

The adoption of the Impoundment Control Act of 1974, however, may make it doubtful that the President retains some residual authority to impound funds when a statute does not mandate spending.

The Act can be viewed as dividing all appropriations measures into two classes: those that explicitly require that all appropriated funds be spent, to which the Act by its own terms does not apply and over which the President has no residual impoundment authority for the reasons set forth above; and all other appropriations measures, to which the Act does apply and over which the President only has such impoundment authority as the Act grants, to be exercised in accordance with the Act's procedures.

Under this interpretation, the President would in effect never possess any residual authority to impound funds based upon the provisions of a specific statute. We are informed by OMB that it interprets the Impoundment Control Act in that way, and has not claimed that the President has residual authority to impound in those instances where a given statute does not on its face mandate spending

dinary occasions. Together, these powers place the President in a substantial position in the lawmaking process. Just as each house may use its power to shape the form and contents of legislation, so too can the President, subject only to override.

As is now the case, the President should propose desired legislation to Congress. But his role should not end here. In the past, Congress has engaged in the highly objectionable practices of combining an unmanageable number of appropriations bills into one measure, of tacking unrelated substantive riders to such bills, and of combining unrelated substantive provisions in a single bill. All of these practices impede the proper functioning of the President's veto authority. Therefore, he should use that very authority to induce the Congress to abandon or modify these practices. As noted above, President Reagan has already informed the Congress that he will not sign an omnibus appropriations bill for the coming fiscal year, instructing it to pass thirteen separate appropriations bills as provided by the Budget Reform Act. In addition, the President should state publicly that he will not consider, and therefore will veto, any appropriations bills not presented to him within a specified time before the government is to run out of money, calling to the public's attention whenever Congress fails to do so. If Congress argues that circumstances make it impossible to comply, then the President should simply require Congress to simultaneously present him with a separate short-term extension of existing appropriations to give him an equivalent period to review the bill. Similarly, the President should inform Congress that if it engages in its now-routine practice of presenting the President with an omnibus appropriations bill upon adjourning, then he will not only veto the measure, but also exercise his constitutional authority to call Congress back into special session.

Moreover, the President could go a long way towards eliminating the second and third practices by stating publicly that he will veto any appropriations bill containing substantive riders or any substantive bill containing obviously unrelated matters. By adhering to these conditions, the President would provide a strong incentive for Congress to act in an orderly and responsible fashion. For example, last year, after Congress failed to override the President's veto of a bill to codify the Fairness Doctrine, several members of Congress sought to evade the President's veto by attaching the bill as a rider to the Continuing Resolution. President Reagan announced publically that if the rider was included, he would veto the entire Continuing Resolution. *See* Tom Kenworthy, *President Threatens To Veto Money Bills: Contra Aid, Fairness Doctrine Disputed*, Wash. Post, Dec. 19, 1987, at A10. Congress subsequently removed the rider prior to presentment.

Apart from these formal requirements, the President may use his authority in the legislative process to have a greater influence on the contents of legislation. For example, if Congress presents the President with an appropriations bill containing wasteful expenditures, then he should veto the entire measure and identify the objectionable items in his message to Congress, stating that he will approve the bill upon the removal of these items. In this way, the president will focus public attention and scrutiny on those items, and shift responsibility for

failure to enact the remainder of the bill on Congress' decision to include them. Moreover, even if the President's veto is ultimately overridden, his actions will have placed full responsibility for enactment of the objectionable provisions with Congress. Thus, in the case of the last Continuing Resolution, the President might have vetoed it solely on the ground that he objected to the last-minute inclusion of funding for French schools and of a provision designed to divest Rupert Murdoch of particular communications holdings. Given the public disapproval of the inclusion of such provisions, this course could only have enhanced the President's authority. Essentially the same course could be followed with respect to objectionable, albeit related, substantive provisions of a bill.

Although some may argue that assuming such an active role in the lawmaking process improperly intrudes upon the legislative prerogatives of Congress, we believe that the Constitution gave the President these powers to enable him fully to participate in the legislative process, and to defend that role. Indeed, throughout history, chief executives have used their authority in the lawmaking process precisely in these ways and with these effects. Hence, it may be premature to suggest that the President's existing authority is so inadequate as to suggest inherent item veto authority before the President has fully exercised his existing authority.

Conclusion

For the foregoing reasons, we conclude that the recent claims that the Constitution grants the President inherent item veto authority are not well-founded. On the other hand, our review suggests that vigorous use of the President's general veto power may alleviate much of the difficulties that give rise to calls for enhanced authority.

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

Investigative Authority of the General Accounting Office

The General Accounting Office lacks statutory authority to review the Executive's discharge of its constitutional foreign policy responsibilities.

GAO is precluded by the Intelligence Oversight Act from access to intelligence information.

The memorandum also reviews generally the executive privilege principles that apply in the contexts of intelligence, law enforcement, and deliberative process information.

August 16, 1988

MEMORANDUM OPINION FOR THE EXECUTIVE SECRETARY
NATIONAL SECURITY COUNCIL

Introduction and Summary

This memorandum is in response to your request for the opinion of this Office on whether, or to what extent, the Administration has a legal basis for declining to cooperate with the pending General Accounting Office ("GAO") investigation concerning U.S. foreign policy decisions with respect to Manuel Noriega. In its June 23, 1988 letter to the National Security Council, GAO described the nature and purpose of the investigation: In order to evaluate whether "information about illegal activities by high level officials of other nations may not be adequately considered in U.S. foreign policy decisions . . . , the General Accounting Office is undertaking an initial case study of how information about General Noriega was developed by various government agencies, and what role such information played in policy decisions regarding Panama." As stated in the National Security Council's response to GAO of July 13, 1988, representatives of GAO have made it clear that GAO's "three areas of interest [are] intelligence files, law enforcement files, and the deliberative process of the Executive branch, including internal communications and deliberations leading to Executive branch actions taken pursuant to the President's constitutional authority."

Specifically, you have asked this Office to advise you as to whether the GAO investigation is within GAO's statutory authority; whether there are statutory or constitutional grounds for denying GAO's request to the extent it is directed specifically at intelligence information, at law enforcement information, or at deliberative process information; and whether there are other grounds for denying GAO's request in whole or in part. As explained below, we conclude that on the present record the GAO investigation is beyond GAO's statutory investigative

authority.[1] Because of this conclusion it is unnecessary to address any constitutional basis for challenging GAO's authority to conduct the investigation. In addition, we are unable to evaluate the strength of any constitutional objection to providing particular information because specific information requests have not yet been made. As a matter of general guidance, however, we outline the constitutional principles which would be applied in evaluating whether particular information can be withheld.

I. Authority to Conduct the Investigation

A. GAO's Investigative Authority

1. *Statutory Limitations*

GAO's investigative authority is set forth in subchapter II of chapter 7 of title 31 of the U.S. Code. Except for section 717(b), the various grants of authority in subchapter II are limited to auditing the finances of government agencies and are thus inadequate bases for the GAO Noriega investigation, which clearly goes well beyond a financial audit. *See* 31 U.S.C. §§ 711–715. Accordingly, GAO must base this investigation on its authority in section 717(b) to "evaluate the results of a program or activity the Government carries out *under existing law*." 2 Op. O.L.C. 415, 420 (1978) (emphasis added) (where a GAO investigation goes beyond fiscal matters, GAO's authority must be based on section 204(a), the substantially identical predecessor version of section 717(b)).

We believe as a matter of statutory construction that the phrase "program or activity . . . *under existing law*" must refer only to activities carried out pursuant to statute, and not activities carried out pursuant to the Executive's discharge of its own constitutional responsibilities.[2] The juxtaposition of "program or activity" with "existing law" strongly suggests an intent to refer to statutory responsibilities. Moreover, the use of the qualifier "existing" appears to suggest that the laws at issue are statutes that may lapse rather than constitutional authorities of the President, which are of greater permanence. Finally, the legislative history of section 717(b) confirms that Congress' focus of concern was the oversight of its legislative programs: "It is intended that in performing [evaluations under section 717(b)], the Comptroller General shall review and analyze Government program results in a manner which will assist the Congress to determine whether those programs and activities are achieving the objectives of the law." H.R. Rep. No. 1215, 91st Cong., 2d Sess. 82 (1970). Nothing in the legislative history man-

[1] Moreover, in addition to GAO's lack of statutory authority to pursue this investigation, we believe that the Intelligence Oversight Act for Fiscal Year 1981, Pub. L. No. 96–450, § 407, 94 Stat. 1975, 1981 (1980), extinguishes whatever authority GAO might otherwise possess in gaining access to intelligence information

[2] The views we express here concerning the limitations on GAO's investigative authority under section 717(b) are not novel. In 1978, the Office opined that GAO's authority under the similarly worded predecessor to 717(b) did not extend to the discharge of the President's constitutional, as opposed to statutory, responsibilities. 2 Op. O.L.C. 415, 420 (1978) ("[T]he appointment of officers of the United States by the President by and with the advice of the Senate does not constitute a Government program or activity carried out under existing law . . . .").

ifests any congressional intent to extend GAO's investigative authority beyond statutory programs into the Executive's discharge of its constitutional responsibilities. *See* S. Rep. No. 924, 93d Cong., 2d Sess. 72 (1974); S. Rep. No. 202, 91st Cong., 1st Sess. (1969); H.R. Rep. No. 1215, *supra*, at 18, 34, 81–84; 116 Cong. Rec. 24,597 (1970).

2. GAO Has Not Justified its Investigation Under Section 717(b)

We conclude on the record before us that GAO has not established that it has authority under section 717(b) to pursue this investigation. The subject of the investigation according to GAO is foreign policymaking, a subject matter which is generally within the purview of the President's power under Article II of the Constitution. GAO has failed to assert any interest in evaluating the results of any specific statutory program or activity that may relate to foreign policy.

As this Office has consistently observed,[3] Section 1 of Article II confers on the President plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject only to limits specifically set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers. *See generally United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Specifically, the President's constitutional authority includes the authority to negotiate with foreign nations, to articulate the foreign policy of the United States, to carry out diplomatic and intelligence missions, and to protect the lives of Americans abroad. *Id.*

Of course, pursuant to its own substantial authority under the Commerce Clause and its exclusive power of appropriation, Congress has enacted statutes that relate to the foreign policy of the United States. For instance, Congress has appropriated funds for foreign assistance and enacted statutes regulating arms sales to foreign governments. If GAO were to express a specific interest in materials relating to such statutes, there would be reasonable and legitimate questions as to which materials were within the scope of GAO's section 717(b) authority, and which were not.

The request before us, however, does not present these close questions. The GAO letter of June 23, 1988 makes it clear that foreign policymaking is the subject of the GAO investigation, and it provides no basis for concluding that GAO is interested in reviewing Executive foreign policymaking pursuant to statutory authority. The GAO letter states that the GAO investigation is premised on a concern that "information about illegal activities by high level officials of other nations may not be adequately considered in U.S. foreign policy decisions" and that it is directed at learning "what role [information about General Noriega] played in policy decisions regarding Panama." The GAO letter thus demonstrates an in-

[3] *See, e g*, Memorandum for Judith H. Bello, General Counsel, Office of the United States Trade Representative, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Authority to Terminate the International Express Mail Agreement With Argentina Without the Consent of the Postal Service* (June 2, 1988).

terest in our "diplomatic" or "national security" foreign relations with Panama and General Noriega, and provides no basis for concluding that it relates to activities undertaken by the Executive under any specific statute.

We therefore conclude based on the nature of the GAO request that the subject of the GAO investigation is the Executive's discharge of its constitutional foreign policy responsibilities, not its statutory responsibilities. The subject is thus not "a program or activity the Government carries our under existing law," and it is beyond GAO's authority under 31 U.S.C. § 717(b). Accordingly, unless this request is tailored to inquire specifically about a program or activity carried out under existing statutory law, we believe there is no obligation to grant GAO access to executive branch agencies for purposes of conducting this investigation.

B. Intelligence Oversight

In addition to the infirmity in GAO's statutory authority to pursue this investigation, we believe that GAO is specifically precluded by statute from access to intelligence information. In establishing by law the oversight relationship between the intelligence committees and the executive branch, Congress indicated that such oversight would be the exclusive means for Congress to gain access to confidential intelligence information in the possession of the executive branch.[4]

This intelligence oversight system has been codified at 50 U.S.C. § 413. That section sets forth requirements for the Director of Central Intelligence, the heads of all other federal agencies involved in intelligence activities, and the President to inform the Congress through the intelligence committees (and in some circumstances the Speaker and minority leader of the House of Representatives and the majority and minority leaders of the Senate) of intelligence activities.

The legislative history of section 413 makes it clear that both the legislative and executive branches believed they were establishing a comprehensive scheme for congressional oversight of intelligence activities that would constitute the exclusive means of congressional oversight. As President Carter stated when he signed the section into law, it

> establishes, for the first time in statute, a comprehensive system for congressional oversight of intelligence activities.... The oversight legislation that was passed . . . codifies the current practice

[4] As a general matter, intelligence gathering is often viewed as a form of diplomatic activity that is within the President's Article II powers. As Professor Louis Henkin has noted, "[t]he gathering of information is a principal purpose of sending ambassadors and maintaining diplomatic relations, an exclusive Presidential power. It is only a small extension to conclude that gathering information by any means is part of the President's 'eyes and ears' function. There is, therefore, a strong case for presidential authority to obtain intelligence not only through our embassies but also through our agents representing the Executive . . . ." Letter from Louis Henkin to Representative Louis Stokes, March 31, 1987, *reprinted in H.R. 1013, H.R. 1371, and Other Proposals Which Address the Issue of Affording Prior Notice of Covert Actions to Congress: Hearings Before the Subcomm on Legislation of the House Permanent Select Comm. on Intelligence*, 100th Cong., 1st Sess. 221 (1987).

> and relationship that has developed between this administration and the Senate and House intelligence committees over the past 3 years.[5]

Senator Huddleston, sponsor of the floor amendment containing the version of section 413 that was enacted into law, emphasized upon the amendment's introduction the comprehensive and exclusive nature of the scheme being established: "this amendment is identical to Senate bill 2284 which the Senate passed by a vote of 89 to 1 on June 3 of this year. It is a bill that establishes the congressional oversight procedures dealing with our intelligence agencies."[6] Senator Huddleston also agreed, in a floor colloquy with Senator Javits on S. 2284, with the following statement by Senator Javits:

> I agree thoroughly with the need for simplifying [the practice of the oversight committees]. There are some seven committees here that could have had this wrestling match with the executive . . . . I am satisfied . . . that the method we now have chosen . . . represents a fair, effective, and objective way in which to accomplish the results of simplifying the intelligence relations between the President and Congress . . . and limiting further the opportunities for misadventure, premature disclosure, and so forth . . . . What we are doing is simply legislating . . . a new arrangement or modus vivendi for the handling of information and consultations between Congress and the intelligence agencies . . . .[7]

The Senate report on S. 2284 also confirms the understanding that congressional oversight with respect to intelligence matters was to be limited to the intelligence committees. In the "general statement" that preceded the section by section analysis, the report noted:

> Out of necessity, intelligence activities are conducted primarily in secret. Because of that necessary secrecy, they are not subject to public scrutiny and debate as is the case for most foreign policy and defense issues. Therefore, the Congress, *through its intelligence oversight committees*, has especially important duties in overseeing these vital activities by the intelligence agencies of the United States. *[50 U.S.C. § 413] is intended to authorize the process by which information concerning intelligence activities*

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[5] 16 Weekly Comp. Pres. Doc. 2231 (Oct. 14, 1980).

[6] 126 Cong. Rec. 17,692 (1980).

[7] 126 Cong. Rec. 17,692–93 (1980) Senator Moynihan agreed with the position of Senators Huddleston and Javits that a major purpose of the Intelligence Oversight Act was to reduce the number of congressional committees that sought intelligence information: "there is a rule of intelligence, which the Senator [Javits] knows well from his wartime experience, which is that you protect sensitive information by compartmentation. The more important that matter is the fewer persons you want to know about it . . . ." *Id.* at 17,694.

> *of the United States is to be shared by the two branches* in order to enable them to fulfill their respective duties and obligations to govern intelligence activities within the constitutional framework. The Executive branch and the intelligence oversight committees have developed over the last four years a practical relationship based on comity and mutual understanding, without confrontation. The purpose of [section 413] is to carry this working relationship forward into statute.[8]

Based on the evidence of intent on the part of both the legislative and executive branches that oversight by the intelligence committees would be the exclusive method of congressional oversight concerning intelligence information, we conclude that 50 U.S.C. § 413 stands as statutory authority for the Administration to decline to provide GAO with access to any intelligence information sought in the Noriega investigation.

II. Executive Privilege

Should GAO, in response to an appropriate direction from Congress, subsequently undertake an investigation properly related to its statutory authority, it would then be necessary to review established principles concerning the maintenance of confidentiality with respect to certain executive branch information. Congressional investigations normally do not pose this problem to the degree suggested by the pending GAO investigation because they are properly tailored to address non- confidential subjects. Disturbingly, and in contrast, the type of information in which GAO expressed interest in its letter of June 23, 1988 suggests a desire to review confidential material generally not available outside the executive branch, such as intelligence, law enforcement, and deliberative process information.[9]

Since GAO has not yet made any specific requests, we cannot analyze the case for withholding any particular document or information. What we do below is summarize briefly the general executive privilege principles that apply in the individual contexts of intelligence, law enforcement, and deliberative process information.

A. Protection of Intelligence Information

In the hierarchy of executive privilege, the "protection of national security" constitutes the strongest interest that can be asserted by the President and one to

[8] S Rep. No. 730, 96th Cong., 2d Sess. 5 (1980) (emphasis added) More specifically, the Senate report stated that "[t]his amendment repeals the congressional reporting requirement of the Hughes-Ryan Amendment of 1974 . . . The effect is to limit reporting to the two intelligence oversight committees, as compared with the seven committees that now receive such reports . . ." *Id* at 5.

[9] This subject is usually discussed in terms of "executive privilege," and we will use that convention here. The question, however, is not strictly speaking just one of executive privilege. The privilege itself need not be claimed formally vis-a-vis Congress except in response to a lawful subpoena

which the courts have traditionally shown the utmost deference. In *United States v. Nixon*, for instance, the Court contrasted President Nixon's claim of executive privilege based on the Executive's general interest in confidentiality with a claim based on the President's national security responsibilities:

> [President Nixon] does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the Courts have traditionally shown the *utmost deference* to Presidential responsibilities.

418 U.S. 683, 710 (1974) (emphasis added).

B. Protection of Law Enforcement Information

With respect to open law enforcement files, it has been the policy of the executive branch throughout our Nation's history to protect these files from any breach of confidentiality, except in extraordinary circumstances. Attorney General Robert H. Jackson well articulated the basic position:

> It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the Laws be faithfully executed," and that congressional or public access to them would not be in the public interest.
>
> Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information that Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

40 Op. Att'y Gen. 45, 46 (1941).

There are, however, circumstances in which the Department of Justice may decide to disclose to Congress information about prosecutorial decisions. This is particularly true where an investigation has been closed without further prosecution. In such a situation concerns about real or perceived congressional interference with an investigation, and about the effects of undue pretrial publicity on a jury, would disappear. Still, extreme caution must be applied whenever the disclosure of such records is contemplated. Much of the information in a closed criminal enforcement file such as unpublished details of allegations against par-

ticular individuals and details that would reveal confidential sources and investigative techniques and methods would continue to merit protection.

C. Protection of Deliberative Process Information

The Constitution gives the President the power to protect the confidentiality of deliberations within the executive branch. *See Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 446 455 (1977); *United States v. Nixon*, 418 U.S. at 708. This is independent of the President's power over foreign affairs or national security, or law enforcement; it is rooted instead in "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *Id.* at 708. The Supreme Court has held that, for this reason, communications among the President and his advisers enjoy "a presumptive privilege" against disclosure in court. *Id.*

The reasons for this privilege, the Court said in *United States v. Nixon*, are "plain." "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *Id.* at 705. Often, an advisor's remarks can be fully understood only in the context of a particular debate and of the positions others have taken. Advisors change their views, or make mistakes which others correct; this is indeed the purpose of internal debate. The result is that advisors are likely to be inhibited if they must anticipate that their remarks will be disclosed to others, not party to the debate, who may misunderstand the significance of a particular statement or discussion taken out of context. Some advisors may hesitate out of self interest to make remarks that might later be used against their colleagues or superiors. As the Supreme Court has stated, "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Id.* at 708.

These reasons for the constitutional privilege have at least as much force when it is Congress, instead of a court, that is seeking information.[10] The United States Court of Appeals for the District of Columbia Circuit has explicitly held that the privilege protects presidential communications against congressional inquiries.[11]

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[10] The Supreme Court has assumed that the constitutional privilege protects executive branch deliberations against Congress to some degree. *See United States v Nixon*, 418 U S. at 712 n.19. Moreover, in *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977), the Court held that the constitutional privilege protects executive branch deliberations from disclosure to members of the *same* branch in a later administration; the Court rejected the specific claim of privilege in that case not because the privilege was inapplicable but because the intrusion was limited and the interests justifying the intrusion were strong and nearly unique. *See id.* at 446–55.

[11] During the Watergate investigation the court of appeals rejected a Senate committee's efforts to obtain tape recordings of conversations in President Nixon's offices The court held that the tapes were constitutionally privileged and that the committee had not made a strong enough showing to overcome the privilege. *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C Cir 1974) (en banc). The court held that the committee was not entitled to the recordings unless it showed that "the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee's functions " *Id* at 731 (emphasis added).

D. Accommodation with Congress

1. *Governing Principles*

Because a claim of executive privilege is not absolute, the executive branch has a duty to seek to accommodate requests that are within Congress' legitimate oversight powers. *See United States v. AT&T*, 567 F.2d 121, 127 130 (D.C. Cir. 1977) (suggesting that, even when a claim of executive privilege rests on national security grounds, the Executive does not enjoy clear and absolute discretion to deny legitimate congressional requests for information, but that each of the two branches must attempt to balance and accommodate the legitimate needs of the other).[12] This duty of accommodation means that the Executive should attempt to satisfy the requests of Congress as completely as it can without making harmful disclosures. *See* Memorandum for the Attorney General from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: The Constitutional Privilege for Executive Branch Deliberations: The Dispute with a House Subcommittee over Documents Concerning the Gasoline Conservation Fee* (Jan. 13, 1981). In this spirit, the Executive has occasionally offered Congress summaries of documents prepared in such a manner as not to disclose, for example, deliberative aspects that might chill executive branch decisionmaking. *See id.* at 22–23.

The nature of the accommodation required in responding to a congressional request for information depends on the balance of interests between the Executive and Congress. In order for its interests to be given weight, Congress must articulate its need for the particular materials; it must "point[] to . . . specific legislative decisions that cannot responsibly be made without access to materials uniquely contained" in the presumptively privileged documents (or testimony) it has requested, and show that the material "is demonstrably critical to the responsible fulfillment of the Committee's functions." *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d at 731, 733.[13]

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[12] It should be emphasized, however, that in *United States v. AT&T* the information Congress sought related to wiretaps on American citizens placing telephone calls from the United States. Although these wiretaps were justified on national security grounds and the President, in turn, could assert national security as a basis for withholding the information, Congress clearly had a substantial interest in this subject matter, because the wiretaps implicated the individual rights of American citizens. Accordingly, we believe that a court may view the relative weights of executive and legislative interests differently when the information sought relates directly to the conduct of foreign relations rather than to the rights of American citizens.

[13] In *Senate Select Committee*, for example, the court held that the committee had not made a sufficient showing of need for copies of the presidential tape recordings, given that the President had already released transcripts of the recordings. The committee argued that it needed the tape recordings "in order to verify the accuracy of" the transcripts, to supply the deleted portions, and to gain an understanding that could be acquired only by hearing the inflection and tone of voice of the speakers. But the court answered that in order to legislate a committee of Congress seldom needs a "precise reconstruction of past events." 498 F.2d at 732. "The Committee has . . . shown no more than that the materials deleted from the transcripts may possibly have some arguable relevance to the subjects it has investigated and to the areas in which it may propose legislation. It points to no specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in the tapes or without resolution of the ambiguities that the transcripts may contain." *Id.* at 733. For this reason, the court stated, "the need demonstrated by the Select Committee . . is too attenuated and too tangential to its functions" to override the President's constitutional privilege *Id*

2. *Procedural Issues*

Only rarely do congressional requests for information result in a subpoena of an executive branch official or in other congressional action. In most cases the informal process of negotiation and accommodation recognized by the courts, and mandated for this Administration by President Reagan,[14] is sufficient to resolve any dispute. On occasion, however, the process breaks down, and a subpoena is issued by a congressional committee or subcommittee.[15] At that point, it would be necessary to consider asking the President to assert executive privilege. Under the terms of the President's Memorandum, executive privilege cannot be asserted vis-a-vis Congress without specific authorization by the President, based on recommendations made to him by the concerned department head, the Attorney General, and the Counsel to the President.

Conclusion

We believe that there are statutory grounds which preclude GAO's present request for access to executive branch agencies for the purposes of conducting the investigation described in its letter of June 23, 1988. Should GAO's request be reformulated in a manner which properly relates it to a congressional interest within the terms of 31 U.S.C. § 717(b) and which comports with the statutory restrictions on access to intelligence information found in 50 U.S.C. § 413, it will be appropriate at that time to consider the application of additional lawful authority to withhold particular national security, intelligence, law enforcement, or deliberative process information. This Office is available for consultation with respect to requests for particular documents or information.

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

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[14] President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information" states:

> The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch . [E]xecutive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches.

[15] In the current context, such a subpoena could only be issued after GAO had reported to its congressional requester that it was unable to obtain the information from the executive branch. Before requesting that a congressional committee issue a subpoena, GAO might attempt to enforce its request for information pursuant to the judicial enforcement mechanism authorized under 31 U S C § 716. Such a course of action could be successfully resisted by the executive branch without a claim of executive privilege, however, because judicial enforcement is precluded whenever the Director of the Office of Management and Budget or the President certify that the information could be withheld under exemptions (b)(5) (information withholdable in litigation) or (b)(7) (law enforcement information) of the Freedom of Information Act (5 U.S.C. § 552(b)(5), (b)(7)) and "disclosure reasonably could be expected to impair substantially the operations of the Government." 31 U S C § 716(d)(1)(C). Upon such a certification, GAO would presumably refer enforcement to the congressional committee.

GAO Access to Trade Secret Information

Section 301(j) of the Food, Drug, and Cosmetic Act of 1938 prohibits the Food and Drug Administration from providing the General Accounting Office with access to trade secret information submitted by drug manufacturers to the FDA.

September 13, 1988

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL
DEPARTMENT OF HEALTH AND HUMAN SERVICES

This memorandum responds to your August 18, 1988, request for our opinion as to whether the Food and Drug Administration ("FDA") may provide the General Accounting Office ("GAO") with access to trade secret information submitted by drug manufacturers pursuant to the Food, Drug, and Cosmetic Act of 1938 ("FDCA"), 21 U.S.C. §§ 301–393. For the reasons discussed below, we concur with the conclusion of your office[1] that section 301(j) of the FDCA, 21 U.S.C. § 331(j), prohibits the FDA from providing the GAO with such access.

Section 301(j) prohibits the FDA from

> revealing, other than to the Secretary [of Health and Human Services (HHS)] or officers or employees of [HHS], or to the courts when relevant in any judicial proceeding under [the FDCA], any information acquired under [specified sections of the FDCA] concerning any method or process which as a trade secret is entitled to protection.

Section 301(j) is clear on its face. It expressly provides that trade secret information may not be disclosed outside HHS with one exception: such information may be disclosed to a court in a judicial proceeding under the FDCA. Since the GAO is obviously not a court or part of HHS, under section 301(j) it is prohibited from gaining access to trade secret information.

Attorney General Griffin Bell previously interpreted section 301(j) to preclude the FDA from furnishing to a congressional committee trade secret information. 43 Op. Att'y Gen. No. 21, at 1–2 (Sept. 8, 1978) (relying "on the unqualified language of § 301(j), the consistent and longstanding interpretation to this effect by

[1] Letter for John O McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, from Robert P Charrow, Deputy General Counsel, Department of Health and Human Services (Aug. 30, 1988).

[HHS], and prior congressional approval of that interpretation through the rejection of an amendment to create an express exemption permitting disclosures to Congress"). The only question raised by your request, therefore, is whether the GAO is precluded from access to trade secret information to the same extent as congressional committees.

We have no hesitation in concluding, on the basis of the 1978 Attorney General Opinion, that section 301(j) should be interpreted to preclude the GAO from access to trade secret information covered by that section. Although whether to provide access to a congressional committee was the specific question presented, the Attorney General Opinion discussed the application of section 301(j) with respect to Congress as a whole. The opinion noted that "[o]n its face, this section imposes an absolute bar to disclosure of trade secret information outside [HHS]," with the one exception of a judicial proceeding; the opinion declined to find "any exception for disclosure to the Congress . . . to be implied." *Id.* at 2. The Supreme Court has held that the GAO is part of the legislative branch and is "subservient to Congress." *Bowsher v. Synar*, 478 U.S. 714, 727-32 (1986). It therefore follows that if there is no "exception for disclosure to the Congress," as the Attorney General Opinion concluded, then there is also no exception in section 301(j) for disclosure to the GAO.

You also raised in your request the question of whether 31 U.S.C. § 716(a) authorizes the GAO to gain access to the trade secret information covered by section 301(j). Section 716(a) provides that:

> Each agency shall give the Comptroller General information the Comptroller General requires about the duties, powers, activities, organization, and financial transactions of the agency. The Comptroller General may inspect an agency record to get the information. This subsection does not apply to expenditures made under section 3524 or 3526(e) of this title.

Your office suggested, but after consideration dismissed, the argument that section 716(a) supersedes section 301(j).

Under established rules of statutory construction concerning statutes that may arguably conflict, however, section 301(j) controls in this situation. It is a cardinal axiom of statutory construction that "[w]here there is no clear [congressional] intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974); *see also Busic v. United States*, 446 U.S. 398, 406 (1980) ("[A] more specific statute will be given precedence over a more general one, regardless of their temporal sequence."). Since section 301(j) is a specific statute directly addressing one executive branch agency's handling of trade secret information, while section 716(a) is a general statute addressed to all kinds of information in possession of the executive branch, section 301(j) controls in the

absence of congressional intent to the contrary. We have reviewed the legislative history of section 716(a) and have found no evidence of any such intent.[2]

Conclusion

For the foregoing reasons, we concur with your conclusion that section 301(j) of the FDCA prohibits the FDA from providing the GAO with access to trade secret information submitted by drug manufacturers pursuant to the FDCA.

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

[2] The judicial enforcement provisions contained in other subsections of 31 U.S.C. § 716 do not provide any basis for concluding that section 716(a) supersedes section 301(j). These other subsections set out a procedure by which the GAO may seek judicial enforcement of its right to executive branch information under section 716(a). *See* 31 U.S.C. § 716(b),(d) They also provide that certain types of information may be exempted from judicial enforcement. *See* 31 U.S.C. § 716(d). It might be argued on the basis of these other subsections that trade secret information must be provided to the GAO because it is not the kind of information that may be exempted from judicial enforcement. This argument has no merit. It ignores the fundamental distinction between a right and a judicial remedy to enforce the right: these other subsections simply address a method of enforcing GAO's right to information under section 716(a), they do not define in any way the right itself. The question of the applicability of GAO's right to information under section 716(a) is separate from, and does not depend on, any questions that may arise under other subsections of 31 U.S.C. § 716 concerning judicial enforcement of that right.

Detail of Law Enforcement Agents to Congressional Committees

Details of Department of Justice law enforcement agents to congressional committees are statutorily authorized provided the details are made on a reimbursable basis

Such details do not violate the constitutional principles of separation of powers as long as the details are advisory in nature, involve functions not required by the Constitution to be performed by an "officer" of the United States, and when there are particularly compelling policy reasons for the assignment that outweigh any separation of powers concerns.

Due to the substantial policy and ethical concerns such details raise, the Department should consider a reimbursable detail only after a careful examination of the functions to be performed and consideration of the conflicts likely to arise.

September 13, 1988

MEMORANDUM OPINION FOR THE ACTING DEPUTY ATTORNEY GENERAL

Introduction and Summary

This responds to a request from James Byrnes, formerly of your office, as to the legality and appropriateness of detailing Department of Justice law enforcement agents to congressional committees.[1] For the reasons outlined below, we find that there is legal authority to support such details as long as the details are made on a reimbursable basis. No constitutional issue is implicated as long as it is carefully ascertained and observed that the functions to be performed by the detailed employee are not those of an "officer" of the United States. We believe, however, that such details do raise separation of powers concerns, because they place an employee in the difficult position of serving two masters with conflicting interests—the legislative and executive branches—and because such details create the risk that privileged executive branch information and plans may be dis-

[1] Department of Justice regulations require Department components to obtain approval of the Deputy Attorney General before details of employees outside the Department can be effected or extended. Mr. Byrnes asked this Office for guidance with respect to four individual requests. *See, e.g.*, Memorandum for Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, from James Byrnes, Associate Deputy Attorney General (June 18, 1987). The Federal Bureau of Investigation ("FBI") proposed to send two FBI agents to the Senate Permanent Subcommittee on Investigations. One of those requests was withdrawn by the FBI; with respect to the other request, the agent did complete the detail, which was arranged on a reimbursable basis. Recently, an extension of this detail has been requested. *See* Memorandum for Harold C. Christensen, Acting Deputy Attorney General, from Harry H. Flickinger, Assistant Attorney General, Office of Legal Counsel (Aug. 22, 1988). The Drug Enforcement Administration ("DEA") proposed to send one DEA special agent to the House Judiciary Subcommittee on Crime and one special agent to the Select Committee on Narcotics Abuse and Control for the 100th Congress. We understand that the former detail was terminated by the Subcommittee within days after the agent commenced the detail; the latter request was withdrawn by the DEA. We have prepared this opinion in order to provide you with guidance in reviewing the request for extension as well as future requests for such details.

closed inappropriately. Moreover, these details may raise potential ethical concerns under the ABA Model Code of Professional Responsibility or analogous codes of professional conduct. In light of these concerns, we do not believe that these details should be approved as a matter of routine practice. Instead, each proposed detail should be carefully scrutinized to determine whether the particular functions to be performed by the employee can be constitutionally undertaken by someone outside the direct supervision of the executive branch and, if so, whether the benefits to be gained by the law enforcement agencies are sufficiently extraordinary to outweigh the separation of powers and ethical concerns raised by the detail.

1. Statutory Authority

This Office has previously construed 2 U.S.C. § 72a(f) to provide implicit legal authority for assignments of executive branch personnel to various congressional committees.[2] Section 72a(f) provides:

> No committee shall appoint to its staff any experts or other personnel detailed or assigned from any department or agency of the Government, except with the written permission of the Committee on Rules and Administration of the Senate or the Committee on House Administration of the House of Representatives, as the case may be.

The theory behind this Office's longstanding interpretation is that it would be superfluous for Congress to impose a statutory prohibition against the appointment of detailed personnel except under specified conditions unless the detail of personnel was already authorized. Accordingly, the precedent of this Office supports the view that there is statutory authority for the FBI and the DEA to send law enforcement agents to congressional committees on a reimbursable basis.[3]

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[2] *See, e g , Detail of Department of Justice Attorneys to Congressional Committees*, 1 Op. O.L.C. 108 (1977); Memorandum from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re· Authority for Detail of Executive Branch Personnel (Assistant United States Attorney) to a Select Committee in the House of Representatives* (June 23, 1969). In both of these opinions, this Office addressed the legality of detailing executive branch attorneys to congressional committees, concluding that section 72a(f) provided legal authority for such assignments. In the 1977 opinion, however, the Office noted that the potential ethical and policy problems of each assignment should be examined carefully by appropriate Department officials.

[3] We note, however, that a nonreimbursable congressional detail raises sufficiently serious legal questions that, as a general matter, they should not be authorized. One possible prohibition to such details is the general rule of appropriations law that prohibits the use of an agency's appropriations for unauthorized purposes. This principle, the so-called "purpose requirement," emanates from 31 U.S C. § 1301(a), which provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." The Comptroller General has interpreted section 1301(a) to restrict the use of appropriated funds by executive branch agencies to compensate their employees who are detailed to congressional committees absent specific statutory authority for such use, stating that it "'must appear that the work of the committee to which the detail or loan of the employee is made will actually aid the agency in the accomplishment of a purpose for which its appropriation was made such as by obviating the necessity for the performance by such agency of the same or similar work.'" 64 Comp. Gen 370, 379 (1985) (quoting 21 Comp Gen. 1055, 1057–58 (1942))

II. Separation of Powers

We turn next to the question of whether details of Department personnel to congressional committees violate the constitutional principle of separation of powers. The United States Supreme Court has consistently reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 725 (1986); *Buckley v. Valeo*, 424 U.S. 1 (1976). In a recent opinion, *Morrison v. Olson*, 487 U.S. 654 (1988), the Court once again recognized that the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as "'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" *Id.* at 693 (quoting *Buckley v. Valeo*, 424 U.S. at 122). The Court, however, also pointed out that it has never held that the Constitution requires that the three branches of government operate with absolute independence of one another. *Id.* at 693–94 (citing *United States v. Nixon*, 418 U.S. 683, 707 (1974)).

Article II, Section 1 vests the executive power in the President of the United States. The President's Article II, Section 3 duty to "take Care that the laws [are] faithfully executed" recognizes the President's authority to exert "general administrative control over those executing the laws." *Myers v. United States*, 272 U.S. 52, 164 (1926). The pertinent issue in the instant case is whether the President's ability to supervise his subordinates in the performance of their executive branch functions is unconstitutionally impaired by the congressional details. *See Morrison v. Olson*, 487 U.S. at 670–77.

It is our view that although the detailed personnel nominally remain executive branch "employees" during the course of the details, they may not, consistent with constitutional requirements, serve as "officers" performing executive branch functions within the contemplation of Article II. *See generally Buckley v. Valeo*, 424 U.S. 1, 126, 140–41 (1976). As a factual matter, none of the proposed details would appear to transgress this principle. In particular, we are advised that the functions to be performed by the detailed personnel are primarily of an advisory or research nature. For example, as we understand it, the purpose of the prior detail of an FBI Special Agent to the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs was to provide to the Subcommittee substantive expertise on organized crime operations and investigative techniques. Under the proposed extension of this detail, the Special Agent will

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[3] (. . . continued)

The Comptroller General is an officer of the legislative branch, *Bowsher v Synar*, 478 U S. 714, 727–32 (1986), and, historically, the executive branch has not considered itself bound by the Comptroller General's legal opinions if they conflict with the legal opinions of the Attorney General or of this Office However, we find that in the instant case the Comptroller General's construction of relevant appropriations law is not adverse to our reading of the law. Based on our interpretation of the purpose requirement, we believe that there is a serious question as to whether a Department law enforcement agency reasonably could claim that it is within the agency's mission or purpose to work for committees within the legislative branch.

continue to assist the Subcommittee in fulfilling its mandate, which requires conducting an in-depth analysis of traditional organized crime methods. Another proposed detail would have involved sending a DEA Special Agent to the House Select Committee on Narcotics Abuse and Control to assist the Committee in evaluating the drug enforcement program and work of the DEA.

The functions described above appear to be of a fact-finding or advisory nature performed on behalf of congressional committees charged with oversight of federal law enforcement efforts and, as such, do not constitute the "exercis[e of] significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. at 126.[4] Nor are they of a law enforcement character which would require that they be performed or supervised by Article II officers.[5] Accordingly, the fact that the detailed employees are supervised by legislative branch personnel does not contravene the Constitution and infringe upon the President's supervisory authority over the executive branch in the exercise of its Article II responsibilities, as long as employees are performing only non-law enforcement, advisory functions.[6]

Even when confined to non-law enforcement and advisory functions, however, we believe that details of executive branch employees to the legislative branch raise substantial separation of powers concerns. In our system of separated powers, the legislative and executive branches often have conflicting interests and thus a detailed employee may be put in the difficult position of choosing between serving the interests of the executive branch and those of the legislative branch. For instance, we note that one DEA agent has been detailed to aid in the evaluation of DEA programs, presumably with a view toward legislation. This surely exacerbates the well-known tension between the executive branch's interest in having administrative flexibility in managing its programs and the legislative branch's interest in imposing more detailed requirements on such management. It seems doubtful that the agent can faithfully defend the interests of the executive branch in such matters when he has been specially detailed to do the legislative branch's bidding.

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[4] Indeed, assuming that the tasks in which the detailed personnel are assisting the legislative branch are within the legitimate scope of the legislative branch's responsibilities, it necessarily follows that such tasks may be performed by persons other than officers of the United States. Members of Congress can perform all legitimate legislative functions and yet are not officers of the United States.

[5] For example, the functions at issue do not involve investigation of alleged violation of the federal criminal laws for the purpose of presenting cases to federal prosecutors or making arrests for such violations. Such federal law enforcement functions are properly executed by appropriate personnel within the executive branch and could not be performed by an employee detailed to the legislative branch and outside meaningful executive branch supervision.

[6] This is not to say that it would never be legal for detailed Department employees to conduct investigatory work for the committee. Historically, Congress has exercised investigatory power independent of the executive branch's authority to execute the laws. Provided the investigative work of a pertinent congressional committee constitutes a legitimate legislative function, participation of a detailed Department of Justice employee in such an investigation would not violate the Constitution. We note, however, that an investigatory assignment during a congressional detail may exacerbate the separation of powers and ethical considerations discussed here because of the potential overlap between investigatory work performed by Congress and the Department's investigatory work on the same or a related matter. To avoid such conflicts, Department officials should avoid detailing employees to congressional committees when the committee work involves activities that may interfere or overlap with the Department's investigatory efforts.

Beyond this general conflict, there is the specific problem of preserving the confidentiality of executive branch information. In the course of his work in the executive branch a law enforcement agent has access to privileged information, such as information relating to open law enforcement files, national security, and the deliberative process within the executive branch. Placing such an employee in a position in which his work will be related to his former duties in the executive branch, but in which he will be under the daily supervision of legislative branch officials, obviously creates risks that such information may be improperly or inadvertently shared with the legislative branch.

III. Ethical Considerations

Any requests for such details should also be examined for potential conflicts of interest under applicable professional codes of ethics. In the 1977 opinion discussing the legality and propriety of detailing Department of Justice attorneys to congressional committees, we noted that such details may raise potential ethical problems under such codes. For example, a Department attorney on congressional detail might rely on information he had received in confidence while working at the Department, implicating Canon 4 of the American Bar Association Model Code of Professional Responsibility, which provides that "[a] lawyer should preserve the confidences and secrets of a client."[7]

Although federal law enforcement agents are not guided by a formal code of ethics similar to the American Bar Association's Code of Professional Responsibility, the potential for conflict of interest addressed in our 1977 opinion regarding the detail of Department attorneys could pose similar problems with respect to detailed law enforcement agents. A particularly embarrassing problem could arise if a congressional committee sponsoring the Department detail was considering or advancing legislation that the Department opposed.

In order to reduce the possibility of any conflicts of interest arising from congressional details of Department employees, we recommend that each proposal for such a detail be examined closely for potential conflicts. This examination should involve a close review of the pertinent committee's official mandate. In addition, the committee should be asked to provide a specific description of the work that the agent would be handling while on the detail. Finally, to avoid any questions concerning their proper roles, agents should be reminded, prior to starting their details, that although they continue to be Department of Justice employees during the course of the detail, their new employer is a separate entity within another branch of government that does not have access as a matter of course to Department of Justice information, files, and documents.

[7] In the 1977 opinion, we also observed that because the attorney theoretically would be returning to the Department at the conclusion of the detail, it is reasonable that he would, while working for the committee, tend to advance positions taken by the Department if the occasion arose. Because the attorney might not be able to adequately represent the interests of both the Department and the subcommittee, Canon 7 of the Model Code of Professional Responsibility could be implicated. 1 Op. O.L.C. at 108–09 Canon 7 states that "[a] lawyer should represent a client zealously within the bounds of the law."

Conclusion

We conclude that the details of Department personnel to congressional committees described above are statutorily authorized provided the agreements are reimbursable. We also conclude that the arrangements as proposed do not violate the principle of separation of powers as long as the details are advisory in nature and involve functions not required by the Constitution to be performed by an "officer" of the United States. Nonetheless, because of the substantial policy and ethical concerns such details raise, we believe the Department should consider a reimbursable detail only after a careful examination of the functions to be performed and consideration of the conflicts likely to arise. Accordingly, the Department should accede to a request for an assignment to a congressional committee only when the assignment may be performed by a person other than an "officer" of the United States and when there are particularly compelling policy reasons for the assignment that outweigh the concerns raised here. Moreover, should a detail be authorized, the Department should emphasize to detailed personnel the nature of their ethical responsibilities as Department of Justice employees, which exist notwithstanding their assignments to congressional committees.

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

Department of Housing and Urban Development Restrictions on Grants to Religious Organizations That Provide Secular Social Services

The Establishment Clause of the Constitution does not require the Department of Housing and Urban Development to deny grants to religious organizations that engage in religion-based employment discrimination or to deny grants for rehabilitation, reconstruction, or construction of facilities that are owned by religious organizations.

Department of Housing and Urban Development prohibition on use of grant funds for religious counseling or use of grant funds to provide services in a facility in which sectarian or religious symbols are displayed is not more restrictive than the Establishment Clause requires.

September 14, 1988

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION

Introduction and Summary

This memorandum responds to your request for our opinion on whether certain regulations of the Department of Housing and Urban Development restrict the participation of religious organizations in the Community Development Block Grant ("CDBG") and Emergency Shelter Grant programs to a greater degree than is required by the Constitution. According to Mike Antonovich, Chairman of the Board of Supervisors of Los Angeles County, these regulations are keeping the Salvation Army from obtaining a Community Development Block Grant to provide emergency shelter and food to the homeless. In a memorandum ("Memorandum") submitted to you last November, Frank Atkinson suggested that HUD's ban on religious counseling exceeds Establishment Clause requirements and may transgress the Free Exercise Clause. The Memorandum therefore recommended that the Legal and Regulatory Policy Working Group develop an administration policy to enable religious organizations to participate in the delivery of government-assisted social services to the maximum extent permissible under the First Amendment.

The restrictions to which the Salvation Army objects are generally not embodied in formal rules, but rather are contained in an addendum that HUD requires as part of its grant agreement with religious organizations. The addendum states that the grantee agrees (1) not to discriminate against any employee or applicant for employment on the basis of religion in connection with the program

receiving the grant,[1] (2) not to discriminate on the basis of religion in the provision of funded services, (3) not to provide any religious instruction or counseling in connection with the program[2], and (4) not to display any sectarian or religious symbols or decorations in any portion of the facility used to conduct the program. The addendum further provides that no federal funds may be used to construct, rehabilitate, or restore any facility owned by a religious organization, except that "minor repairs" that are directly related to the provision of public services and that constitute in dollar terms only a minor portion of the federal grant may be made to a facility used exclusively for non-religious purposes.

For the reasons stated below, we believe that HUD's addendum interferes with religious organizations' ability to participate in the CDBG program in several respects not mandated by the Establishment Clause. First, we believe neither the Constitution nor the applicable statutes require religious organizations to refrain from discrimination on the basis of religion in employment as a condition of their receipt of funds under the Community Development Block Grant program. We also believe that the restriction on the use of federal funds to construct, rehabilitate, or restore facilities owned by religious organizations is more severe than current jurisprudence under the Establishment Clause requires. So long as religious organizations agree to dedicate facilities constructed, rehabilitated or restored with federal funds to secular purposes in perpetuity, the strictures mandated by Establishment Clause jurisprudence are satisfied. Finally, the prohibitions of religious instruction or counseling and religious symbols are acceptable so long as they are reasonably interpreted in light of the facts of each case. *See infra* note 17 and accompanying text.

After analyzing these restrictions under current Establishment Clause jurisprudence we review the Supreme Court's recent decision in *Bowen v. Kendrick*, 487 U.S. 589 (1988) and discuss its general implications for the participation of religious organizations in secular social welfare programs.

Analysis

A. Amos Case and HUD's Restrictions Prohibiting Discrimination in Employment

In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 438 U.S. 327 (1987), the Supreme Court upheld against

[1] In addition to this provision of the addendum, HUD's formal regulations for the Community Development Block Grants program require grantees "to document the actions undertaken to assure that no person, on the ground of race, color, national origin, religion, or sex, has been excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under any activity funded under this part." 24 C.F.R. § 570.900(c)(1) (1988); *see also* 49 Fed. Reg. 43,852, 43,899 (1984) (to be codified at 24 C.F.R. § 570.904(a)) (proposed Oct. 31, 1984).

[2] The HUD addendum provides that the grantee "agrees that, in connection with such public services[,] . . . it will provide no religious instruction or counseling, conduct no religious worship or services, engage in no religious proselytizing, and exert no other religious influence in the provision of such public services."

an Establishment Clause challenge an exemption from title VII's ban on religious discrimination in employment for "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." *Id.* at 330 n.1. Specifically, the Court held that exemption satisfied the three-part test set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), for determining whether government assistance to religion is permissible under the Establishment Clause. The Court held that the law passed muster under the first prong of the *Lemon* test, which requires that legislation serve a secular purpose, because its purpose was to limit governmental interference with the exercise of religion. *Id.* at 335–36. The Court held that the exemption did not have the primary purpose of advancing religion, and thus passed the second prong of the *Lemon* test, because it did not increase the capacity of religious institutions to propagate their religion beyond that which the institutions possessed prior to enactment of title VII. *Id.* at 337. Finally, the Court concluded that the statute did not impermissibly entangle church and state, the third prong of the *Lemon* test, because it effected a complete separation between churches and title VII. *Id.* at 339.

Amos establishes that the Constitution permits an exemption for religious organizations from an otherwise generally applicable prohibition on religious discrimination in employment and therefore suggests that HUD is not constitutionally obligated to require grantees to refrain from religious discrimination in hiring. *Amos*, however, does not conclusively resolve the issue of whether HUD's regulation prohibiting religious discrimination in employment is required by the Establishment Clause, because *Amos* does not address whether an organization that practices religious discrimination in employment is a "pervasively sectarian" institution and therefore more likely to be ineligible to receive government financial assistance under current Supreme Court caselaw.[3] Although we have found

[3] We do not believe that *Amos* itself implies that there is an identity between the class of institutions that are characterized as "pervasively sectarian" under the Establishment Clause and those that qualify for the exemption. The exemption at issue in *Amos* applied to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1. Nothing in the language of the statute suggests that the exemption is available only to those religious organizations that are characterized "pervasively sectarian" as a matter of constitutional jurisprudence. *See, e.g., Hunt v McNair*, 413 U.S. 734, 743 (1973) (referring to "pervasively sectarian" institutions as those "in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission"). Indeed, since the only institutions that have actually been held to be "pervasively sectarian" are parochial schools, equating "religious" with "pervasively sectarian" would appear substantially to narrow the scope of the exemption.

The facts of the *Amos* case itself indicate that the exemption is available to religious organizations that are not "pervasively sectarian." The individual whose case was before the Supreme Court was employed as a building engineer at the Deseret Gymnasium, a non-profit facility operated by the Mormon Church. 183 U.S. at 330. The district court had specifically found that "there is nothing in the running or purpose of Deseret that suggests that it was intended to spread or teach the religious beliefs and doctrine and practices of sacred ritual of the Mormon Church or that it was intended to be an integral part of church administration. Rather, its primary function is to provide facilities for physical exercise and athletic games. Deseret is open to the public for annual membership fees or for daily or series admission fees." *Amos v Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 594 F. Supp. 791, 800–01 (D. Utah 1984) (footnotes omitted), *modified*, 618 F. Supp. 1013

no case in which this question is squarely presented, we believe the fact that an organization practices religious discrimination in hiring does not preclude government financial assistance in a manner otherwise compatible with the Establishment Clause.

There is no precise definition of a "pervasively sectarian" institution. In *Hunt v. NcNair*, 413 U.S. 734 (1973), the Court referred to institutions "in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." *Id.* at 743. In *Roemer v. Maryland Public Works Board*, 426 U.S. 736 (1976), the Court defined a "pervasively sectarian" institution somewhat tautologically as an institution "so permeated by religion that the secular side cannot be separated from the sectarian." *Id.* at 759.[4]

In practice, the concept of the "pervasively sectarian" institution has been applied only in the context of aid to church-related schools. Courts have generally found that church-related elementary and secondary schools are "pervasively sectarian," while most post-secondary institutions have been deemed sufficiently secular to permit government assistance. In making these determinations, courts have looked at a variety of factors, including the degree of control by religious organizations, whether the school or its curriculum has the purpose of teaching and promoting a particular religious faith, whether there are religious restrictions on admission to the school, whether there are required courses in theology or religious doctrine, whether participation in religious exercises is required, and whether the school is an integral part of the sponsoring organization's religious mission.[5] In particular, two appellate courts have considered restrictions or pref-

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[3] (. . . continued)

(D. Utah 1985), *rev'd*, 483 U.S. 327 (1987). The Supreme Court never disputed these findings of the district court Indeed, the only reference in the majority opinion to the religiosity of the Deseret Gymnasium was a quotation from the Dedicatory Prayer offered at the opening of the facility "[may] all who assemble here, and who come for the benefit of their health, and for physical blessings, may feel that they are in a house dedicated to the Lord." 483 U.S. at 337. Based on the evidence adduced by the Supreme Court, the Deseret Gymnasium does not appear to be a "pervasively sectarian" institution under Establishment Clause jurisprudence

[4] In addition to the lack of a precise definition of "pervasively sectarian" institution, members of the Court differ with respect to the significance of such a determination For example, Justice Kennedy, in his concurring opinion in *Bowen* for himself and Justice Scalia, indicates some skepticism about the utility of the "pervasively sectarian" concept. "The question in an as-applied challenge is not whether the entity is of a religious character, but how it spends its grant." 487 U.S. at 624–25. The separate concurrence of Justice O'Connor as well suggests that the proper inquiry is whether any public funds have been used to promote religion 487 U.S. at 622. Even Justices Blackmun, Brennan, Marshall, and Stevens in dissent in *Bowen* indicated that "the Constitution does not prohibit the government from supporting secular social-welfare services solely because they are provided by a religiously affiliated organization " 487 U.S. at 640 Significantly for the matter under review, the dissent stated "[t]here is a very real and important difference between running a soup kitchen or a hospital, and counseling pregnant teenagers " *Id.* at 641. Thus, the dissent suggests the importance of evaluating the substantive nature of the use of public funds. Confusingly, the dissent also indicated that the label "pervasively sectarian" may serve in some cases as a proxy for a more detailed analysis of the institution, the nature of the aid, and the manner in which the aid may be used. *Id* at 633, *see also Roemer v Maryland Pub. Works Bd* , 426 U S. 736, 758 (1976).

[5] *See, e g., Felton v Secretary, United States Dep't of Educ.*, 739 F 2d 48 (2d Cir. 1984), *aff'd sub nom. Aguilar v. Felton*, 473 U.S. 402 (1985).

erences in hiring as one factor that may be indicative of a "pervasively sectarian" institution.[6]

We do not believe, however, that these cases establish that any organization providing social services that limits employment opportunities to adherents of a single faith is "pervasively sectarian." Again, the only entities which have been found by the courts to be "pervasively sectarian" are parochial schools. In contrast, religiously affiliated colleges—even those that grant preference in admissions or hiring to members of the sponsoring faith—have generally not been deemed pervasively sectarian. *See Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971). Moreover, even those members of the Court more apt to find an institution to be pervasively sectarian have indicated that the Establishment Clause poses fewer obstacles to the involvement of religious organizations when the activity is not aimed at the "shaping [of] belief and changing behavior," but "neutrally dispensing medication, food or shelter."[7] We therefore believe that the few cases ascribing significance to discrimination in hiring by parochial schools in determining whether such schools are "pervasively sectarian" are of limited relevance when applied to the subject under review.[8]

Nor does any statute require HUD to prohibit CDBG grantees from limiting employment opportunities on the basis of religion. The statute creating the CDBG program, title I of the Housing and Community Development Act of 1974, Pub. L. No. 93–383, 88 Stat. 633 (codified as amended at 42 U.S.C. §§ 5301–5320), does not require prohibition of religious discrimination in employment.[9] More-

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[6] The Second Circuit held that parochial schools receiving title I assistance were "pervasively sectarian" because, inter alia, they were part of a "system in which religious considerations play a key role in the selection of students and teachers, and which has as its substantial purpose the inculcation of religious values." *Felton v. Secretary, United States Dep't of Educ.*, 739 F 2d 48, 68 (2d Cir 1984), *aff'd sub nom. Aguilar v Felton*, 473 U.S. 402 (1985); *see also Cuesnongle v. Ramos*, 713 F.2d 881, 883 (1st Cir. 1983) (attributes of a "pervasively sectarian" institution include religion-based admission policies).

[7] *Bowen v. Kendrick*, 487 U S. 641 (1988) (Blackmun, J., dissenting)

[8] The Memorandum for John J Knapp, General Counsel, Department of Housing and Urban Development, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel (July 1, 1983) ("Olson Memorandum") which stated that "[A]n institution that grants preferences to members of a particular creed would by definition be a pervasively sectarian organization," Olson Memorandum at 19, is not to the contrary. That comment was made in the context of religious discrimination among potential beneficiaries of government-funded social service programs. While that comment may at some point require re-examination, we need not here reach the constitutional issue of whether discrimination among beneficiaries makes an institution "pervasively sectarian," because, as discussed below, the statute creating the CDBG program prohibits religious discrimination in the provision of services. *See infra* note 10.

[9] Section 109 of the 1974 Act (42 U.S.C. § 5309) provides that "[n]o person in the United States shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this chapter," but does not forbid religious discrimination Section 104(b)(2) of the Act (42 U.S.C § 5304(b)(2)) further requires grantees to certify that their grants "will be conducted and administered in conformity with Public Law 88–352 and Public Law 90–284." Public Law No. 88–352 is the Civil Rights Act of 1964, 78 Stat 241 (codified as amended at 28 U S.C. § 1447, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6), and Public Law No. 90–284 is the Civil Rights Act of 1968, 82 Stat. 73 (codified as amended in scattered sections of 18 U.S.C., 42 U.S C , 25 U.S.C. §§ 1301–1341, 28 U.S.C. § 1360 note). No provision of the latter act relates to discrimination in employment.

over, although title VI of the Civil Rights Act of 1964 contains a general prohibition of discrimination in federally assisted programs on the ground of race, color, or national origin, 42 U.S.C. § 2000d, religious discrimination is not prohibited.[10]

The only other arguably relevant provision of the 1964 Act is title II, the public accommodations provision, which provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a). Although barring religious discrimination by places of public accommodation, this section does not apply to the employment practices of such establishments but only to their provision of services. Accordingly, it appears that the Housing and Community Development Act of 1974, whose certification provision incorporates by reference the Civil Rights Acts of 1964 and 1968, does not require religious organizations to refrain from religious discrimination in employment in connection with activities funded under the Act.[11]

We therefore conclude that the Constitution not only permits the granting of an exemption to religious organizations from otherwise applicable prohibitions on religious discrimination in employment, but also that it permits government financial assistance to the organizations so exempted.[12] The act creating the block grant program does not require a prohibition on religious discrimination in hiring. Since HUD's regulations flatly prohibit this form of religious discrimination by grantees, they are more restrictive than required by law.

B. HUD's Restrictions Prohibiting Rehabilitation, Restoration and Construction Funds for Religious Organizations

The HUD regulations that prohibit use of federal funds to construct, rehabilitate, or restore any facility that is owned by a religious organization are also more restrictive than is constitutionally required. It is clear that there is no per se exclusion of religious institutions from the receipt of government aid under certain circumstances. As the Court has stated, "[r]eligious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736, 746 (1976).

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[10] Title VII of the 1964 Act does forbid discrimination, including religious discrimination, in employment, but also contains the exemption for religious organizations upheld in *Amos*. 42 U.S.C. § 2000e-1

[11] The same is not true of religious discrimination in the provision of funded social services. Title II of the Civil Rights Act of 1964, as indicated in the text, prohibits religious discrimination in places of public accommodation. Shelters appear to be places of public accommodation under the statute, since they constitute an "inn, hotel, motel, or other establishment which provides lodging to transient guests." 42 U S.C. § 2000a(b)(1). Other types of social service facilities may or may not fall under the statutory definition of places of public accommodation.

[12] It is also clear that mere receipt of government financial assistance will not transform the religious organization into a state actor subject to constitutional prohibitions on religious discrimination. *Rendell-Baker v Kohn*, 457 U.S. 830 (1982) (fact that public funds constituted between 90 and 99 percent of private school's budget did not satisfy under color of law requirement of 42 U.S.C. § 1983); *see also Blum v Yaretsky*, 457 U.S. 991 (1982); *Jackson v Metropolitan Edison Co.*, 419 U S 345, 350–53 (1974).

While the Court's recent decision in *Bowen* casts some doubt on the breadth or significance of the label "pervasively sectarian,"[13] the Court has in the past distinguished between those religious institutions that are "pervasively sectarian" and those that are not.[14] Government assistance to a "pervasively sectarian" religious institution has been generally thought to have the primary effect of advancing religion, *Hunt v. McNair*, 413 U.S. 734, 743 (1973), and therefore fail the second prong of the *Lemon* test. However, as discussed above, not all religious institutions are "pervasively sectarian," and the Court has sustained direct financial assistance to church-affiliated organizations, provided the three-part *Lemon* test is satisfied. *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736 (1976) (aid to church-affiliated college); *Hunt v. McNair*, 413 U.S. 734 (1973) (same); *Tilton v. Richardson*, 403 U.S. 672 (1971) (same); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (aid to hospital operated by religious order).

The seminal modern case on the permissibility of government assistance to religious institutions qua institutions is *Tilton v. Richardson*, 403 U.S. 672 (1971). Earlier cases such as *Everson v. Board of Educ.*, 330 U.S. 1 (1947), and *Board of Educ. v. Allen*, 392 U.S. 236 (1968), had upheld the constitutionality of public assistance in the context of parochial schools on the theory that the aid went to the students, not to the schools themselves. "The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Everson v. Board of Educ.*, 330 U.S. at 18. "[N]o funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." *Board of Educ. v. Allen*, 392 U.S. at 243–44. *Tilton* is the first modern case to permit direct financial assistance to religious institutions.[15]

In *Tilton* the Supreme Court upheld the constitutionality of awarding construction grants under the federal Higher Education Facilities Act of 1963 to church-related colleges and universities. The Act established a program, administered by the Commissioner of Education, to provide grants and loans to institutions of higher education for the construction of academic facilities. The Act specifically excluded

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[13] *See supra* note 5

[14] This Office has already repudiated any inference from the Olson Memorandum that organizations such as the Salvation Army, B'nai B'rith, and the Young Men's Christian Association are "pervasively sectarian." *See* Letter for Stuart C. Sloame, Deputy General Counsel, Department of Housing and Urban Development, from Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel (Dec. 1, 1986) ("Kmiec letter"), *reprinted in HUD's Proposed Regulations Denying Funds to Religious Groups for Sheltering the Homeless Hearings Before a Subcomm of the House Comm. on Government Operations*, 100th Cong., 1st Sess. 111–12 (1987).

[15] An intermediate case bridging the student benefit cases and the direct aid cases is *Walz v. Tax Comm'n*, 397 U.S 664 (1970) There the Court sustained the constitutionality of a property tax exemption for property owned by religious organizations. Although a tax exemption is the economic equivalent of a subsidy, as the Court has recognized in other contexts, *see Regan v. Taxation With Representation of Washington*, 461 U S. 540, 544 (1983)("Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income."), the Court in *Walz* clearly distinguished tax exemptions from subsidies for purposes of legal analysis "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." 397 U.S at 675.

from eligibility for federal financing, however, "any facility used or to be used for sectarian instruction or as a place for religious worship."

The Court found that the Act clearly had a legitimate secular purpose, namely encouraging and assisting colleges and universities to expand opportunities for higher education. A more difficult question was whether the Act, despite its legitimate secular objective, nevertheless had the primary effect of advancing religion. The Court noted that "[T]he simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield v. Roberts*, 175 U.S. 291 (1899)." *Tilton v. Richardson*, 403 U.S. 672, 679 (1971). The Court then proceeded to examine the use of federal assistance by the recipient institutions to determine whether the program had the effect of advancing religion.

The Court found that the Act "was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function" of the grantee. *Id.* at 679. The colleges whose grants were before the Court had scrupulously observed these restrictions and presented uncontradicted evidence that "there had been no religious services or worship in the federally financed facilities, that there are no religious symbols . . . in or on them, and that they had been used solely for nonreligious purposes." *Id.* at 680. On this basis the Court concluded that the federally funded buildings were "indistinguishable from a typical state university facility." *Id.*

Moreover, the Court found that, unlike elementary and secondary parochial schools, religious indoctrination was not a substantial purpose or activity of church-related colleges. *Id.* at 680, 681. Accordingly, "there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education." *Id.* at 687. That in turn "reduces the risk that government aid will in fact serve to support religious activities," thereby diminishing the need for intensive government surveillance and reducing to an acceptable level the entanglement between government and religion. *Id.*[16] The Court therefore concluded that the inclusion of church-related schools in the grant program did not violate the Establishment Clause.

Hunt v. McNair and *Roemer v. Maryland Public Works Board* involved similar programs at the state level. At issue in *Hunt* was a South Carolina statute that provided for the issuance of revenue bonds by a state authority to finance facilities at colleges and universities. The Court rejected a facial challenge to the participation of church-related colleges in the program for the same reasons set forth in *Tilton*.

In *Roemer* the Court upheld the constitutionality of noncategorical grants to church-related colleges, so long as the grants were not used for sectarian purposes. Justice Blackmun's plurality opinion in *Roemer* is perhaps the most forceful statement of the propriety of allowing religious organizations to participate in secular assistance programs. Recognizing the impossibility of any "hermetic separation" between church and state, Justice Blackmun noted that "[i]t long has

[16] The Court also found that the Act did not violate the Free Exercise rights of taxpayers who objected to the grants to church-related schools. 403 U.S. at 689.

been established . . . that the State may send a cleric, indeed even a clerical order, to perform a wholly secular task." *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736, 746 (1976). The Court not only rejected the notion that "a religious person can never be in the State's pay for a secular purpose," it suggested that exclusion because of religion would itself be unconstitutional. *Id.* at 746 & n.13. *Tilton*, *Hunt*, and *Roemer* make it clear that a religious organization may participate in public programs of a secular nature on the same basis as nonsectarian organizations. The determinative factor for Establishment Clause purposes is not the religious nature of the facility's owner but the uses to which the facility is put. So long as a facility is used for secular purposes, and is permanently dedicated to those purposes, the Constitution permits governmental aid, even though the facility is owned by a religious institution. *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Bradfield v. Roberts*, 175 U.S. 291 (1899).[17]

[17] HUD itself apparently now recognizes "the vital and unique role religious organizations play in providing for individuals in need of shelter and other public assistance." 52 Fed. Reg. 38,864, 38,868 (1987) In its recently promulgated regulations for the Emergency Shelter Grants Program, HUD announced that federal funds can be used to renovate buildings owned by religious organizations if (1) the building or portion thereof that is to be improved with HUD funds is leased to a wholly secular entity, (2) the HUD funds are provided solely to the secular lessee, (3) the leased premises are used exclusively for secular purposes and are available to all persons regardless of religion, (4) the lease payments do not exceed the fair market rent of the premises before the improvements are made, (5) the portion of the cost of any improvements that also serve non-leased areas of the building is allocated to and paid by the lessor, (6) the lessor agrees that, unless the lessee or another secular successor retain the leased premises for wholly secular purposes for at least the useful life of the improvements, the lessor will pay to the lessee an amount equal to the residual value of the improvements, and (7) the lessee permits any payments for the residual value of improvements to the State or local government agency that made the original grant, or to HUD in the case of a direct grant. 52 Fed. Reg. 38,864, 38,870 (1987) (to be codified at 24 C.F.R. § 575.21(b)(2)).

We believe that the leasing arrangement required by the regulations is not constitutionally necessary and therefore should not be mandated by HUD. It is clear that religious organizations may participate on an equal footing with secular organizations in general assistance programs. The Supreme Court has recently reaffirmed this principle, noting that "this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Bowen v. Kendrick*, 487 U.S. 589, 608 (1988). Leasing arrangements under the terms specified in the HUD regulations might enhance the acceptability, however, of a religious organization running a homeless shelter under the Emergency Shelter grant program within a highly sectarian structure like a church building. The leasing provisions might be prudentially retained, therefore, but with the qualification that they apply only where a religious organization wishes to utilize space within a highly sectarian building of this variety.

This is not to state that such leasing arrangements are constitutionally required even in this context. Given the Court's newly-expressed preference to review Establishment Clause challenges on an as-applied, rather than facial, basis, and the suggestion by even the dissenting members of the Court in *Bowen v. Kendrick* that "soup kitchen"-like functions are more tolerably supplied by religious organizations, it may be that the Court would sustain the operation of a publicly-funded emergency homeless shelter even, perhaps, in the Church proper, despite the presence of permanently affixed religious symbols therein, provided the shelter was operated without religious counseling or in a manner designed to inculcate the views of religious faith. The willingness of the Court to accept the use of such a facility will likely depend, however, on the severity of the particular emergency housing need and the willingness of the church to demonstrate clearly that only secular assistance will be provided. The point is simply that the Court has indicated that Establishment Clause principles ought not be applied in a sweeping, mechanical fashion. Moreover, where a recipient of public funds has applied them in a manner inconsistent with the Clause, "an appropriate remedy would require the Secretary to withdraw [grant approval for that recipient]." 487 U.S. at 621

Despite the somewhat more generous attitude displayed by HUD's shelter regulations, we are informed that HUD still requires grantees under both the Community Development Block Grant and Emergency Shelter Grant programs to execute the special addendum to the grant agreement.

C. HUD's Prohibitions on Religious Counseling and Religious Symbols

On its face, HUD's prohibition on religious counseling and religious symbols would not appear to be more restrictive than required by the Establishment Clause. The Supreme Court's Establishment Clause cases presuppose that government is providing secular assistance to be used for only secular purposes.

Although it is clear beyond peradventure that the government cannot subsidize religious counseling by the Salvation Army, there is nothing precluding HUD from subsidizing the Army's secular program for the homeless (food and shelter) if it can be meaningfully and reasonably separated from the Army's sectarian program (religious counseling). Constitutional difficulty only arises when the secular component is inseparable from the sectarian component to permit government assistance.

Thus, as a constitutional matter the Salvation Army cannot undertake religious counseling with public funds; however, it can accept public funds to provide food and shelter. If the facility used for the shelter program was not constructed, renovated, or maintained with public funds, it is theoretically possible for a portion of the facility to be used exclusively for the publicly-funded secular purpose of food and shelter and another portion to be used for the non-publicly funded sectarian purpose of religious counseling. Beyond this physical separation, HUD need only ensure that the Army's privately-funded religious activities are not offered as part of its shelter program and that the shelter program is not used as a device to involve the homeless in religious activities.[18] Assuming these conditions were met, the Salvation Army could both participate in the CDBG or Emergency Shelter Grant programs and fulfill its religious mission using a single facility.[19]

D. Bowen v. Kendrick

The Supreme Court's recent decision in *Bowen v. Kendrick*, 487 U.S. 598 (1988), upholding the participation of religious organizations in federally funded counseling programs under the Adolescent Family Life Act, Pub. L. No. 97–35, tit. IX, 95 Stat. 578 (codified as amended at 42 U.S.C. §§ 300z to 300z-10), reconfirms the analysis set forth above. Specifically, *Kendrick* makes it clear that religious organizations may participate in government-funded social welfare programs so long as they engage in only purely secular activities. *Kendrick* thus sup-

[18] The Court's recent decision in *Bowen v. Kendrick* indicates that outside of the parochial school context the monitoring necessary to ensure this separation will not entail excessive entanglement between church and state. 487 U.S. at 615–16.

[19] Moreover, we believe that HUD's addendum on religious counseling may be construed to permit such use, because if religious counseling is kept completely separate from the publicly funded services it is not "connected" with those services within the meaning of the addendum. Of course, if the facility was constructed, renovated, or maintained with public funds, then no religious activities could be permitted therein. However, it may be permissible to use public funds to construct, renovate or maintain a separable portion of the facility that would be permanently and exclusively devoted to secular activities. HUD's regulations for the Emergency Shelter Grant program contemplate this possibility. *See supra*, note 17.

ports our conclusion that the Salvation Army may receive federal funds for the purpose of sheltering the homeless.

At issue in *Kendrick* were grants awarded under the Adolescent Family Life Act ("AFLA") to religious organizations for counseling teenagers in the areas of adolescent premarital sexual relations, pregnancy, and parenthood. The Court firmly rejected the claim that the mere participation of religious organizations as grantees under AFLA was unconstitutional. Relying on a long line of cases upholding government assistance to religious organizations dating back to 1899, the Court disavowed the notion that "religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988). So long as the assistance does not have the effect of advancing religion, religious institutions may participate in general social welfare programs on an equal footing with secular organizations.

The Court also disagreed with the claim that government funding of religious organizations in activities, even though otherwise purely secular, that involved fundamental matters of religious doctrine created a "symbolic link" between church and state that violated the Establishment Clause. *Id.* at 613. The Court noted that acceptance of this argument would always preclude any aid to religious organizations. *Id.* at 613.

Moreover, the Court squarely rejected the argument that funding such organizations under AFLA may lead to an "excessive government entanglement with religion" and thus violate the third prong of the *Lemon* test. *Id.* at 615. Noting that this prong of the *Lemon* test had been much criticized over the years, the Court explained that cases that had found entanglement had involved aid to parochial schools, which were "pervasively sectarian" and had "as a substantial purpose the inculcation of religious values." *Id.* at 616. In contrast, the Court noted that there was no reason to assume that the religious organizations eligible for AFLA funds are pervasively sectarian and thus no reason to fear that the kind of monitoring required will lead to excessive entanglement. *Id.*

The Court's opinion in *Kendrick* thus stands for several important propositions. First, it makes clear that religious organizations may fully participate in government social programs even when these programs include moral teaching. A fortiori, religious organizations are eligible to participate in the provision of government-subsidized care for the poor. Second, the Court's opinion seems to signal a relaxation of the entanglement prong of the *Lemon* test. Unless the institutional context in which the religious organization operates is so pervasively sectarian as to be akin to a parochial school, the government will be permitted to monitor religious organizations to assure that public money is spent in a constitutional manner.[20]

[20] We believe that the Supreme Court's conclusion with respect to excessive entanglement in *Kendrick* fatally undermines the Olson Memorandum's argument that, in order to avoid excessive entanglement, religious organizations could participate in the section 202 program only through separate, nonreligious entities. The memorandum reasoned that participation by religious organizations in the section 202 program would require a degree of "administrative oversight [that] would necessarily involve an excessive government entanglement with religion." Olson Memorandum at 13.

On the other hand, *Kendrick* did not address the degree to which and the means by which organizations must keep separate their religious activities from the activities funded by the government. Because the Supreme Court decided only the facial validity of the statute, leaving the validity of the statute as applied to the district court on remand, *Kendrick* provides little guidance on the issue of the degree of separation required between the government-funded secular activities and the privately funded sectarian activities of a religious grantee. It is clear, however, that at least some of the religious grantees did not maintain the constitutionally required separation between their religious mission and their secular function under AFLA. The Government's brief in Kendrick conceded that there were "departures from proper constitutional principles in individual AFLA programs," Brief for the Appellant at 40, *Bowen v. Kendrick*, 487 U.S. 589 (1988), and the Court explicitly acknowledged that "the record contains evidence of specific incidents of impermissible behavior by AFLA grantees." 487 U.S. at 620.[21] Accordingly, *Kendrick* does not in any way establish that religious organizations may use public funds in connection with promotion of religious views or practices. The Supreme Court has ruled only that religious organizations may participate on an equal basis in secular government assistance programs; *Kendrick* does not suggest that the Court would be amenable to relaxing the degree to which these organizations must separate their religious functions from their government-funded secular activities.

Conclusion

For the reasons set forth in this memorandum, we believe that HUD's grant prohibitions on religious discrimination in employment and its limitation on grants for rehabilitation, restoration or construction of facilities owned by religious organizations but devoted to secular purposes are not required by the Constitution. We do not believe that HUD's addendum prohibitions of religious counseling and religious symbols are more restrictive than the Establishment Clause requires so long as they are reasonably applied. Finally, the prohibition relating to discrimination against program beneficiaries is consistent with constitutional and statutory requirements.

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

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[20] (. . continued)

Kendrick is clearly to the contrary. If the Court rejected an excessive entanglement attack in the context of a program such as AFLA, which involved counseling of adolescents on secular matters which frequently coincided with religious values, a fortiori it would not sustain such an attack in the context of a program that provided nonpedagogical assistance with no religious connotation, such as food, clothing, and shelter. For a disavowal of an expansive interpretation of the Olson Memorandum's concept of "pervasively sectarian," see the Kmiec letter at note 15.

[21] The district court had found that at least one grantee had included "spiritual counseling" as part of its services, that numerous grantees conducted their programs in facilities adorned with religious symbols, and that several grantees had presented privately funded religious counseling immediately after the government-funded AFLA counseling. *Kendrick v. Bowen*, 657 F. Supp. 1547, 1566 (D.D.C. 1987)

Whether a Federal Prisoner Worker is an "Employee" Within the Meaning of Certain Federal Statutes

A federal prisoner worker is not an "employee" within the meaning of section 23 of the Toxic Substances Control Act, section 312 of the Clean Air Act Amendments of 1977, or section 3 of the Occupational Safety and Health Act of 1970.

September 19, 1988

MEMORANDUM OPINION FOR THE ACTING ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

This memorandum responds to the July 17, 1987, request of former Assistant Attorney General Weld to Assistant Attorney General Markman that the Federal Legal Council resolve the question of whether a federal inmate who complains about his working conditions is an "employee" within the meaning of section 23 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2622, and of section 312 of the Clean Air Act Amendments of 1977 ("CAAA"), 42 U.S.C. § 7622.[1] Subsequently, on August 4, 1987, Assistant Attorney General Markman referred this matter to the Office of Legal Counsel for resolution.[2] Following the referral of this matter to our Office, we were asked by Victor D. Stone, Senior Legal Advisor, Criminal Division, to also address the question of whether a federal inmate is an "employee" within the meaning of section 3 of the Occupational

[1] *See* Memorandum for Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, from William F. Weld, Assistant Attorney General, Criminal Division, *Re Request for Federal Legal Council Resolution in Interagency Jurisdictional Disagreement Between the Bureau of Prisons and the Department of Labor* (July 17, 1987) ("Weld Memo"). This request for a Federal Legal Council opinion was made in light of the Bureau of Prison's disagreement with a ruling by a United States Department of Labor administrative law judge, holding that a federal inmate is an "employee" for purposes of TSCA and the CAAA *Plumley v Federal Bureau of Prisons*, No. 86-CAA-6 (Dec. 31, 1986). Subsequently, on July 20, 1987, the Labor Department entered into a settlement agreement with the prisoner whose complaint had given rise to the administrative law judge's ruling. Assistant Attorney General Weld's Memorandum stated that, in light of the then-imminent settlement of the *Plumley* case, "[a] resolution [of this legal issue] by the Federal Legal Council, therefore, is urgently requested before future lawsuits are filed which lead to new discovery demands, fees and costs, attorney time, and serious agency conflict " Weld Memo at 2.

[2] Memorandum for Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, from Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, *Re: Interagency Jurisdictional Disagreement Between the Bureau of Prisons and the Department of Labor* (Aug. 4, 1987). Assistant Attorney General Markman's memorandum stated that "the Federal Legal Council [is not authorized] to resolve legal disputes submitted to the Attorney General . . . . [T]he resolution of interagency disputes is usually within your Office's [the Office of Legal Counsel's] jurisdiction."

Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. § 652. For the reasons set forth below, we conclude that a federal inmate is not an "employee" within the meaning of these statutory provisions.[3]

Discussion

Former Assistant Attorney General Weld's original request required that we address the scope of statutory provisions prohibiting employers from discriminating against "whistleblowing" employees who participate in enforcement proceedings brought under TSCA and the Clean Air Act ("CAA"). Because the language of 15 U.S.C. § 2622 and 42 U.S.C. § 7622 is virtually identical, we analyze these two statutes in tandem. After discussing these two statutory provisions, we turn to the meaning of "employer" and "employee" as defined in section 3 of OSHA.

Both the TSCA provision, Pub. L. No. 94–469, § 23, 90 Stat. 2044 (1976) (codified at 15 U.S.C. § 2622), and the CAAA provision, Pub. L. No. 95–95, § 312, 91 Stat. 783 (1977) (codified at 42 U.S.C. § 7622), begin by setting forth identical clauses prohibiting an "employer" from "discharg[ing] . . . or otherwise discriminat[ing]" (with respect to "compensation, terms, conditions, or privileges of employment") against an "employee" who "commence[s]," "testifie[s]," "assist[s]," or "participate[s]" in TSCA and CAA proceedings directed against the employer. 15 U.S.C. § 2622(a); 42 U.S.C. § 7622(a).[4] In order to remedy prohibited discharges or other acts of discrimination, these two statutes authorize "[a]ny employee" to "file . . . a complaint with the Secretary of Labor alleging such discharge or discrimination." 15 U.S.C. § 2622(b)(1); 42 U.S.C. § 7622(b)(1). If the Secretary finds a violation, he is empowered to order the violator "to reinstate the complainant to his former position together with the com-

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[3] The Environmental Protection Agency concurs in our view that section 23 of TSCA and section 312 of the CAAA do not apply to federal inmates Letter for John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, from Lawrence J. Jensen, Acting General Counsel, Environmental Protection Agency (Aug. 11, 1988). In a letter to this Office, the Department of Labor expressed no opinion on the merits of the question whether federal inmates are "employees" within the meaning of OSHA, TSCA, and the CAAA. Letter for John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, from George R. Salem, Solicitor of Labor (Aug. 30, 1988).

[4] 42 U.S.C. § 7622(a) states.

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) —
>
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan;
>
> (2) testified or is about to testify in any such proceeding; or
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter

15 U.S.C § 2622(a) is in all material respects identical. In the context of section 2622(a), "chapter" refers to chapter 53 of title 15 of the United States Code ("Toxic Substances Control"), 15 U.S C §§ 2601–2629; in the context of § 7622(a), "chapter" refers to chapter 85 of title 42 of the United States Code ("Air Pollution Prevention and Control"), 42 U.S.C. §§ 7401–7642.

pensation (including back pay), terms, conditions, and privileges of his employment," plus compensatory damages. 42 U.S.C. § 7622(b)(2)(B); *see also* 15 U.S.C. § 2622(b)(2)(B) (materially identical provision).[5]

Neither TSCA nor the CAA (including the 1977 CAAA), nor the legislative histories of those statutes, defines the terms "employee" and "employer." Nevertheless, the meaning of these words as they apply to the employer-employee relationship can be drawn implicitly from the requirements set forth in 15 U.S.C. § 2622 ("TSCA provision") and 42 U.S.C. § 7622 ("clean air provision"), summarized above. Both the TSCA provision and the clean air provision seek to prevent an employer from discharging or otherwise discriminating against a "whistleblowing" employee (*i.e.*, an employee who brings the employer's environmental health and safety derelictions to light). In particular, the two provisions prohibit discrimination with respect to "terms, conditions, or privileges of employment." Furthermore, both provisions provide that an employee wrongfully discriminated against shall be reinstated to his former position, subject to the same compensation (including back pay), terms, conditions, and privileges he previously enjoyed. It follows that both the TSCA provision and the clean air provision contemplate "traditional" contractually based employer-employee relationships, in which an employee obtains an agreed-upon compensation and certain privileges by virtue of his employment. In other words, the TSCA and clean air provisions envision an employment relationship in which an "employee" is "[a] person in the service of another *under any contract of hire, express or implied, oral or written*," Black's Law Dictionary 471 (5th ed. 1979) (emphasis added).

Section 3 of OSHA, 29 U.S.C. § 652, sets forth definitions applicable to chapter 15 of title 29 of the United States Code. Section 3(5) defines an "employer" as "a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State." Section 3(6) states that an "employee" is "an employee of an employer who is employed in a business of his employer which affects commerce." The latter definition plainly comports with the understanding that an "employee" is "[a] person in the service of another a non-government employer under any contract of hire, express or implied, oral or written." Black's Law Dictionary at 471.

In contrast, federal prisoners clearly are not parties to a contractually based employer-employee relationship as contemplated in TSCA, the CAAA, or OSHA. A federal prisoner is "committed, for such term of imprisonment as the sentencing court may direct, to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served." 18 U.S.C. § 4082(a). Thus, since a federal prisoner is, by definition,

[5] An aggrieved employee or employer may obtain review of the Secretary's order in the United States Court of Appeals for the circuit in which the violation of subsection (a) allegedly occurred. 15 U.S.C. § 2622(c); 42 U.S.C. § 7622(c). Under the TSCA provision, the Secretary "*shall*" file a civil action in United States district court whenever a person has failed to comply with a subsection (b)(2) order 15 U S.C § 2622(d) The Secretary "*may*" file such an action under the parallel CAAA provision 42 U S.C. § 7622(d).

"*[o]ne who is deprived of his liberty*," Black's Law Dictionary at 1075 (emphasis added), he cannot freely enter into a contract of employment. That federal prisoners are legally *incapable* of entering into "any contract of hire" is underscored by the fact that the work they perform involves *involuntary servitude. See Emory v. United States*, 2 Cl. Ct. 579, 580 (rejecting federal prisoner's claim that his being required to work amounts to unconstitutional "slave labor," since "the thirteenth amendment, in abolishing slavery and involuntary servitude, specifically adds the phrase 'except as a punishment for crime whereof the party shall have been duly convicted,' which covers the plaintiff[] [prisoner's] situation"), *aff'd*, 727 F.2d 1119 (Fed. Cir. 1983).

An examination of the terms under which federal prisoners are assigned work reinforces the conclusion that they are not "employees." The work rendered by federal prisoners is controlled by Federal Prison Industries ("FPI"), which "*shall* determine in what manner and to what extent industrial operations shall be carried on" by federal prisoners. 18 U.S.C. § 4122(a) (emphasis added). FPI's "board of directors *shall* provide employment for all physically fit inmates in the United States penal and correctional institutions," in a manner that minimizes competition with private industry. 18 U.S.C. § 4122(b) (emphasis added). The "employment" provided by FPI, however, does not establish a contractual employer-employee relationship between FPI and federal prisoners. As indicated by the language of 18 U.S.C. § 4122, a federal prisoner worker does *not* voluntarily enter into "any contract for hire"; rather, he is *assigned* work by FPI. Thus, in particular contrast to the "employees" covered by TSCA and the clean air provision, and by OSHA, a federal prisoner worker enjoys no "privileges" of employment.[6] Furthermore, unlike a typical employer, who is contractually bound to pay wages, FPI merely "*is authorized [but not required]* to employ" funds under its control "in paying, under rules and regulations promulgated by the Attorney General, compensation to inmates" who are assigned work. 18 U.S.C. § 4126(c) (emphasis added). Payments made by FPI are not a matter of contractual right. Instead, they are rendered "solely by congressional grace and governed by the rules and regulations promulgated by the Attorney General." *Sprouse v. Federal Prison Industries, Inc.*, 480 F.2d 1, 4 (5th Cir.), *cert. denied*, 414 U.S. 1095 (1973). *See also Garza v. Miller*, 688 F.2d 480 (7th Cir. 1982), *cert. denied*, 459 U.S. 1150 (1983) (federal prisoner has no proprietary or protected liberty interest in his job or his compensation).

Since the assignment of work to federal prisoners does not involve the type of employer-employee relationships envisioned in TSCA, the CAAA, and OSHA, we believe it follows logically that the protections those three statutes afford "em-

[6] As described above, the TSCA and clean air provisions prohibit discrimination with "regard to terms, conditions, or privileges of employment," and provide for the reinstatement of employees who are discharged due to discrimination, subject to the same "terms, conditions, or privileges " Federal prisoners, however, do not enjoy "privileges" of employment, since they *must* carry out the tasks set for them by FPI and adhere to the conditions specified by FPI. In addition, since federal prisoners are *required* to work (FPI "*shall* provide employment for *all* physically fit inmates"), they are not, of course, subject to discrimination *through discharge*

ployees" should not be deemed to extend to federal prisoners. Consistent with this conclusion, it is apparent that the TSCA and clean air "whistleblower" protections, as well as OSHA's definition of an "employee," logically should *not* be applied to federal prisoner workers.

Consistent with our conclusion that federal prisoners should not be viewed as "employees," Congress enacted a specific statutory provision, 18 U.S.C. § 4126, authorizing compensation for injuries suffered by federal prisoners in federal penitentiaries. In contrast, private-sector employees receive compensation for workplace injuries under state worker's compensation laws, and federal employees are compensated for injuries on the job under the terms of Federal Employees' Compensation Act, 5 U.S.C. §§ 8101–8173.[7] This divergence in statutory treatment suggests that Congress, in providing for the compensation of injured prisoner workers, viewed them as neither private-sector employees nor federal employees.

Our conclusion also draws additional support from judicial and administrative holdings. In the case of OSHA, an Acting Area Director of the Occupational Safety and Health Administration has opined that OSHA's statutory protections do not apply to federal prisoners. In a November 27, 1984, letter to Warden Calvin Edwards of the Federal Correctional Institution at Milan, Michigan, OSHA Acting Area Director Jerry M. Gillooly specifically conceded that OSHA's jurisdiction does not extend to federal prisoners working in the prison's sewage lift station and paint shop:

> Although OSHA exercises jurisdiction in Federal agency safety and health matters, *we do not believe our authority extends to prisoners*, inmates, or other institutionalized persons *as there does not appear to be an employer/employee relationship between the agency and the individual.* We, therefore, defer to your responsibility for the safety and health of inmates in your care.

Gillooly letter at 1 (emphasis added). In short, consistent with our analysis, OSHA has on at least one occasion conceded that federal prisoners do not fall within the ambit of employer-employee relationships covered by OSHA.

While no judicial or administrative decision deals with the applicability of TSCA or the CAA to federal prisoners, determinations bearing on other federal statutes are instructive. For example, the United States Claims Court has held that a federal prisoner is not an "employee" within the meaning of the Fair Labor Standards Act of 1938 and thus is not entitled to receive the minimum wages specified in that Act. *Emory v. United States*, 2 Cl. Ct. 579, *aff'd*, 727 F.2d 1119

[7] While certain provisions of 18 U.S.C. § 4126 are patterned after the Federal Employees' Compensation Act, the Supreme Court has recognized that "differing circumstances of prisoners and non-prisoners have led to differences in the way the two statutes protect their beneficiaries." *Berry v. Federal Prison Industries, Inc.*, 440 F. Supp. 1147, 1150 (N.D. Cal 1977) (citing *United States v. Demko*, 385 U.S. 149, 152 (1966)).

(Fed. Cir. 1983).[8] Consistent with that holding, the Claims Court recently ruled, in *Amos v. United States*, 13 Cl. Ct. 442 (1987), that federal prisoners supervised by cook foremen are not "employees" within the meaning of the Fair Labor Standards Act. Citing precedents, the Claims Court's decision, 13 Cl. Ct. at 445–46, contains a good discussion of why federal prisoners who are paid a nominal amount for work performed are not "employees":

> Clearly, the inmates provide a service to the government and are paid a minimal amount. Yet inmates are technically and realistically not employees. "Economic reality is the test of employment as bearing on the applicability of the FLSA." *Souder v. Brennan*, 367 F. Supp. 808 (D.D.C. 1973). The economic reality is that inmates are convicted criminals incarcerated in a penitentiary. *Sims v. Parke Davis & Co.*, 334 F. Supp. 774, 787 (E.D. Mich. 1971), *aff'd*, 453 F.2d 1259 (6th Cir. 1971), *cert. denied*, 405 U.S. 978, 92 S. Ct. 1196, 31 L.Ed. 2d 254 (1972). They are not civil servants. Inmates are not free to set their wages through negotiation or bargaining; they may not form unions or strike; and they may not quit work. Their service in vocational programs and their right to compensation is solely by legislative grace, primarily for their own benefit and rehabilitation. *Sprouse v. Federal Prison Industries, Inc.*, 480 F.2d 1 (5th Cir. 1973), *cert. denied*, 414 U.S. 1095, 94 S. Ct. 728, 38 L.Ed. 2d 553 (1973). They are not employed within the meaning of the federal FLSA regulation; thus, they are not employees.

Administrative determinations dealing with the status of prisoner workers comport with these case-law principles. In a January 4, 1945, letter to the Director of the Bureau of Prisons, the Acting Deputy Commissioner of the Internal Revenue Service opined that the withholding provisions of the Individual Income Tax Act of 1944 were inapplicable to the payments paid to federal prisoner workers. That letter stressed that the "nominal sums" paid federal prisoners for the work they perform "are gratuitous allowances provided by Federal law for the labor required *and are not wages arising out of a relationship of employment* within the meaning of the provisions of the Internal Revenue Code." Letter at 2 (emphasis added).

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[8] The court in *Emory* cited in support of its holding the case of *Alexander v. Sara, Inc*, 505 F. Supp. 1080 (M.D. La. 1981), *aff'd*, 721 F.2d 149 (5th Cir. 1983), which held that state prisoner inmates who participated in a blood plasma program operated by a private corporation were not "employees" for purposes of the Fair Labor Standards Act, since the ultimate control and regulation of the inmates remained with prison officials. According to the *Emory* court, although "[t]he Alexander case involved state prisoners, . . the same principle is pertinent in a case involving a federal prisoner." 2 Cl. Ct. at 580 n.1. At least four other federal district court decisions have held that prisoners are not "employees" within the meaning of the Fair Labor Standards Act. *Huntley v. Gunn Furniture Co*, 79 F. Supp. 110 (W.D. Mich. 1948); *Hudgins v Hart*, 323 F. Supp. 898 (E.D. La. 1971); *Sims v. Parke Davis & Co*, 334 F. Supp. 774 (E.D. Mich.), *aff'd*, 453 F.2d 1259 (6th Cir. 1971), *cert denied*, 405 U.S. 978 (1972); *Worsley v. Lash*, 421 F. Supp. 556 (N.D. Ind 1976). All of these decisions emphasized that prisoner workers are not parties to an employer-employee relationship.

The Treasury Department reaffirmed the non-employee status of federal prison inmates in Rev. Rul. 75–325, 1975–2 C.B. 415. According to that Ruling, "the relationship between the inmates and Federal Prison Industries, Inc., arises from the incarceration of the inmates on one hand and from the legal duty of the Corporation to provide rehabilitative labor on the other. *It is not the legal relationship of employer and employee.*" *Id.* (emphasis added). Summarizing this jurisprudence, the Criminal Division recently opined "that the nominal sums awarded to federal inmates employed in the federal correctional system do not constitute employee wages or other gross income for" income tax withholding purposes, since "*the classic employer-employee relationship does not exist in the federal prison industry setting*, and . . . the nominal sums awarded to working inmates represent[] a gratuitous allowance or rehabilitative incentive payment rather than wages or other earned income." Memorandum for W. Lawrence Wallace, Assistant Attorney General, Justice Management Division, from Stephen S. Trott, Assistant Attorney General, Criminal Division, *Re: IRS Reporting Requirements for Inmates Employed by Federal Prison Industries, Inc.* at 2 (Sept. 2, 1986) (emphasis added).

Taken together, these holdings provide substantial support for the proposition that federal laws affecting "employees" should not (absent specific language covering federal prisoners) be applied to federal prisoner workers, since those workers are not involved in a traditional employer-employee relationship with FPI. Accordingly, strong precedents drawn from other areas of federal law suggest that employee-related provisions of the CAA, TSCA, and OSHA are not applicable to the federal prison setting.

In summary, the TSCA and clean air whistleblower provisions, as well as OSHA's definition of "employee," apply to individuals who are parties to "employer-employee" relationships, as generally understood. In contrast, federal prisoner workers are not parties to contractual employment relationships; rather, they are subject to involuntary servitude. Thus, federal prisoners do not enjoy the rights commonly enjoyed by employees, such as the right to wages. It therefore follows that the TSCA whistleblower provision, the clean air whistleblower provision, and the OSHA definition of "employee," do not apply to federal prisoners.

Conclusion

For the foregoing reasons, we conclude that a federal inmate is not an "employee" within the meaning of 15 U.S.C. § 2622, 42 U.S.C. § 7622, or 29 U.S.C. § 652.

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

Application of Section 504 of the Rehabilitation Act To HIV-Infected Individuals

In the non-employment context, section 504 of the Rehabilitation Act protects symptomatic and asymptomatic HIV-infected individuals against discrimination in any covered program or activity on the basis of any actual, past or perceived effect of HIV that substantially limits any major life activity—so long as the HIV-infected individual is "otherwise qualified" to participate in the program or activity.

Section 504 applies in substance in the same way in the employment context. Subject to an employer making reasonable accommodation within the terms of its existing personnel policies, the symptomatic or asymptomatic HIV-infected individual is protected against discrimination if he or she is able to perform the duties of the job and does not constitute a direct threat to the health or safety of others.

September 27, 1988

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

Introduction and Summary

This memorandum responds to your request for an opinion on the application of section 504 of the Rehabilitation Act of 1973 ("Act"), 29 U.S.C. § 794, to individuals who are infected with the Human Immunodeficiency Virus ("HIV" or "AIDS virus"). You specifically asked us to consider this subject in light of *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). Congress has also sought to clarify the law in this area by amending the Rehabilitation Act to address directly the situation of contagious diseases and infections in the employment context. *See* Civil Rights Restoration Act of 1987, Pub. L. No. 100–259, § 9, 102 Stat. 28, 31 (1988) ("Civil Rights Restoration Act"). Although your opinion request was limited to the application of section 504 in the employment context, we have also considered the non-employment context because the President has directed the Department of Justice to review all existing federal anti-discrimination law applicable in the HIV infection context and to make recommendations with respect to possible new legislation.[1] *See* Memorandum for the Attorney General from President Ronald Reagan, 24 Weekly Comp. Pres. Doc. 1007 (Aug. 5, 1988).

[1] We defer to others in the Department to make the policy determinations necessary to recommend legislation, and, in keeping with the tradition of this Office, confine our analysis to matters of legal interpretation.

For the reasons stated below, we have concluded, with respect to the non-employment context, that section 504 protects symptomatic and asymptomatic HIV-infected individuals[2] against discrimination in any covered program or activity on the basis of any actual, past or perceived effect of HIV infection that substantially limits any major life activity[3]—so long as the HIV-infected individual is "otherwise qualified" to participate in the program or activity, as determined under the "otherwise qualified" standard set forth in *Arline*. We have further concluded that section 504 is similarly applicable in the employment context, except for the fact that the Civil Rights Restoration Act replaced the *Arline* "otherwise qualified" standard with a slightly different statutory formulation. We believe this formulation leads to a result substantively identical to that reached in the non-employment context: namely, that an HIV-infected individual is only protected against discrimination if he or she is able to perform the duties of the job and does not constitute a direct threat to the health or safety of others.[4]

I. Statutory Framework Under Section 504

Section 504 was intended to proscribe discrimination against the handicapped in programs or activities that are conducted by federal agencies or that receive federal funds. In relevant part, the statute provides:

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be

[2] In this opinion, individuals who are infected with the AIDS virus and have developed the clinical symptoms known as Acquired Immune Deficiency Syndrome ("AIDS") or AIDS-Related Complex ("ARC") will sometimes be referred to as "symptomatic HIV-infected individuals." Individuals who are infected with the AIDS virus but do not have AIDS or ARC will sometimes be referred to as "asymptomatic HIV-infected individuals." References to AIDS should be understood to include ARC, except where a distinction between the two is expressly drawn. Finally, where we intend to refer to all HIV-infected individuals, whether symptomatic or not, we either refer to "HIV-infected individuals" or to "HIV infection" (without any "symptomatic" or "asymptomatic" modifier) or clearly indicate in the text that the discussion refers to both categories.

[3] The medical information available to us indicates that HIV infection is a physical impairment which in a given case may substantially limit a person's major life activities. *See* infra pp. 213–17. In addition, others may regard an HIV-infected person as being so impaired. *See* infra pp 217–18. Either element in a given case, we believe, would be sufficient for a court to conclude that an HIV-infected person is an "individual with handicaps" within the terms of the Act. By virtue of the fact that the handicap here, HIV infection, gives rise both to disabling physical symptoms and to contagiousness, it is unnecessary to resolve with respect to any other infection or condition which gives rise to contagiousness alone whether that singular fact could render a person handicapped. In other words, the medical information available to us undermines the accuracy of the assumption or contention referenced in *Arline* that carriers of the AIDS virus are without physical impairment. 480 U.S. at 282 n.7.

[4] These conclusions differ from, and supersede to the extent of the difference, a June 20, 1986 opinion from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, for Ronald E. Robertson, General Counsel, Department of Health and Human Services ("Cooper Opinion"). The conclusions herein incorporate subsequent legal developments (the Supreme Court's decision in *Arline* and Congress' passage of the Civil Rights Restoration Act) and subsequent medical clarification (*see* July 29, 1988 letter from C Everett Koop, M.D., Surgeon General, to Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel ("Koop Letter") (attached).

> denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794.[5]

There are two definitions of "individual with handicaps," one or both of which may be applicable to HIV-infected individuals depending upon the context in which the discrimination occurs. The generally-applicable definition is "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(8)(B). Thus, an individual can qualify as handicapped under the general definition if he actually suffers from a disabling impairment, has recovered from a previous such condition, was previously misclassified as having such a condition, or is regarded as having such a condition, whether or not he actually has it. The Civil Rights Restoration Act amended the definitions section of the Rehabilitation Act to provide, in the employment context, a qualification of the definition of an "individual with handicaps" with respect to contagious diseases and infections. This provision qualifies rather than supplants the general definition of "individual with handicaps".[6] The amendment provides as follows:

> For the purpose of sections 503 and 504, as such sections relate to employment, [the term "individual with handicaps"] does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individu-

[5] Section 504 thus has five elements First, an individual claiming discriminatory treatment must be an "individual with handicaps," as defined in the Act. Second, the individual must be "otherwise qualified" for the benefit or program participation being sought Third, the individual must be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under a covered program or activity. Fourth, the contested treatment must be "solely by reason of . . handicap." And fifth, the discrimination must occur in a program or activity conducted or funded by the federal government.

The definition of "program or activity" is set forth in a new section 504(b), which was added by section 4 of the Civil Rights Restoration Act. In general, the term is to be given an institution-wide scope rather than the program- or activity-specific scope called for by *Grove City College v Bell*, 465 U.S. 555 (1984). *Grove City* was superseded by the Civil Rights Restoration Act *See* Pub L. No 100–259, § 2, 102 Stat. 28.

[6] The Civil Rights Restoration Act amended 29 U.S.C. § 706(8) to add the qualification as a new subparagraph (C), to follow subparagraph (B), which contains the generally-applicable definition of "individual with handicaps." The new subparagraph thus constitutes a specific qualification of the preceding general definition. The qualification operates in the same way as the qualification Congress enacted in 1978 with respect to alcohol and drug abuse, on which the contagious disease provision was modeled. *See infra* note 19 and accompanying text. Both provisions are structured as exclusions from the general definition. The natural implication of both statutory exclusions is that persons who do not fall within the specified grounds for exclusion are covered by section 504 to the extent that they meet the general requirements of that section.

als or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

Pub. L. No. 100–259, § 9, 102 Stat. 28, 31–32 (1988).

II. Application of Section 504 in Contexts Other Than Employment

Section 504, as interpreted by the Supreme Court in *Arline*, has two primary elements: the definition of "individual with handicaps" and the "otherwise qualified" requirement. We will first determine whether in the non-employment context an HIV-infected individual, whether symptomatic or asymptomatic, is an "individual with handicaps," and then discuss the application of the "otherwise qualified" requirement to such an individual.[7]

A. Symptomatic HIV-Infected Individuals

As discussed below, *Arline* requires the conclusion that persons with AIDS (*i.e.*, *symptomatic* HIV-infected individuals) are within the section 504 definition of handicapped individual notwithstanding their contagiousness. Contagiousness, by itself, does not obviate the existence of a handicap for purposes of section 504. *Arline*, 480 U.S. at 282.

Arline involved an elementary school teacher who had been discharged after suffering a third relapse of tuberculosis within two years. All parties conceded, and the Court found, that the plaintiff was handicapped because her tuberculosis had adversely affected her respiratory system, requiring hospitalization. *Id.* at 281. Plaintiff's respiratory ailment thus was a physical impairment that substantially limited one of her major life activities. *Id.* The Court concluded that the defendant's action came within the coverage of section 504, notwithstanding the fact that Ms. Arline was dismissed not because of any disabling effects of her tuberculosis but because of her employer's fear that her contagiousness threatened the health of her students. The Court concluded that "the fact that a person with a record of physical impairment is also contagious does not suffice to *remove* that person from coverage under § 504." *Id.* at 285–86 (emphasis added).

We believe that symptomatic HIV-infected individuals are handicapped under section 504. For these individuals, the disease has progressed to the point where the immune system has been sufficiently weakened that a disease such as cancer

[7] *Arline* was also concerned with a third element: namely, whether the contagiousness of a handicapped individual covered by the Act could be used as a justification for discrimination against that individual Subject to the "otherwise qualified" limitation, the Court held that contagiousness cannot be used for this purpose. The Court stated: "We do not agree with petitioners that, in defining a handicapped individual under § 504, the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant. . . . It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment." *Arline*, 480 U.S. at 282. In light of the Court's holding, we conclude that the contagiousness of an HIV-infected individual cannot be relied upon to remove that individual from the coverage of the Act. *Contra* Cooper Opinion at 27 & n.70.

or pneumonia has developed, and as a result, the individual is diagnosed as having clinical AIDS. Because of the substantial limiting effects these clinical symptoms have on major life activities, such a person is an "individual with handicaps" for purposes of section 504. This same conclusion should also apply to a person with ARC, who also has serious disabling physical effects caused by HIV infection, although the physical symptoms are not the particular diseases that the Centers for Disease Control have included in its list of the clinical symptoms that constitute AIDS. As with the tuberculosis that afflicted Ms. Arline, AIDS (or ARC) is often "serious enough to require hospitalization, a fact more than sufficient [in itself] to establish that one or more . . . major life activities [are] substantially limited." *Id.* at 281. Therefore, assuming they are otherwise qualified, contagiousness does not excuse or justify discrimination against individuals handicapped by symptomatic HIV infection. As will be seen, the consideration of the "otherwise qualified" standard allows for a reasonable determination of whether contagiousness threatens the health or safety of others or job performance, and in those events, permits the exclusion of the individual from the covered program or activity.

B. Asymptomatic HIV-Infected Individuals

Arline did not resolve the application of section 504 to *asymptomatic* HIV-infected individuals.[8] The Court left open the question of whether such individuals are "individuals with handicaps" under section 504, a question which turns on whether an asymptomatic HIV-infected individual "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(8)(B). These determinations primarily focus upon: (1) whether HIV infection by itself is a physical or mental impairment; and (2) whether the impairment substantially limits a major life activity (*i.e.*, whether it has a disabling effect); or (3) whether someone with HIV infection could be regarded as having an impairment which substantially limits a major life activity.

[8] Since the plaintiff had disabling physical symptoms and thus was clearly a handicapped individual under section 504, the Court declined to reach the question of whether a person without such an impairment could be considered handicapped by virtue of a communicable disease alone As the Court stated, "[t]his case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS [who suffers no physical impairment] could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act " *Id.* at 282 n.7 Subsequent to *Arline*, the Surgeon General informed this Office that even an asymptomatic HIV-infected individual is physically impaired, stating that "from a purely scientific perspective, persons with HIV infection are clearly impaired. They are not comparable to an immune carrier of a contagious disease such as Hepatitis B." Koop Letter at 2. In light of Dr Koop's letter, this Office has no occasion to determine whether a contagious, but not impaired individual, such as a Hepatitis B carrier, would be protected by the Act. *See supra* note 3. *Cf Kohl by Kohl v. Woodhaven Learning Ctr.*, 672 F Supp. 1226, 1236 (W.D Mo 1987) (finding a Hepatitis B carrier to be within the Act).

1. *Asymptomatic HIV-Infected Individuals Are Physically Impaired*

The Department of Health and Human Services regulations implementing section 504 define "physical impairment" as:

> [A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine.

45 C.F.R. § 84.3(j)(2)(i) (1987). In addition, an appendix to the regulations provides an illustrative (but not exhaustive) list of diseases and conditions that are "physical impairments" for purposes of section 504: "such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, [and] emotional illness, and . . . drug addiction and alcoholism." 45 C.F.R. pt. 84, app. A, p. 344 (1987).

The first question is whether an asymptomatic HIV-infected individual is physically impaired for purposes of section 504. For this factual determination we necessarily must rely heavily on the views of the Public Health Service of the United States. In this respect, Dr. C. Everett Koop, the Surgeon General of the Public Health Service, has indicated that it is

> inappropriate to think of [HIV infection] as composed of discrete conditions such as ARC or "full blown" AIDS. HIV infection is the starting point of a single disease which progresses through a variable range of stages. In addition to an acute flu-like illness, early stages of the disease may involve subclinical manifestations *i.e.*, impairments and no visible signs of illness. The overwhelming majority of infected persons exhibit detectable abnormalities of the immune system.

Koop Letter at 1–2. On the basis of these facts, the Surgeon General concluded that

> from a purely scientific perspective, persons with HIV infection are clearly impaired. They are not comparable to an immune carrier of a contagious disease such as Hepatitis B. Like a person in the early stages of cancer, they may appear outwardly healthy but are in fact seriously ill.

Id. at 2.

In our view, the type of impairment described in the Surgeon General's letter fits the HHS definition of "physical impairment" because it is a "physiological

disorder or condition" affecting the "hemic and lymphatic" systems.[9] We therefore believe that, in light of the Surgeon General's medical assessment, asymptomatic HIV-infected individuals, like their symptomatic counterparts, have a physical impairment.

2. *Asymptomatic HIV-Infected Individuals and Limits on Major Life Activities*

The second question, therefore, is whether the physical impairment of HIV infection substantially limits any major life activities.

Under the HHS regulations implementing section 504, "'major life activities' means functions *such as* caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. § 84.3(j)(2)(ii) (1987) (emphasis added). Although the definition is illustrative and not exhaustive, it does provide a helpful starting point for our analysis. We would expect that courts will resolve the factual question of whether the impairment of HIV infection limits a major life activity by reviewing this list for guidance in ascertaining whether a particular activity constitutes a basic function of life comparable to those on the list.

As indicated earlier, the disabling effects of HIV infection are readily apparent in the case of symptomatic HIV infection. The salient point with respect to symptomatic HIV-infected individuals is not that they have AIDS or ARC but rather that their impairment has manifest disabling effects. Again, as noted above, we believe that the courts will find that such individuals are limited in a number of major activities. Due to the weakness of their immune system and depending on the nature of the particular disease afflicting symptomatic HIV-infected individuals, any and perhaps all of the life activities listed in the HHS regulations could be substantially limited.

The question with respect to asymptomatic HIV-infected individuals is more difficult because such individuals would not appear at first glance to have disabling physical effects from their infection that substantially affect the type of life activities listed in the HHS regulations. Their ability, for example, to work,

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[9] Moreover, it would also appear that the impairment affects the brain and central nervous system as well. Medical evidence indicates that the AIDS virus, apart from any effect it has on the immune system, also attacks the central nervous system and may result in some form of mental deficiency or brain dysfunction in a significant percentage of persons infected with the virus. "Mental disease (dementia) will occur in some patients who have the AIDS virus *before* they have any other manifestation such as ARC or classic AIDS." U.S. Department of Health Services, *Surgeon General's Report on Acquired Immune Deficiency Syndrome* 32 (1986) ("*Surgeon General's Report*") *See also id.* at 12 ("The AIDS virus may also attack the nervous system and cause delayed damage to the brain. This damage may take years to develop and the symptoms may show up as memory loss, indifference, loss of coordination, partial paralysis, or mental disorder. These symptoms may occur alone, or with other symptoms mentioned earlier.").

In addition, as discussed below with respect to the effects of HIV infection on major life activities, infection with the virus affects the reproductive system because of the significant danger that the virus will be transmitted to a baby during pregnancy. Also bearing on whether HIV infection is a physical impairment under the HHS regulations is the Surgeon General's statement in his letter that HIV infection in its early stages is comparable to cancer—a disease that is listed in the HHS regulations as a physical impairment—in that infected individuals "may appear outwardly healthy but are in fact seriously ill." Koop Letter at 2.

to care for themselves, to perform manual tasks, or to use their senses are usually not directly affected.

Nevertheless, we believe it is likely that the courts will conclude that asymptomatic HIV-infected individuals have an impairment that substantially limits certain major life activities. While the Supreme Court explicitly refrained from answering this precise question in *Arline*, because HIV infection was not before it and perhaps in the mistaken understanding that asymptomatic HIV infection was not accompanied by an impairment,[10] the logic of the decision cannot fairly be said to lead to a different conclusion. This conclusion, we believe, may be based either on the effect that the knowledge of infection will have on the individual or the effect that knowledge of the infection will have on others. With respect to the latter basis, the Court observed, "[i]t would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment." *Arline*, 480 U.S. at 282.

a. *Limitation of Life Activities Traceable to Knowledge of Infection by Asymptomatic HIV-Infected Individual*

Turning first to the effect knowledge of infection may have on the asymptomatic individual, it can certainly be argued that asymptomatic HIV infection does not directly affect any major life activity listed in the HHS regulations. 45 C.F.R. § 84.3(j)(2)(ii) (1987). However, since the regulatory list was not intended as an exhaustive one, we believe at least some courts would find a number of other equally important matters to be directly affected. Perhaps the most important such activities are procreation and intimate personal relations.

Based on the medical knowledge available to us, we believe that it is reasonable to conclude that the life activity of procreation—the fulfillment of the desire to conceive and bear healthy children—is substantially limited for an asymptomatic HIV-infected individual. In light of the significant risk that the AIDS virus may be transmitted to a baby during pregnancy,[11] HIV-infected individuals cannot, whether they are male or female, engage in the act of procreation with the normal expectation of bringing forth a healthy child. Because of the infection in their system, they will be unable to fulfill this basic human desire. There is little doubt that procreation is a major life activity and that the physical ability to engage in *normal* procreation—procreation free from the fear of what the infection will do to one's child—is substantially limited once an individual is infected with the AIDS virus.

This limitation—the physical inability to bear healthy children—is separate and apart from the fact that asymptomatic HIV-infected individuals will choose not to attempt procreation. The secondary decision to forego having children is

[10] *Compare Arline*, 480 U S. at 282 n.7 (suggesting that HIV infection is a disease without physical impairment) *with* Koop Letter at 2 (HIV infection is a physical impairment)

[11] *Surgeon General's Report* at 20–21 ("Approximately one third of the babies born to AIDS-infected mothers will also be infected with the AIDS virus.").

just one of many major life decisions that we assume infected individuals will make differently as a result of their awareness of their infection. Similarly, some courts can be expected to find a limitation of a major life activity in the fact that an asymptomatic HIV-infected individual's intimate relations are also likely to be affected by HIV infection. The life activity of engaging in sexual relations is threatened and probably substantially limited by the contagiousness of the virus.[12]

Finding limitations of life activities on the basis of the asymptomatic individual's responses to the knowledge of infection might be assailed as not fully persuasive since it depends upon the conscience and good sense of the person infected. The causal nexus, it would be argued, is not between the physical effect of the infection (as specified in the Koop Letter) and life activities, but between the conscience or normative judgment of the particular infected person and life activities. Thus, it might be asserted that there is nothing inherent in the infection which actually prevents either procreation or intimate relations.[13]

It is undoubtedly true that some HIV-infected individuals have not or will not change their behavior after learning they are infected, thereby exhibiting disregard for the health of their offspring or sexual partners. Nonetheless, in any case where the evidence indicates that the plaintiff HIV-infected individual has in fact changed his or her behavior—as, for example, where the plaintiff represents that procreation has been foregone—the court might well find a limitation of major life activity. Moreover, courts may choose to pass over such factual questions since the Supreme Court has stated an alternative rationale for finding a life activity limitation based on the reaction of others to the infection. We turn to that rationale next.

b. *Limitation of Life Activities Traceable to Reaction of Others to Asymptomatic HIV Infection*

The *Arline* Court relied on the express terms of the statute for the proposition that a handicapped individual includes someone who is regarded by others as having a limitation of major life activities whether they do or not. 29 U.S.C. § 706(8)(B)(iii). This provision was added by Congress in 1974. The Court cited the legislative history accompanying this textual expansion to show that an impaired person could be protected even if the impairment "in fact does not substantially limit that person's functioning," S. Rep. No. 1297, 93d Cong., 2d Sess. 64 (1974), and observed that such an impairment "could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283.

This construction by the Court of the statutory definition of the term "handicapped individual" has particular significance for the application of section 504 to asymptomatic HIV-infected individuals. The Court found that in order "[t]o combat the effects of erroneous but nevertheless prevalent perceptions about the

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[12] *Id* at 14–18.

[13] As indicated in the text, we think this argument is disingenuous at least insofar as infection physically precludes the normal procreation of healthy children.

handicapped," Congress intended by its 1974 amendment to expand the section's scope to include persons who are regarded as handicapped, but who "'may at present have no actual incapacity at all.'" *Id.* at 279 (quoting *Southeastern Community College v. Davis*, 442 U.S. 397, 405–06 n.6 (1979)). Stressing this point, the Court repeated later in the opinion that the amended definition covers persons "who, as a result [of being incorrectly regarded as handicapped], are substantially limited in a major life activity." *Id.* at 284. The effect of this interpretation is that the perceived impairment need not directly result in a limitation of a major life activity, so long as it has the indirect effect, due to the misperceptions of others, of limiting a life activity (in *Arline*, the activity of working).[14] Thus, at least one district court following *Arline* has held that if an individual or organization limits an HIV-infected individual's participation in a section 504 covered activity because of fear of contagion, a major life activity of the individual is substantially limited.[15]

C. Application of the "Otherwise Qualified" Requirement

The Supreme Court's opinion in *Arline* concluded by remanding the case for consideration by the district court of whether the plaintiff was "otherwise qualified." The Court indicated more generally that section 504 cases involving persons with contagious diseases should turn on the "otherwise qualified" issue, that such individuals must "have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were 'otherwise qualified.'" 480 U.S. at 285. The Court stressed that before making this determination the trial court must

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[14] The *Arline* Court appears not to accept the distinction between being perceived as having an impairment that itself limits a major life activity (the literal meaning of the statutory language) and having a condition the misperception of which results in limitation of a life activity. This may have been the distinction the Solicitor General was attempting to draw by suggesting there was a difference between being perceived as having a handicap that precludes work and being perceived as contagious, which does not physically preclude work, except that because of the perception, no work is offered. As recited by the Court, the Solicitor General stated at oral argument "that to argue that a condition that impaired *only* the ability to work was a handicapping condition was to make 'a totally circular argument which lifts itself by its bootstraps.' The argument is not circular, however, but direct. Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one's ability to work." *Id* at 283 n.10 (citation omitted). This last statement, of course, returned the Court to the statute's literal meaning. The only justification for departing from that meaning occurs not in footnote 10 of *Arline*, but in footnote 9, where the Court relied on legislative history which does indicate that at least some members of Congress believed that the perception of a physical disability by others does not have to include the belief that the perceived condition results in a limitation of major life activities, but simply that the perception of the condition by others in itself has that effect. *Id.* at 282–83 n.9 (physically repulsive aspects of cerebral palsy, arthritis, and facial deformities).

[15] *Doe v Centinela Hosp.*, Civ 87-2514 (C.D. Cal. June 30, 1988) (holding HIV-infected individual to be "individual with handicaps" because he was perceived as such by the defendant). The district court wrote that a person is an individual with handicaps if he "has a physiological disorder or condition affecting a body system that substantially limits a 'function' only as a result of the attitudes of others toward the disorder or condition." Slip op at 12 The HHS regulations are in accord with this view 45 C.F.R. § 84.3(j)(2)(iv)(B) (1987). Although as indicated in the previous footnote we think this aspect of the Supreme Court's reasoning departs from the literal meaning of the statutory text in favor of legislative history, we do not question that the district court in *Centinela Hospital* fairly reads *Arline* to support a finding that the reaction of others to the contagiousness of an HIV-infected individual in itself may constitute a limitation on a major life activity.

> conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks . . . . In the context of the employment of a person handicapped with a contagious disease . . . this inquiry should include "[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm." Brief for American Medical Association as *Amicus Curiae* 19. In making these findings, courts normally should defer to the reasonable medical judgments of public health officials. The next step in the "otherwise-qualified" inquiry is for the court to evaluate, in light of these medical findings, whether the employer could reasonably accommodate the employee under the established standards for that inquiry.

Id. at 287–88 (footnotes omitted).

It is important to emphasize that the Court recognized that "[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." *Id.* at 288 n.16. The Court has thus made it clear that persons infected with the AIDS virus will not be "otherwise qualified" to perform jobs that involve a significant risk of transmitting the virus to others. In addition, an "otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979).[16]

Based on current medical knowledge, it would seem that in most situations the probability that the AIDS virus will be transmitted is slight, and therefore as a matter of health and safety there will often be little, if any, justification for treating infected individuals differently from others.[17] Similarly, mere HIV infection involving only "subclinical manifestations" will generally also not render an individual unqualified to participate in a covered program or activity on the basis of inability to perform. As the disease progresses, however, and conditions such as ARC or "full blown" AIDS affect the physical or mental capacity of the indi-

[16] In ascertaining whether a person is otherwise qualified, the court considers "whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions. Accommodation is not reasonable if it either imposes 'undue financial and administrative burdens' on a grantee, . . . or requires 'a fundamental alteration in the nature of [the] program.'" 480 U.S. at 287 n 17 (citations omitted).

[17] *See Surgeon General's Report* at 13 ("No Risk from Casual Contact").

vidual, it may well be that an "individualized inquiry" will reveal that such person is not otherwise qualified to participate.

In addition, current medical knowledge does suggest the possibility of specialized contexts where, even with respect to a person in the early stages of the disease, a court might find an individual to be not otherwise qualified. These situations are very likely to involve individuals who have responsibility for health or safety, such as health care professionals or air traffic controllers. In these and similar situations where there is a greater possibility that the AIDS virus could be transmitted *see generally Surgeon General's Report*, or the consequences of a dementia attack could be especially dangerous, *see supra* note 9, we believe a court could find, within the scope of "otherwise qualified" standard, a justification for treating HIV-infected individuals differently from uninfected individuals.

In brief, whether HIV-infected individuals will be found after the individualized inquiry required by *Arline* to be otherwise qualified will often depend on how far the disease has progressed. At the early stages of the disease, it is likely that neither health and safety nor performance will provide a justification for excluding an HIV-infected person. Moreover, while current medical knowledge suggests that safety should not be a concern in most contexts even as the disease progresses, an individualized assessment of performance may result in those with AIDS or ARC being found not otherwise qualified. Finally, courts may find in certain specialized contexts that an HIV-infected individual is not otherwise qualified at any stage of the disease because infection in itself presents an especially serious health or safety risk to others because of the nature of the position. The inquiry in each case will be a factual one, and because of that, we are unable to speculate further.

III. *Application of Section 504 in the Employment Context*

A. Introduction and Summary

The Civil Rights Restoration Act included a provision, the Harkin-Humphrey amendment,[18] which amended the definitions section of the Rehabilitation Act to provide, with respect to employment, a specific qualification of the definition of an "individual with handicaps" in the context of contagious diseases and infections:

> For the purpose of sections 503 and 504, as such sections relate to employment, [the term "individual with handicaps"] does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individu-

[18] Pub. L. No. 100–259, § 9, 102 Stat. 28, 31–32 (1988). Since this amendment to section 504 was jointly sponsored by Senators Harkin and Humphrey, we will refer to the amendment in this opinion as "Harkin-Humphrey."

als or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

As discussed below, application of the Harkin-Humphrey amendment in the employment context should result in substantially the same conclusions as result from application in the non-employment context of section 504 as interpreted in *Arline*. Specifically, we conclude that Harkin-Humphrey provides that HIV-infected individuals (regardless of whether or not they are symptomatic) are protected against discrimination in the employment context so long as they fall within the general section 504 requirements defining an "individual with handicaps" and do not contravene the specific qualification to the general requirements that the amendment provides: namely, that they do not "constitute a direct threat to the health or safety of other individuals" and they can "perform the duties of the job." In our judgment, this qualification merely codifies the "otherwise qualified" standard discussed by the Court in *Arline* and discussed above in this memorandum, including the provision of a means of reasonable accommodation that can eliminate the health or safety threat or enable the employee to perform the duties of the job, if it is provided for under the employer's existing personnel policies and does not impose an undue financial or administrative burden.

Because Harkin-Humphrey was a floor amendment that was not developed by a committee, there is no committee report explaining it. The only explanatory statement that accompanied its introduction was a one-sentence statement of purpose—"Purpose: To provide a clarification for otherwise qualified individuals with handicaps in the employment context", 134 Cong. Rec. 383 (1988)—and a brief colloquy between the two sponsors. *Id.* at 383–84.

The sponsors' colloquy made three basic points. First, the amendment was designed to do in the contagious disease and infection context what the comparably phrased 1978 amendment to section 504 did in the context of alcohol and drug abuse[19]—"assure employers that they are not required to retain or hire individuals with a contagious disease or infection when such individuals pose a direct threat to the health or safety of other individuals, or cannot perform the essential duties of a job." *Id.* at 384. Second, the amendment "does nothing to change the current laws regarding reasonable accommodation as it applies to individuals with handicaps." *Id.* Finally, "as we stated in 1978 with respect to alcohol and drug abusers, . . . the two-step process in section 504 applies in the situation under which it was first determined that a person was handicapped and then it is determined that a person is otherwise qualified." *Id.* With that description of Harkin-Humphrey's principal legislative history as background, we now discuss the amendment's impact on two aspects of the application of section 504 to HIV infection cases in the employment context: (1) whether section 504 applies to both

[19] "For purposes of sections 503 and 504 as such sections relate to employment, [the term "handicapped individual"] does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." Pub. L. No. 95–602, § 122(a), 92 Stat. 2955, 2985 (1978) (codified at 29 U.S.C. § 706(8)(B)).

asymptomatic and symptomatic HIV-infected individuals; and (2) the manner in which the section's "otherwise qualified" requirement is to be applied, including whether employers must provide "reasonable accommodation" to infected individuals.

B. Coverage of All HIV-Infected Individuals (Subject to the Stated Limitations)

We have no difficulty concluding that the Harkin-Humphrey amendment, and thus section 504 in the employment context, includes within its coverage both asymptomatic and symptomatic HIV-infected individuals. The amendment's language draws no distinction between asymptomatic and symptomatic individuals and, notably, applies to a "contagious disease or infection." It therefore applies to all HIV-infected individuals, whether or not they are symptomatic. It is true that the amendment is phrased in the negative in that it says who is not handicapped, rather than defining who is handicapped. Nevertheless, we believe the natural implication of this statutory exclusion is that persons who do not fall within the specified grounds for exclusion are covered by section 504 to the extent that they meet the general requirements of that section. Accordingly, in light of our previous discussion of the application of the general provisions of section 504 to HIV-infected persons, we conclude that all HIV-infected individuals who are not a direct threat to the health or safety of others and are able to perform the duties of their job are covered by section 504.

Harkin-Humphrey's legislative history reinforces this reading of the amendment.[20] There was no disagreement expressed concerning the amendment's applicability to asymptomatic HIV-infected individuals, and a number of legislators expressly stated that such persons were covered. Senator Harkin described the purpose of the amendment in a letter, dated February 26, 1988, to Representatives Hawkins and Edwards. Senator Harkin explained:

> The objective of the amendment is to expressly state in the statute the current standards of section 504 so as to reassure employers that they are *not* required to hire or retain individuals with contagious diseases or infections who pose a direct threat to the health or safety of others or who cannot perform the duties of a job.
>
> The basic manner in which an individual with a contagious disease or infection can present a direct threat to the health or safety of others is when the individual poses a significant risk of transmitting the contagious disease or infection to other individuals.

[20] Moreover, the model for the Harkin-Humphrey amendment—the 1978 amendment to section 504 concerning drug addicts and alcoholics—was intended to include within section 504 those covered persons not possessing the deficiencies identified in the statute. *See generally* 124 Cong Rec. 30,322–25 (1978) (statements of Senators Cannon, Williams, and Hathaway).

> The Supreme Court in *Arline* explicitly recognized this necessary limitation in the protections of section 504. The amendment is consistent with this standard.

134 Cong. Rec. 4781 (1988).[21]

During the subsequent debate in the House of Representatives, the Representatives who commented on the amendment indicated their understanding that persons with contagious diseases or *infections* were covered. For example, referring to the dissenting opinion in *Arline*, *see* 480 U.S. at 289–93, Representative Weiss observed:

> [Chief] Justice Rehnquist stated that Congress should have stated explicitly that individuals with contagious diseases were intended to be covered under section 504. Congress has done so now with this amendment, stating clearly that individuals with contagious diseases or infections are protected under the statute as long as they meet the "otherwise qualified" standard. This clarity is particularly important with regard to infections because individuals who are suffering from a contagious infection—such as carriers of the AIDS virus or carriers of the hepatitis B virus—can also be discriminated against on the basis of their infection and are also individuals with handicaps under the statute.

134 Cong. Rec. 2937 (1988). Representative Coelho stated that the amendment

> provides that individuals with contagious diseases or infections are protected under the statute unless they pose a direct threat to the health or safety of others or cannot perform the duties of the job.
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> . . .
>
> People with contagious diseases and infections, such as people with AIDS or people infected with the AIDS virus, can be subject to intense and irrational discrimination. I am pleased that this amendment makes clear that such individuals are covered under the protections of the Rehabilitation Act.

Id. at 2924. Representative Owens commented:

> I am glad to see that [the amendment] refers to individuals with contagious infections, thus clarifying that such infections can constitute a handicapping condition under the Act.

[21] *See also* 134 Cong. Rec. 2860 (1988) ("The purpose of the amendment was to clarify for employers the applicability of section 504 of the Rehabilitation Act of 1973 to persons who have a currently contagious disease or infection.") (statement of Sen. Harkin).

Id. at 2937. The record is replete with similar comments.[22]

In summary, we believe that under the Harkin-Humphrey amendment, section 504 applies in the employment context to all HIV-infected individuals, which necessarily includes both asymptomatic and symptomatic HIV-infected individuals. This parallels our conclusions with respect to HIV-infected individuals, both symptomatic and asymptomatic, outside the employment context. The difference between the employment and non-employment contexts because of the Harkin-Humphrey amendment is thus more apparent than real. Specifically, it is our view that the Harkin-Humphrey amendment merely collapses the "otherwise qualified" inquiry applicable outside the employment context into the definition of "individual with handicaps" in the employment text. Thus, whether *outside the employment context* a particular infected person is deemed to be handicapped but ultimately receives no protection under the statute because that person poses a danger to others and is thereby not "otherwise qualified" or whether that same person is not deemed to be handicapped under the Harkin-Humphrey amendment *in the employment context* for the same reason is of only semantic significance. In either case, if the infection is a direct threat to the health or safety of others or renders the individual unable to perform the duties of the job, the grantee or employer is not required to include that person in the covered program or activity or retain or hire him in a job. Indeed, the legislative history suggests that the principal purpose of the Harkin-Humphrey amendment was the codification of the "otherwise qualified" limitation as discussed in *Arline*.[23]

C. Is There a "Reasonable Accommodation" Requirement Under Harkin-Humphrey?

The Department of Health and Human Services ("HHS") regulations implementing section 504, first issued in 1977, reflect HHS' determination that a "reasonable accommodation" requirement is implicit in the "otherwise qualified" element of section 504. 42 Fed. Reg. 22,676, 22,678 (1977). Then, as now, the regulations provided the following statement of the "otherwise qualified" requirement: "'Qualified handicapped person' means . . . [w]ith respect to employment, a handicapped person who, *with reasonable accommodation*, can per-

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[22] *See, e g* , 134 Cong. Rec. 2948 (1988) (statement of Rep. Edwards) ("I commend the Members of the Senate for fashioning this amendment in such a way that the courts will continue to adjudicate cases involving AIDS, HIV infection and other communicable conditions on a case by case basis "); *id* at 3044 (statement of Rep. Hoyer) (referring to "people with AIDS and people infected with the AIDS virus" as equally subject to the amendment); *id.* at 2943 (statement of Rep Dannemeyer) (opposing amendment because it covers "asymptomatic carriers").

[23] "Purpose. To provide a clarification for otherwise qualified individuals with handicaps in the employment context." 134 Cong. Rec. 383 (1988). *See also* the sponsors' colloquy, discussed *supra* in the text, as well as the comments of individual members *E g* , *id* at 2947 (statement of Rep Edwards) ("This amendment . . . codif[ies] the 'otherwise qualified' framework for courts to utilize in these cases."); *id.* at 2937 (statement of Rep. Weiss) ("In such circumstances [significant risk of communicating a contagious disease], the individual is not 'otherwise qualified' to remain in that particular position. The Supreme Court in *Arline* explicitly recognized this necessary limitation in the protections of section 504. The Senate amendment places that standard in statutory language . . ."), *id.* at 3043 (statement of Rep. Hoyer) ("[T]his amendment essentially codifies the existing standard of otherwise qualified in section 504, as explicated by the Supreme Court in *Arline* ").

form the essential functions of the job in question."[24] In *Arline*, the Supreme Court endorsed the "reasonable accommodation" requirement of the regulations, explaining that when a handicapped person is not able to perform the essential functions of the job, and is therefore not "otherwise qualified," "the court must also consider whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions."[25]

As noted above, the Harkin-Humphrey amendment includes within it the "otherwise qualified" standard. We must determine whether a "reasonable accommodation" requirement is implicit in Harkin-Humphrey's special section 504 formulation, just as HHS and the Supreme Court found such a requirement to be implicit in section 504 prior to this amendment. More specifically, was Harkin-Humphrey intended to require reasonable accommodation of a contagious individual who, absent such accommodation, poses a "direct threat to the health or safety of other individuals or . . . is unable to perform the duties of the job?" The amendment's legislative history convinces us that Congress intended that consideration of "reasonable accommodation" should be factored into an employer's determination of whether an infected employee poses a direct threat or can perform the job.

The legislative history of the Harkin-Humphrey amendment indicates that Congress was quite aware that administrative and judicial interpretation had added the "reasonable accommodation" gloss to section 504, and Congress understood and intended that such a gloss would be put on Harkin-Humphrey. The first evidence of this is found in the colloquy between Senators Harkin and Humphrey upon the introduction of the amendment. The colloquy stressed that the amendment "does nothing to change the current laws regarding reasonable accommodation as it applies to individuals with handicaps." 134 Cong. Rec. 384 (1988). More expansively, Senator Harkin subsequently stated:

> [T]he amendment does nothing to change the requirements in the regulations regarding providing reasonable accommodations for persons with handicaps, as such provisions apply to persons with contagious diseases and infections. Thus, if a reasonable accommodation would eliminate the existence of a direct threat to the health or safety of others or eliminate the inability of an individual with a contagious disease or infection to perform the essential duties of a job, the individual is qualified to remain in his or her position.

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[24] 45 C.F.R. § 84.3(k)(1) (1987) (emphasis added). *See also* 45 C.F.R. § 84.12 (1987) (setting forth the "reasonable accommodation" requirements).

[25] *Arline*, 480 U.S. at 287 n.17 The Court suggested that two factors, originally employed by the Court in *Davis*, should be used to ascertain the reasonableness of an employer's refusal to accommodate a handicapped individual: "Accommodation is not reasonable if it either imposes 'undue financial and administrative burdens' on a grantee, *Southeastern Community College v. Davis*, 442 U.S. at 412, or requires a 'fundamental alteration in the nature of [the] program' *id.* at 410. *See* 45 C.F.R. § 84.12(c) (1985) (listing factors to consider in determining whether accommodation would cause undue hardship). . " *Id*

Id. at 2861–62.

Senator Harkin's statement cannot be given dispositive weight because it was not joined by his co-sponsor, Senator Humphrey, and it was not made before the Senate voted on the amendment. However, Senator Humphrey never directly challenged this statement, or said that reasonable accommodation was not intended, and unchallenged statements to the same effect were made by members of the House speaking in favor of and against the amendment prior to the House vote on the amendment and by members of the Senate speaking in favor of and against the amendment prior to the vote to override the President's veto of the Civil Rights Restoration Act.

Prior to the House vote, for example, Representative Weiss remarked:

> As the Senate amendment now restates in statutory terms, [individuals with contagious diseases or infections] are also not otherwise qualified if, without reasonable accommodation, they would pose a direct threat to the health or safety of others or could not perform the essential functions of a job.

Id. at 2937. Representative Waxman said the same thing:

> [T]he Court went on to say [in *Arline*] that if [persons with contagious diseases] pose a significant risk of transmitting their diseases in the workplace, and if that risk cannot be eliminated by reasonable accommodation, then they cannot be considered to be "otherwise qualified" for the job. The amendment added by the Senate to this bill places that standard in law.

Id. at 2939 (emphasis added). Many other Representatives supporting the amendment agreed.[26] Opposing the amendment, Representative Dannemeyer stated that "[i]f this bill is passed as presently written, employers will be required to accommodate victims of this fatal disease despite potential health threats to other employees." *Id.* at 2943.

Prior to the Senate vote to override the President's veto of the Civil Rights Restoration Act, Senator Harkin reiterated his intent and understanding that reasonable accommodation was required:

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[26] *E.g.*, 134 Cong. Rec 3280 (1988) (statement of Rep. Miller) ("[T]he new language added by the Senate changes nothing with respect to current law and is not intended to displace the . . . reasonable accommodations requirement under section 504."); *id* at 2947 (statement of Rep Edwards) ("The colloquy in the Senate between the two cosponsors of the amendment clarifies that it is the intent of Congress that the amendment result in no change in the substantive law with regard to assessing whether persons with this kind of handicapping condition are 'otherwise qualified' for the job in question or whether employers must provide 'reasonable accommodations' for such individuals."), *id.* at 2924 (statement of Rep. Coehlo) ("[I]ndividuals with contagious diseases and infections are not otherwise qualified—and thus are not protected in a particular position—if, without reasonable accommodation, they would pose a direct threat to the health or safety of others or cannot perform the duties of the job."), *id* at 3043–44 (statement of Rep. Hoyer) (not "otherwise qualified" if risk of communicating contagious disease "cannot be eliminated by reasonable accommodation"); *id* at 3935 (statement of Rep. Jeffords) (same); *id* at 2937 (statement of Rep. Owens) (same).

> I say to this body this bill does not I repeat does not require an employer to hire or retain in employment all persons with contagious diseases. An employer is free to refuse to hire or fire any employee who poses a direct threat to the health or safety of others who cannot perform the essential functions of the job *if no reasonable accommodation can remove the threat to the safety of others or enable the person to perform the essential functions of the job*. This determination must be made on an individualized basis and be based on facts and sound medical judgment.

Id. at 4272 (emphasis added). Moreover, in arguing that the President's veto should be sustained, a number of Senators stated their understanding that Harkin-Humphrey would require reasonable accommodation. Senator Hatch included in his list of objectionable features of the Civil Rights Restoration Act "the requirement to attempt to accommodate persons with infectious diseases, such as tuberculosis and AIDS." *Id.* at 4239. Senator Symms made the same point, arguing that "[t]he equality-of-result rather than equality-of-opportunity standards [in the Civil Rights Restoration Act] can lead to . . . the need to attempt to accommodate infectious persons." *Id.* at 4246.

Moreover, in addition to this direct evidence of congressional intent concerning the Harkin-Humphrey amendment, we also find illuminating the evidence that the 1978 drug and alcohol abuse amendment, on which Harkin-Humphrey is modeled,[27] was intended to require reasonable accommodation. During the Senate debate on Harkin-Humphrey, Senator Cranston observed that the drug and alcohol abuse amendment

> did not result in any basic change in the process under section 504 by which it is determined whether the individual claiming unlawful discrimination is handicapped and whether that individual is "otherwise qualified," *taking into account*—as in the case of all other handicapped persons—*any reasonable accommodations that should be made to enable him or her to perform the job satisfactorily*.

Id. at 1174 (emphasis added).

The legislative history of the drug and alcohol abuse amendment supports Senator Cranston's assertion that "reasonable accommodation" was required under that amendment. That legislative history is clear that the amendment was designed to codify the existing "otherwise qualified" standard, as interpreted by the Attorney General and the Secretary of HEW, which included the "reasonable accommodation" requirement.[28] In explaining the amendment, one of its sponsors specifically cited the "reasonable accommodation" requirement:

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[27] *See sponsors'* colloquy, 134 Cong. Rec. 383–84 (1988).

[28] 43 Op. Att'y Gen. No 12, at 2 (1977) (section 504 does not "require unrealistic accommodations" for drug addicts or alcoholics); 42 Fed. Reg. 22,676, 22,678 (1977) (promulgating "otherwise qualified" definition, which is identical to current definition and thus includes reasonable accommodation).

> Regulations implementing sections 503 and 504 already address [the concerns of employers and others seeking the amendment]. They make clear that the protections of sections 503 and 504 only apply to otherwise qualified individuals. That means . . . that distinction on the basis of qualification is perfectly justifiable. Regulations implementing section 503 define "qualified handicapped individual" as a handicapped person who is capable of performing a particular job *with reasonable accommodation to his or her handicap.*[29]

Our final reason for believing that Congress intended the Harkin-Humphrey amendment to preserve the "reasonable accommodation" requirement of existing law is that a contrary conclusion would entail overruling a specific holding of *Arline*. After holding that the plaintiff in *Arline* was a "handicapped individual," the Supreme Court remanded the case to the district court for the "otherwise qualified" determination, which the Court said should include "evaluat[ing], in light of [a series of medical findings], whether the employer could reasonably accommodate the employee under the established standards for that inquiry." 480 U.S. at 288.

Any reading of the Harkin-Humphrey amendment that precluded reasonable accommodation would be inconsistent with that *Arline* holding. Applying Harkin-Humphrey without reasonable accommodation to an individual like the plaintiff in *Arline* would probably result in a finding that the individual is a direct threat to the health and safety of her students without any meaningful consideration of nonburdensome ways to alleviate the danger. Thus, under that reading, an individual

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[29] 124 Cong. Rec. 30,324 (1978) (statement of Sen Hathaway) (emphasis added). The sponsors of the amendment believed that it "simply [made] explicit what prior interpret[ations] of the act—including those of the Attorney General and the Secretary of Health, Education, and Welfare—have found." *Id* at 37,510 (statement of Sen. Williams). They did not believe that a change in law was necessary, but they were willing to provide a clarification in order to "reassure employers that it is not the intent of Congress to require any employer to hire a person who is not qualified for the position or who cannot perform competently in his or her job." *Id.* at 30,323. The amendment used an "otherwise qualified" formulation to clarify how existing law applied to drug and alcohol abusers. As explained by Senator Williams, "while the legislative history of the 1973 act, as authoritatively interpreted by the Attorney General, made clear that qualified individuals with conditions or histories of alcoholism or drug addiction were protected from discrimination by covered employers, this amendment codifies that intent." *Id.* at 37,509. Senator Williams' reference to the Attorney General was to an opinion Attorney General Bell provided to HEW Secretary Califano a month before HEW's promulgation (on May 4, 1977) of its regulations implementing section 504. 43 Op. Att'y Gen. No. 12 (Apr. 12, 1977). While concluding that drug and alcohol abusers were "handicapped individuals" subject to the same protections under section 504 as were all other handicapped individuals, the Attorney General stressed the applicability of the "otherwise qualified" requirement:

> [O]ur conclusion that alcoholics and drug addicts are "handicapped individuals" for purposes of section 504 does not mean that such a person must be hired or permitted to participate in a federally assisted program if the manifestations of his condition prevent him from effectively performing the job in question or from participating adequately in the program. A person's behavioral manifestations of a disability may also be such that his employment or participation would be unduly disruptive to others, and *section 504 presumably would not require unrealistic accommodations in such a situation.*

Id at 2 (emphasis added). As Senator Williams noted (124 Cong. Rec. 30,324 (1978)), Secretary Califano's statement accompanying issuance of the regulations agreed with the Attorney General's interpretation and his emphasis on the "otherwise qualified" requirement. 42 Fed. Reg 22,676, 22,686 (1977). The regulations issued by Secretary Califano included the "otherwise qualified" regulation requiring reasonable accommodation. *Id.* at 22,678.

with tuberculosis (or an HIV-infected individual) would receive less individualized scrutiny under the amendment than under *Arline*. However, it is clear that Congress did not intend to overrule *Arline*. Indeed, supporters of Harkin-Humphrey repeatedly and unequivocally spoke of codifying Arline and acting consistently with *Arline*, including specifically *Arline*'s approach to "otherwise qualified" and "reasonable accommodation."[30] Only a single statement by Senator Humphrey is arguably somewhat to the contrary, and even this remark does not undermine our conclusion, or the overwhelming evidence of legislative intent on which it is based.[31] Senator Humphrey merely stated that the amendment must result in some change or it would have been "pointless." However, codifying a Supreme Court holding in a manner designed to reassure those infected with a contagious disease of the law's protection and employers of the law's limits has a point.

For the foregoing reasons, we conclude that implicit in Harkin-Humphrey's statement of the "otherwise qualified" standard for the contagious disease context is a "reasonable accommodation" requirement.[32] Accordingly, before determining that an HIV-infected employee is not an "individual with handicaps," an employer must first consider whether, consistent with the employer's existing personnel policies for the job in question, a reasonable accommodation would eliminate the health or safety threat or enable the employee to perform the duties of the job.

Arline's discussion of the HHS regulations' "reasonable accommodation" requirement presents a useful point of reference for considering what "reasonable accommodation" should be provided for HIV-infected individuals in the employment context. As noted by the Court, the HHS regulations provide that "[e]mployers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies." 480 U.S. at 288 n.19. However, "where reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination." 45 C.F.R., pt. 84, app. A, p. 350 (1987).

While reasonable accommodation is part of the individualized factual inquiry and therefore difficult to discuss in the abstract, it clearly does not require al-

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[30] *E g.*, 134 Cong. Rec. 4272 (1988) (statement of Sen. Harkin), *id* at 2860 (statement of Sen. Harkin, concurred in by Sen Kennedy and Sen Weicker), *id* at 1174 (statement of Sen Cranston), *id* at 2924 (statement of Rep. Coelho), *id* at 2931 (statement of Rep. Hawkins); *id*. at 3935 (statement of Rep Jeffords), *id* at 2937 (statement of Rep. Owens), *id* at 2939 (statement of Rep. Waxman); *id* at 2947 (statement of Rep. Edwards).

[31] 134 Cong Rec. 1794 (1988) (statement of Sen. Humphrey) ("If the Humphrey-Harkin amendment had not resulted in some substantive change in the law, it would have been a pointless exercise. . . . [The amendment was not] intended merely to codify the status quo in this area The language of these measures is quite clear, and post facto interpretations should not be construed to alter their actual intent or effect ").

[32] The American Law Division of the Library of Congress' Congressional Research Service has reached the same conclusion. CRS Report for Congress, *Legal Implications of the Contagious Disease or Infections Amendment to the Civil Rights Restoration Act, S 557* at 18–23 (March 14, 1988).

lowing an HIV-infected individual to continue in a position where the infection poses a threat to others. This would appear to be the case with infected health care workers who are involved in invasive surgical procedures, and it may also be the case with respect to other infected health care workers or individuals employed in jobs that entail responsibility for the safety of others. Limited accommodations might be required if alternative employment is reasonably available under the employer's existing policies. For example, a surgeon in a teaching hospital might be restricted to teaching or other medical duties that do not involve participation in invasive surgical procedures, or a policeman might be reassigned to duties that do not involve a significant risk of a physical injury that would involve bloodshed. In contrast, given the evolving and uncertain state of knowledge concerning the effects of the AIDS virus on the central nervous system, it may not be possible, at least if the disease has sufficiently progressed, to make reasonable accommodation for positions, such as bus driver, airline pilot, or air traffic controller, that may allow very little flexibility in possible job assignment and where the risk of injury is great if the employer guesses wrongly and the infected person is not able to perform the duties of the job.

Conclusion

We have concluded, with respect to the non-employment context, that section 504 protects symptomatic and asymptomatic HIV-infected individuals against discrimination in any covered program or activity on the basis of any actual, past or perceived effect of HIV infection that substantially limits any major life activity—so long as the HIV-infected individual is "otherwise qualified" to participate in the program or activity, as determined under the "otherwise qualified" standard set forth in *Arline*. We have further concluded that section 504 applies in substance in the same way in the employment context, since the statutory qualification set forth in the Civil Rights Restoration Act merely incorporates the *Arline* "otherwise qualified" standard for those individuals who are handicapped under the general provisions of section 504 by reason of a currently contagious disease or infection. The result is the same: subject to an employer making reasonable accommodation within the terms of his existing personnel policies, the symptomatic or asymptomatic HIV-infected individual is protected against discrimination if he or she is able to perform the duties of the job and does not constitute a direct threat to the health or safety of others.

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

Attachment

July 29, 1988

Douglas Kmiec, Esq.
Acting Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, D.C.

Dear Mr. Kmiec:

I was pleased to be able to convey to you, at our meeting of July 20, 1988, our medical and public health concerns regarding discrimination and the current HIV epidemic. These concerns will be greatly affected by the extent to which HIV infected individuals understand themselves to be protected from discrimination on account of their infection.

Protection of persons with HIV infection from discrimination is an extremely critical public health necessity because of our limited tools in the fight against AIDS. At this time, we have no vaccine to protect against HIV infection and only one treatment which appears to extend the lives of some persons with AIDS but does not cure the disease. Consequently, the primary public health strategy is prevention of HIV transmission.

This strategy requires extensive counseling and testing for HIV infection. If counseling and testing are to work most effectively, individuals must have confidence that they will be protected fully from HIV related discrimination.

During our meeting you and members of your staff raised a number of perceptive questions concerning the nature of HIV infection including the pathogenesis of the virus and its modes of transmission. Your interest in the scientific aspects of HIV infection is welcome, since it is our belief that any legal opinion regarding HIV infection should accurately reflect scientific reality. As I sought to emphasize during our meeting, much has been learned about HIV infection that makes it inappropriate to think of it as composed of discrete conditions such as ARC or "full blown" AIDS. HIV infection is the starting point of a single disease which progresses through a variable range of stages. In addition to an acute flu-like illness, early stages of the disease may involve subclinical manifestations *i.e.*, impairments and no visible signs of illness. The overwhelming majority of infected persons exhibit detectable abnormalities of the immune system. Almost all, HIV infected persons will go on to develop more serious manifestations of the disease and our present knowledge suggests that all will die of HIV infection barring premature death from other causes. Accordingly, from a purely scientific perspective, persons with HIV infection are clearly impaired. They are not comparable to an immune carrier of a contagious disease such as Hepatitis B. Like a

person in the early stages of cancer, they may appear outwardly healthy but are in fact seriously ill. Regrettably, given the absence of any curative therapy for AIDS, a person with cancer currently has a much better chance of survival than an HIV infected individual.

Please do not hesitate to contact me if I can be of any further assistance to you in this matter.

Sincerely,

C. Everett Koop, M.D.
Surgeon General

Reimbursement of the Internal Revenue Service for Investigative Services Provided to the Independent Counsel

To the extent that Internal Revenue Service agents detailed to an independent counsel perform work that is related to the type of work for which the IRS receives its appropriations, the detail falls within an exception to the general rule against non-reimbursable details. Reimbursement by the independent counsel is appropriate for work performed by the detailed agents that is not IRS-related.

September 30, 1988

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION

Introduction and Summary

This responds to your memorandum asking for the opinion of this Office concerning the propriety of reimbursing the Internal Revenue Service ("IRS") for the services of IRS agents assigned to assist Independent Counsel Lawrence E. Walsh and James C. McKay.[1] The IRS, which entered into agreements to be reimbursed by the independent counsel for the services of IRS agents, contends that it must receive reimbursement and that reimbursement cannot be waived. For the reasons stated below, we conclude that to the extent that an IRS agent detailed to an independent counsel performs activities related to the purposes of the IRS, the detail falls within an exception to the general rule against the reimbursable details. This conclusion is consistent with a recent congressional committee report which, while only a matter of legislative guidance, suggests that reimbursement by the independent counsel to the IRS is inappropriate where "agents will presumably be performing IRS work—investigating federal tax fraud." However, with respect to all work that does not fall within that exception, the IRS should seek reimbursement from the independent counsel.

Analysis

A federal agency must spend its funds on the objects for which they were appropriated. 31 U.S.C. § 1301(a). A corollary to this statutory rule is that an agency may not augment its appropriations from outside sources without specific statu-

[1] Memorandum for Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, from Harry H. Flickinger, Assistant Attorney General for Administration, Justice Management Division (May 6, 1988).

tory authority. *See generally* United States General Accounting Office, Office of General Counsel, *Principles of Federal Appropriations Law* 5–62 to 5–63 (1st ed. 1982) (explaining the augmentation theory). The statute and its corollary combine to create a general prohibition on the detail of employees from one federal agency to another on a non-reimbursable basis. "To the extent that agencies detail employees on a nonreimbursable basis . . . they may be avoiding congressional limitations on the amount of moneys appropriated to the receiving agency for particular programs." 64 Comp. Gen. 370, 380 (1985).[2]

There are several recognized exceptions to the rule against non-reimbursable details. First, there is a de minimis exception for details that have a negligible effect on the loaning agency's appropriations. *See* 65 Comp. Gen. 635, 637 (1986). Second, non-reimbursable details are permissible if the detail involves a matter related to the loaning agency's appropriations and which would aid the loaning agency in accomplishing the objects of its appropriations. *Id.*; *see also* 64 Comp. Gen. at 380. Third, Congress may expressly permit non-reimbursable details in certain instances. *See, e.g.*, 5 U.S.C. § 3343 (authorizing details to international organizations).

We believe that non-reimbursable details to the independent counsel are permissible in this case under the second exception. In this regard, the IRS concedes that non-reimbursable details are appropriate "to the extent that IRS employees are assigned to investigations concerning violations of the internal revenue laws." Memorandum for Associate Chief Counsel (Litigation) from Director, General Legal Services Division at 2 (Sept. 23, 1987). This is so because the IRS is appropriated funds for "necessary expenses of the Internal Revenue Service for investigation and enforcement activities." Act of Dec. 22, 1987, Pub. L. No. 100-202, 101 Stat. 1329, 1329–395. *Accord* Act of Oct. 30, 1986, Pub. L. No. 99–591, § 101(m), 100 Stat. 3341, 3341–312.

We have examined your letter to Mr. Brennan and agree that it is reasonable to conclude that the IRS agents detailed to the independent counsels would appear to be working on matters related to the IRS appropriation. Under the agreement, IRS employees are "to perform assigned financial investigative activities, including tracing of funds and net worth computations." Memorandum of Understanding between the Internal Revenue Service and the Office of Independent Counsel at 1 (Mar. 6, 1987) ("MOU"). As you noted in your letter to Mr. Brennan:

> At our meeting with you on September 29, 1987, Anthony Langone, Assistant Commissioner for Criminal Investigations, IRS, confirmed that to the best of his knowledge this was in fact the type of work performed by the IRS employees in this investiga-

[2] The Comptroller General is an officer of the legislative branch, *see Bowsher v. Synar*, 478 U.S. 714, 727–32 (1986), and, historically, the executive branch has not considered itself bound by the Comptroller General's legal opinions if they conflict with the legal opinions of the Attorney General or of this Office. However, the opinions do supply valuable guidance and, in this instance, the Comptroller General's construction of appropriations law is not inconsistent with our reading of the law.

> tion. By its very nature, this type of work tends to uncover violations of the revenue laws to the extent that they may be present. . . . [I]n a recent telephone conversation, the Independent Counsel's Office confirmed that the work of the IRS employees, at least in part, involved tax related matters.
>
> In light of these facts, we believe there is a reasonable basis to conclude that the work of the IRS employees for the independent counsel was in furtherance of an IRS appropriation.

Letter for the Honorable Charles H. Brennan, Deputy Commissioner—Operations, Internal Revenue Service, Department of the Treasury from Harry H. Flickinger, Assistant Attorney General for Administration at 2 (Sept. 30, 1987) ("Flickinger Letter"). Indeed, the work of the independent counsel produced an indictment against former Lieutenant Colonel North and others for conspiracy to defraud the IRS. *United States v. Poindexter*, No. 88–80 (D.D.C. Jan 28, 1987) (count twenty-three of the indictment). It therefore seems evident that at least some of the work done by IRS agents was in aid of the IRS' objective of investigating violations of the tax laws and supporting enforcement activity against violators. Therefore, the IRS should not insist upon reimbursement where the facts indicate the work was in support of the mission of the IRS.[3]

The third exception to the general rule—explicit congressional authorization for non-reimbursable details—does not seem to apply in this case, although there are legislative statements contemplating non-reimbursement under the second exception discussed above. An independent counsel may request assistance during an investigation pursuant to 28 U.S.C. § 594(d)(1):

> An independent counsel may request assistance from the Department of Justice in carrying out the functions of the independent counsel, and the Department of Justice shall provide that assistance, which may include . . . the resources and personnel necessary to perform [the] independent counsel's duties.

Obviously, this provision does not expressly permit federal agencies to detail agents to an independent counsel on a non-reimbursable basis. Indeed, the provision only states that an independent counsel may obtain assistance from the Department of Justice—it does not address the issue of how the independent counsel may obtain assistance from other federal agencies or on what basis such assistance should be provided. Nor is the legislative history of the Ethics in Gov-

[3] Indeed, to require reimbursement for activities within an agency's mandate may, under some circumstances, constitute an improper augmentation of funds. As you stated in your letter of September 30, 1987 to Mr. Brennan, "[i]t would be an authorized augmentation of the IRS appropriations for the IRS to be reimbursed for work that Congress intended to fund out of an IRS appropriation." Flickinger Letter at 1–2. *See also* United States Government Accounting Office, Office of General Counsel, *Principles of Federal Appropriations Law* 5–62 to 5–63 (1st ed. 1983).

ernment Act of 1978, Pub. L. No. 95–521, § 601(a), 92 Stat. 1824, 1869–70, the origin of section 594(d), helpful. The 1978 legislative history does anticipate that an independent counsel may need assistance from other agencies, but the legislative history does not address the specific issue of whether such assistance is to be provided on a reimbursable basis. *See* H.R. Rep. No. 1307, 95th Cong., 2d Sess. 9 (1978) ("When requested, the Justice Department must also furnish the special prosecutor with resources and personnel needed by the special prosecutor in order to perform his duties."); S. Rep. No. 170, 95th Cong., 1st Sess. 68 (1977) ("The special prosecutor may choose to hire his own investigators or may choose to make some use of the Federal Bureau of Investigation or other federal investigation services. . . . If the special prosecutor requests the services of the Federal Bureau of Investigation or any federal investigative service, the Department of Justice is directed to provide the personnel and resources needed.").

Legislative statements accompanying the 1987 amendments to the independent counsel statute do provide, however, some evidence of Congress' desire to have assistance provided to an independent counsel on a non-reimbursable basis. Even though section 594(d)(1) was not changed when Congress reauthorized the independent counsel statute in 1987, a Senate report explained that section 594(d)(1) "enables [the independent counsel], standing in the shoes of the Attorney General, to request assistance from other investigative agencies *such as the Internal Revenue Service*, Secret Service, Inspectors General and Customs Service, which routinely assist the Department of Justice with its criminal investigations." S. Rep. No. 123, 100th Cong., 1st Sess. 23 (1987) (emphasis added). The report then observes:

> [T]he Internal Revenue Service (IRS) has recently demanded that an independent counsel sign a reimbursement agreement to use IRS investigative agents, even though it appears the IRS does not demand similar reimbursement from the Justice Department for the assistance of such agents with other criminal cases. Reimbursement appears particularly inappropriate since these agents will presumably be performing IRS work—investigating federal tax fraud.

Id. at 23. The report adds that "Congress . . . intended other investigative agencies to provide assistance to independent counsels . . . on the same nonreimbursable basis available to [the Justice] Department. . . . [F]ederal agencies are instructed to discontinue the practice of requiring reimbursement agreements mandated by [section 594(d)]." *Id.*

The unmistakable inference from this discussion is that the IRS should not require reimbursement for assistance it provides to the independent counsel, if it would not require similar reimbursement from the Department of Justice. Since IRS assistance to the Department would normally be non-reimbursable where the assistance advanced the mission of the IRS, these legislative statements suggest,

but do not obligate,[4] that the IRS should treat details to an independent counsel in a similar fashion.

Conclusion

We believe that the IRS should not insist upon reimbursement from an independent counsel for the services of IRS agents to the extent that the portion of the work being done by the agents is related to the type of work for which the IRS receives its appropriations. This is consistent with longstanding appropriations law and principles and coincident with legislative statements which suggest that these principles should be observed with respect to the independent counsel, just as they are with the Department of Justice. For all non-IRS-related work done by the detailed agents, however, the general rule requiring reimbursement would appear to apply.

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

[4] There are two reasons why the 1987 Senate committee report cannot obligate the IRS as a matter of law. First, the report language that instructs federal agencies to discontinue all reimbursement agreements is not part of the statute. Committee reports are not statutes and they need not be treated as such. *See TVA v. Hill*, 437 U S 153, 191 (1978), 55 Comp. Gen. 812, 819–20 (1976); Reed Dickerson, *The Interpretation and Application of Statutes* 143–45 (1975) Legislative intent is ineffective unless it is embodied in the words of the statute. *See Commissioner v Acker*, 361 U.S. 87, 92–93 (1959)

Second, even though one might ordinarily review the legislative history of a statute to discern the meaning of an ambiguous provision, post-enactment legislative history generally is entitled to little weight This is especially true when the history is found in a committee report written several years after Congress enacted the statute. *See Oscar Mayer & Co v Evans*, 441 U.S. 750, 758 (1979) (The Senate report "was written 11 years after the [act] was passed in 1967, and such '[l]egislative observations . are in no sense part of the legislative history.'") (quoting *United Airlines v McMann*, 434 U.S. 192, 200 n.7 (1977)). In this case, Congress did not change section 594(d)(1) in 1987, so the discussion of non-reimbursable details is not related to any statutory action taken by Congress. Nevertheless, the Senate Committee on Governmental Affairs obviously favored non-reimbursable details to the independent counsels, and to the extent appropriations law and principles coincide with this stated reference, they should be pursued.

Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea

The President has the authority to issue a proclamation extending the jurisdiction of the United States over the territorial sea from three to twelve miles out.

The President also has the authority to assert the United States's sovereignty over the extended territorial sea, although most such claims in the nation's history have been executed by treaty.

There is a serious question whether Congress has the authority either to assert jurisdiction over an expanded territorial sea for purposes of international law or to assert the United States's sovereignty over it.

The domestic law effect on federal statutes of the extension of the territorial sea is to be determined by examining Congress's intent in enacting each affected statute.

The extension of the territorial sea will not affect the Coastal Zone Management Act.

October 4, 1988

MEMORANDUM OPINION FOR THE LEGAL ADVISER
DEPARTMENT OF STATE

Introduction and Summary

This responds to the requests, made by your Office and an inter-agency working group, for analysis of the constitutional and statutory questions raised by a proposed presidential proclamation to extend the territorial sea of the United States from its present breadth of three miles to twelve miles.[1] In particular, we have been asked to address the following questions: First, does the President have the authority to declare, by presidential proclamation, the proposed extension? Second, assuming the President does have the authority, what effect would such a proclamation have on domestic legislation, such as the Coastal Zone Management Act? Third, can the President limit the effect the proclamation will have on domestic legislation? We have also been asked to comment on H.R. 5069, a bill that would extend the territorial sea by legislation.

We conclude that the President can extend the territorial sea from three to twelve miles by proclamation. While the most legally secure method of doing so would be by entering into a treaty with other nations on this issue, we believe that the President may extend the territorial sea by virtue of his constitutional role

[1] Letter for Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, from Michael J. Matheson, Acting Legal Adviser (Aug. 15, 1988). *See also* Memorandum for Michael A. Carvin, Deputy Assistant Attorney General, Office of Legal Counsel, from Kevin R. Jones, Deputy Assistant Attorney General, Office of Legal Policy (June 20, 1988) (raising similar questions on behalf of the inter-agency working group).

as the representative of the United States in foreign relations. The President's foreign relations authority under the Constitution clearly permits his unilateral assertion on behalf of the United States of jurisdiction over the territorial sea. Whether the President may individually assert sovereignty over the territorial sea is open to some question, although on the basis of several long-settled, historical examples of Presidents unilaterally claiming territory in this fashion, we believe that he may. Finally, we conclude that while Congress may establish state boundaries, there is a serious question whether it has the constitutional authority either to assert jurisdiction over an expanded territorial sea for international law purposes or to assert sovereignty over it.

With respect to the statutory issues, we believe that the better view is that the expansion of the territorial sea will not extend the coverage of the Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451–1464, the statute that has been identified to us by the inter-agency working group as being of special concern. It must be acknowledged, however, that the effect of the proclamation on the CZMA is not entirely free from doubt and that the effect of the expansion on other federal statutes raises complex questions. We therefore recommend that the President seek legislation stating that federal statutes that rely upon the concept of the territorial sea are not affected by the President's proclamation extending the territorial sea from three miles to twelve miles.

Analysis

I. The Territorial Sea

In order to understand the legal issues raised by the proposal to extend the territorial sea, we begin by examining three concepts: the meaning of the "territorial sea" as that term is used in international law; the nature of the other areas of the sea over which a nation may assert some control under international law; and, finally, the distinction between a claim of sovereignty over the territorial sea and claims of jurisdiction over other areas of the sea.

The territorial sea is the belt of water immediately adjacent to the coast of a nation. *See, e.g.*, Restatement (Third) of The Foreign Relations Law of the United States § 511(a)(1986) ("Restatement Third"); 1 L. Oppenheim, *International Law* § 172, at 416 (H. Lauterpacht ed., 7th ed. 1948) ("Oppenheim"). The territorial sea extends from the nation's coast to a distance of up to twelve miles from the coast, the maximum breadth now permitted by international law. Restatement Third § 511(a). Although the United States and some other nations continue to follow the historical practice of adhering to a three-mile territorial sea, most nations now assert sovereignty over a twelve-mile territorial sea.[2]

[2] "At the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders." *United States v. California*, 332 U.S. 19, 32 (1947). By the beginning of the nineteenth century it was generally agreed that the territorial sea extended as far as a cannon could shoot: three miles. *See The Ann*, 1 F. Cas. 926 (C.C.D. Mass. 1812)

A nation is sovereign in its territorial sea. *See* Convention on the Territorial Sea, pt. I, art. 1, 15 U.S.T. at 1608.[3] Indeed, a nation has the same sovereignty over the territorial sea as it has over its land territory. *See* Restatement Third § 512 (sovereignty is the same over the territorial sea as it is over land territory); *Church v. Hubbart*, 6 U.S. (2 Cranch) 187, 234 (1804) (Marshall, C.J.) (a nation exercises absolute and exclusive authority within its own territory, including the territorial sea); *The Ann*, 1 F. Cas. 926, 927 (C.C.D. Mass. 1812) (No. 397) (Story, J.) (the territorial waters "are considered as a part of the territory of the sovereign").[4]

By contrast, a nation is not sovereign over the high seas, which are the remainder of the ocean beyond the territorial sea,[5] and include areas such as the contiguous zone, the continental shelf, and the Exclusive Economic Zone ("EEZ").[6] Rather, a nation may assert more limited forms of jurisdiction in such areas. In the contiguous zone, for example, a nation may only exercise control incident to the application of its customs, fiscal, immigration, and sanitary regulations in the territorial sea. Convention on the Territorial Sea, pt. II, art. 24 (1),

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[2] (. . . continued)

(No. 397) (Story, J.). *See generally* Sayre A. Swarztrauber, *The Three-Mile Limit of Territorial Seas* 23–35 (1972) (describing the history of the cannon-shot rule) ("Swarztrauber"). In the twentieth century, however, the international agreement on the three-mile territorial sea collapsed. Swarztrauber, *supra*, at 131–251. The 1958 Convention on the Territorial Sea and the Contiguous Zone ("Convention on the Territorial Sea"), Apr 29, 1958, pt I, art. 3, 15 U.S.T. 1607, 1608, failed to establish an accepted limitation on the extent of the territorial sea One hundred four nations now claim a twelve-mile territorial sea, while only thirteen maintain the three-mile limit. U.S. Dep't of State, *Summary of Territorial Sea, Fishery, and Economic Zone Claims* 1 (1988)

[3] The Convention on the Territorial Sea, to which both the United States and the Soviet Union are parties, provides, "[t]he *sovereignty* of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea " Convention on the Territorial Sea, pt. I, art. 1, 15 U.S.T. at 1608 (emphasis added). The character of the territorial sea as territory in the same sense that land is territory has not always been free from doubt. *See United States v Louisiana*, 363 U.S. 1, 34 (1960) (Harlan, J.) ("a [maritime] boundary, even if it delimits territorial waters, confers rights more limited than a land boundary"). Similarly, Oppenheim observed in 1937 that "a minority of writers emphatically deny the territorial character of the maritime belt." Oppenheim, *supra*, § 185, at 442–43. These statements, however, have given way to the modern view that a nation exercises the same full sovereignty over its territorial sea as it exercises over its territory on land. Convention on the Territorial Sea, pt. I, art 1, 15 U.S T. at 1608; Restatement Third § 513(1)(a). The notion that a nation is less than fully sovereign over its territorial sea is now considered archaic. *See* Restatement Third § 512, reporters' note 1.

[4] The only qualification on a nation's sovereignty within its territorial sea is that all ships enjoy a right of innocent passage. Convention on the Territorial Sea, pt. I, art 14(1), 15 U.S.T. at 1610; Restatement Third § 513(1)(a). The right of innocent passage is extended to warships so long as their passage is not prejudicial to the peace, good order, or security of the coastal state. *Id* , pt. I, arts. 14(4), 22, 23, 15 U.S.T. at 1610, 1612. The right of innocent passage also extends to submarines as long as they are navigating on the surface and show their flag. *Id* , pt. I, art. 14(6), 15 U S.T. at 1610.

[5] The high seas are open to all nations; no nation may claim sovereignty over any part of the high seas Convention on the High Seas, Apr. 29, 1958, art. 2, 13 U.S T. 2313, 2314. Both the United States and the Soviet Union are parties to the Convention on the High Seas.

[6] The contiguous zone is the part of the high seas that borders the territorial sea. Convention on the Territorial Sea, pt. II, art 24(1), 15 U S.T. at 1612, Restatement Third § 511(b). The continental shelf includes the sea-bed and the subsoil of the submarine areas that extend from the coast to the outer edge of the continental margin (or, if the continental margin does not extend so far, to a distance of not more than two hundred miles) Restatement Third § 511(c). The EEZ extends from the coast to no further than two hundred miles from the coast. *Id.* § 511(d).

15 U.S.T. at 1612.[7] A nation's authority over its continental shelf is restricted to the exploration and exploitation of natural resources. Restatement Third § 515(1). A nation's authority within its EEZ is restricted to activities for economic exploration and exploitation, scientific research, and the protection of the environment. *Id.* § 514(1). Outside these areas, a nation has no jurisdiction over the activities of other nations. Convention on the High Seas, Apr. 29, 1958, art. 2, 13 U.S.T. 2313, 2314.

In sum, the United States may exercise full sovereign power within its territorial sea, while exercising more limited kinds of jurisdiction in three overlapping portions of the high seas—the contiguous zone, the continental shelf, and the EEZ.[8]

II. Constitutional Authority to Extend the Territorial Sea

The question of where the power to extend the territorial sea resides under our constitutional scheme is novel and complex. The Constitution does not discuss the matter and there has been no direct precedent since President Washington first claimed a three-mile territorial sea in 1793. The proposed extension raises issues of the ways in which the United States, through the executive and legislative branches, may acquire territory and assert sovereignty over it, as well as questions about the President's foreign relations power.

With these concerns in mind, we conclude, for the reasons stated below, that the President undoubtedly has the power to assert jurisdiction over the territorial sea so as to establish a new territorial sea for the United States under international

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[7] The Convention on the Territorial Sea provides that "[t]he contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured." Convention on the Territorial Sea, pt. II, art 24 (2). The proposed proclamation, however, states that "[t]he outer boundary of the contiguous zone of the United States henceforth extends 24 nautical miles from the baselines from which the territorial sea is measured." Although customary international law now permits a nation to claim a contiguous zone up to twenty-four miles from the baselines, *see, e g*, Restatement Third § 511(b), the United States has declined to ratify the Law of the Sea Convention in which this new norm is codified. Therefore, the provision extending the contiguous zone should be deleted from the proclamation.

It may be true that most countries have adopted the new twenty-four mile contiguous zone by ratifying the Law of the Sea Convention or would waive their right to protest such an extension. Nevertheless, such a proclamation would be inconsistent with our treaty obligations if the new contiguous zone were asserted against another party to the 1958 Convention on the Territorial Sea who wished to protest. We have been advised informally by the Department of State that the likelihood of protests is small.

[8] Jessup best explams the difference between sovereignty over the territorial sea and limited jurisdiction over other areas of the sea:

> There is a vital distinction between that maritime belt which is claimed as a part of the territory of the state and the limited rights of control or jurisdiction claimed upon the high seas. The confusion is intensified by the disagreement among text writers as to the nature of the control or jurisdiction exercised over territorial waters. If one starts with the proposition that the littoral state has only a "bundle of servitudes" over the territorial waters, one is naturally unable to see much distinction between claims to a three-mile and to a twelve-mile zone. Similarly if one posits merely certain rights of control or jurisdiction therein. But if, on the other hand, one maintains that each maritime state may rightly claim as a part of its territory a certain maritime belt, then the distinction becomes clear. It is this latter hypothesis which is believed to be sound, historically, theoretically and according to international practice

Phillip C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* xxxiii - xxxiv (1927).

law. We also believe, although the issue is not entirely free from doubt, that he has the power to assert sovereignty over the territorial sea as a function of his power to acquire territory on behalf of the United States. Finally, we doubt that Congress has constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States.

A. The President's Power to Assert Jurisdiction

The President's power to assert jurisdiction over the territorial sea is based on his constitutional power over foreign relations.[9] The President's constitutional role as the sole representative of the United States in foreign relations has long been recognized. In the words of John Marshall, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 Annals of Cong. 613 (1800).[10] Thus, it is not surprising that Justice Sutherland explained the nature of the President's authority in expansive terms:

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.
>
> . . . .
>
> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

[9] It is axiomatic that under our Constitution the President has been given broad authority over the conduct of the Nation's foreign relations. *United States v Curtiss-Wright Export Corp.*, 299 U.S. 304, 315–22 (1936). This authority arises from a number of the President's constitutional powers: as Commander-in-Chief of the Nation's military forces, art. II, § 2, cl 1; as the individual charged with the power to negotiate treaties, art. II, § 2, cl. 2; and as the individual who receives ambassadors and other foreign representatives, art. II, § 3. Of course, these specific provisions are supplemented by the general provision of Article II, Section 1, Clause 1, which provides that "[t]he executive power shall be vested in a President of the United States of America." Additionally, the United States obtained inherent sovereign authority over foreign relations when it secured its independence from Great Britain, *Curtiss-Wright*, 299 U.S. at 318, and the President exercises many of the powers that were formerly vested in the British crown, and that are not enumerated in the Constitution as belonging to Congress. *See, e.g.*, 1 William Blackstone, Commentaries on the Laws of England 257 (1771 ed.).

[10] Marshall made this remark as a member of the House of Representatives during a debate concerning an extradition ordered by President John Adams. *See* Edward S. Corwin, *The President: Office and Powers, 1787–1984* at 207–08 (Randall W. Bland et al. eds., 5th ed. 1984).

United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–20 (1935). As a leading constitutional scholar concluded, "*[t]here is no more securely established principle of constitutional practice than the exclusive right of the President to be the nation's intermediary in its dealing with other nations.*" Edward S. Corwin, *The President: Office and Powers, 1787–1984* at 214 (footnote omitted).

The Supreme Court addressed the difficult issue of the relationship between the President's foreign relations power and his power to assert jurisdiction over the territorial sea on behalf of the United States in *United States v. Louisiana*, 363 U.S. 1 (1960) (Harlan, J.). In that case, which involved rights under the Submerged Lands Act, the Court considered the power to fix state boundaries for domestic purposes and the power to fix them for international purposes. The executive branch had argued that no state could have a boundary of more than three miles because a state boundary must coincide with the three-mile limit of our claim to the territorial sea in order to avoid international embarrassment. The Court rejected that argument as an oversimplification of the issue. Justice Harlan described the relationship between the constitutional powers of the executive and the legislature branches as follows:

> The power to admit new States resides in Congress. *The President, on the other hand, is the constitutional representative of the United States in its dealings with foreign nations.* From the former springs the power to establish state boundaries; *from the latter comes the power to determine how far this country will claim territorial rights in the marginal sea as against other nations.* Any such determination is, of course, binding on the States. The exercise of Congress' power to admit new States, while it may have international consequences, also entails consequences as between Nation and State. We need not decide whether action by Congress fixing a State's territorial boundary more than three miles beyond its coast constitutes an overriding determination that the State, and therefore this country, are to claim that much territory against foreign nations. It is sufficient for present purposes to note that there is no question of Congress' power to fix state land and water boundaries as a domestic matter.

Id. at 35 (emphasis added).

The Court thus established two principles: first, that determination of the scope of the territorial sea as against foreign nations is one of the President's constitutional powers, and second, that establishing state boundaries is one of Congress' constitutional powers. The Court left unanswered the question of whether congressional action fixing a state boundary could result in a claim on behalf of the United States for the purpose of international law. The Court proceeded to carefully distinguish between the state boundaries established for domestic purposes by the Submerged Lands Act and the boundary of the territorial sea established by the President for international purposes. *Id.* at 33–36. The Court then held that

the state boundary for domestic purposes can be established by Congress irrespective of the limit of the territorial sea. *Id.* at 35–36.

Thus, it is clear that under *Louisiana* the President may use his power in the realm of foreign affairs to assert jurisdiction over the territorial sea on behalf of the United States as against other nations. We understand that this is the central purpose of the proposed proclamation and we have no doubt that the President may issue such an assertion of jurisdiction.

Indeed, history supports the Court's statement in *Louisiana* that the President's constitutional position as the representative of the United States in foreign relations authorizes him to make claims on behalf of the United States concerning the territorial sea. The primary example, of course, is the first claim of a three-mile territorial sea made on behalf of the United States by then-Secretary of State Thomas Jefferson in 1793. France, Great Britain, and Spain—all of which held territory in North America—were engaged in maritime hostilities off our Atlantic coast, an extension of wars ongoing in Europe. As part of an effort to undermine our policy of neutrality, France pressured us to state the extent of our territorial sea. *See* Sayre A. Swarztrauber, *The Three-Mile Territorial Sea* 56–59 (1972). In response, and although "neither Washington nor Jefferson wished to be hurried" into establishing the limit of our claim, President Washington instructed Jefferson to make an initial claim for the United States. *Id.* at 57.[11] Jefferson sent letters to both the French and British Ministers fixing a provisional limit. The letter to the British minister states:

> SIR: The President of the United States, thinking that, before it shall be finally decided to what distance from our sea shores the territorial protection of the United States shall be exercised, it will be proper to enter into friendly conferences and explanations with the powers chiefly interested in the navigation of the seas on our coasts, and relying that convenient occasions may be taken for these hereafter, finds it necessary in the mean time to fix provisionally on some distance for the present government of these questions. You are sensible that very different opinions and claims have been theretofore advanced on this subject. The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upward of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated at one sea-league. Some intermediate distances have also been insisted on, and that of three sea-leagues has some authority in its favor. The character of our coast, re-

[11] One month before Jefferson did so, President Washington observed, "[t]hree miles will, if I recollect rightly, bring [the captured Brigantine] Coningham within the rule of some decisions, but the *extent* of Territorial jurisdiction at Sea, has not yet been fixed, on account of some difficulties which occur in not being able to ascertain with precision what the general practice of Nations in this case has been." Washington to Governor Thomas Sim Lee, Oct. 16, 1793, *reprinted in* 33 *The Writings of George Washington* 132 (John C. Fitzpatrick ed., 1940)

> markable in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us, in reason, to as broad a margin of protected navigation as any nation whatever. Reserving, however, the ultimate extent of this for future deliberation, *the President gives instructions to the officers acting under his authority, to consider those heretofore given them as restrained for the present to the distance of one sea-league or three geographical miles from the sea-shores.* This distance can admit of no opposition, as it is recognized by treaties between some of the powers with whom we are connected in commerce and navigation, and is as little, or less, than is claimed by any of them on their own coasts.

Letter from Mr. Jefferson to British Minister George Hammond, Nov. 8, 1793, *reprinted in* H.R. Doc. No. 324, 42d Cong., 2d Sess. 553–54 (1872).(emphasis added).

Secretary of State Jefferson's letters, stating the President's determination, have traditionally been viewed as the vehicle by which the United States claimed a three-mile territorial sea. *See, e.g., United States v. California*, 332 U.S. 19, 33 n.16 (1947). Thus, the President was responsible for the initial assertion of jurisdiction over the territorial sea on behalf of the United States. Moreover, Jefferson indicated that the executive reserved the right to extend the territorial sea in the future.[12] We believe that the context makes it clear that the assertion of a claim over the territorial sea was done as a function of the President's power as the representative of the United States in foreign relations, and that the power to do so has been confirmed by the Supreme Court in *Louisiana.*

The actions of two other Presidents who individually asserted control over sections of the high seas provide further support for the argument that the President's constitutional power as the representative of the United States in foreign relations includes the authority to claim portions of the sea for the United States for purposes of international law. In 1945 President Truman issued two proclamations, one concerning the continental shelf and another establishing a fisheries conservation zone. In the Continental Shelf Proclamation, President Truman stated that the "Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf . . . [as] subject to its jurisdiction and control." Proclamation No. 2667, 3 C.F.R. 67 (1943–1948). This Office approved the Proclamation and advised that it was lawful both as a statement of national policy in foreign affairs and as an expansion of the territorial jurisdiction of the United States. Memorandum for Harold W. Judson, Assistant Attorney General, Office of Assistant Solicitor General, from William H. Rose (Sept. 16,

[12] Not only does the letter imply as much, but also Jefferson as President reportedly proposed to claim a broader territorial sea, emphasizing that in the 1793 letter he had "taken care expressly to reserve the subject for future consideration, with a view to this same doctrine for which he now contends." 1 *Memoirs of John Quincy Adams* 375–76 (Charles Francis Adams ed. 1874) (quoting a conversation with Jefferson).

1945). On the same day, President Truman also issued a proclamation which stated that the United States regarded it as proper to establish fishery conservation zones in certain areas of the high seas contiguous to the United States. Proclamation No. 2668, 3 C.F.R. 68 (1943–1948). Where the fishing was by United States nationals alone, "the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States." *Id.* The Proclamation then went on to declare that the United States' policy with respect to zones where nationals of other countries also fished would be determined by agreements between the United States and foreign states. This Proclamation, with its explicit statement of how the issue would be resolved with respect to other nations, was clearly based on the President's constitutional power to represent the United States' interests in the international arena. Finally, in 1983 President Reagan used the same power when he proclaimed "the sovereign rights and jurisdiction of the United States" to an exclusive economic zone extending two hundred miles from the coast of the United States. Proclamation No. 5030, 3 C.F.R. 22 (1984).[13] All of these precedents illustrate that the President's constitutional role as the representative of the United States in foreign relations permits him to proclaim jurisdiction over certain areas of the sea, consistent with international law, on behalf of the United States.

B. The President's Power to Assert Sovereignty

The more difficult issue is whether the President may assert sovereignty over the territorial sea.[14] The key difference between this and an assertion of jurisdiction is that an assertion of sovereignty means that the territorial sea would be considered a part of the territory of the United States—*i.e.*, as much a part of the continental United States as a piece of land. While originally subject to doubt by some, the modern view is that the territorial sea is part of a nation and that a nation asserts full sovereignty rights over its territorial sea.[15] The issue therefore becomes whether the President has the authority to assert sovereignty over territory on behalf of the United States. As indicated below, Presidents have asserted this authority. Based on this historical record, we conclude that the President acting alone may assert sovereignty over an extended territorial sea on behalf of the United States, as a matter of discovery and occupation.

The Constitution does not specifically address the power to acquire territory on

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[13] The President is also authorized to establish "defensive sea areas" by executive order for purposes of national defense. 18 U.S.C. § 2152. *See also* U.S. Naval War College, *International Law Situation and Documents—1956* at 603–04 (1957) (listing defensive sea areas established by the President).

[14] We believe an assertion of sovereignty over the territorial sea would be tantamount to, and would raise the same considerations as, the acquisition of land territory. *See supra* note 3. Because we believe that the territorial sea is probably territory in the same sense that land is territory, we must examine the means by which the United States may acquire territory.

[15] *See supra* note 3.

behalf of the United States.[16] Nonetheless, it is now agreed that the United States has the power to acquire territory as an incident of national sovereignty. *See, e.g., Mormon Church v. United States*, 136 U.S. 1, 42 (1890).[17] The United States has acquired territory through cession, purchase, conquest, annexation, treaty, and discovery and occupation.[18] These methods are permissible under international law[19] and have been approved by the Supreme Court.[20] The executive and the legislature have performed different roles in the acquisition of territory by each of these means. Unfortunately, the historical practice does not supply a precise explanation of where the Constitution places the power to acquire territory for the United States.

1. Assertion of Sovereignty by Treaty

The clearest source of constitutional power to acquire territory is the treaty making power. Under the Constitution, 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. It is pursuant to that power that the United States has made most acquisitions of territory, as a result of either purchase or conquest.[21] Thus, "[i]t is too late in the history of the United

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[16] As Senator (later Justice) Sutherland observed, "[t]here is no provision in the Constitution by which the national government is specifically authorized to acquire territory; and only by a great effort of the imagination can the substantive power to do so be found in the terms of any or all of the enumerated powers." George Sutherland, *Constitutional Power and World Affairs* 52 (1919)

[17] The authority of the United States to acquire territory was seriously questioned in the years immediately following the adoption of the Constitution. The argument against federal authority to acquire territory relied upon the Tenth Amendment provision that the powers not delegated to the federal government are reserved to the states or to the people 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1317 (2d ed. 1851). The Louisiana Purchase afforded the most urgent occasion for the consideration of the issue. Secretary of the Treasury Gallatin advised President Jefferson that "the power of acquiring territory is delegated to the United States by the several provisions which authorize the several branches of government to make war, to make treaties, and to govern the territory of the Union " Letter from Gallatin to Jefferson, Jan 13, 1803, *reprinted in* 1 *Writings of Albert Gallatin* 114 (Henry Adams ed. 1879) Jefferson himself was more concerned about his authority to incorporate the territory into the United States than the authority to acquire the territory *See* Letter from Jefferson to Gallatin, Jan 1803, *reprinted in* 1 *Writings of Albert Gallatin, supra*, at 115. *See also Downes v. Bidwell*, 182 U.S. 244, 322–33 (1901) (White, J , concurring). As the United States continued to acquire large areas of land, the power to acquire territory was taken to have been settled during the nineteenth century. *See* 2 J. Story, *supra*, § 1320.

[18] Territory is acquired by discovery and occupation where no other recognized nation asserts sovereignty over such territory. In contrast, when territory is acquired by treaty, purchase, cession, or conquest, it is acquired from another nation

[19] *See, e g* , Oppenheim, *supra*, § 211, at 498.

[20] The Supreme Court has acknowledged the authority to acquire territory by these methods *See, e g , Curtiss-Wright*, 299 U S. at 318 ("The power to acquire territory by discovery and occupation . . exist[s] as inherently inseparable from the conception of nationality."), *American Ins Co v Canter*, 26 U.S. (1 Pet.) 511, 542 (1828) (Marshall, C.J) ("The Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.")

[21] *See* Treaty Between the United States and the French Republic, Apr. 30, 1803, art. 1, 8 Stat. 200, 201 (Louisiana Purchase); Treaty of Amity, Settlement, and Limits, Between the United States of America and his Catholic Majesty, Feb 22, 1819, art. 2, 8 Stat. 252, 253 (cession of Florida by Spain); Treaty with Great Britain, June 15, 1846, art 1, 9 Stat. 869 (Oregon Compromise), Treaty of Peace, Friendship, Limits and Settlement between the United States of America and the Mexican Republic, Feb 2, 1848, art. 5, 9 Stat 922, 926–27 (cession of California by Mexico); Treaty with Mexico, Dec 30, 1853, art 1, 10 Stat. 1031, 1032 (Gadsden Purchase); Treaty with Russia, Mar 30, 1867, art. 1, 15 Stat. 539 (cession of Alaska by Russia); Isthmian Canal Convention, Nov. 18, 1903, arts. 2 & 3, 33 Stat. 2234, 2234–35 (cession of Panama Canal Zone by Panama), Convention Between the United States and Denmark for Cession of the Danish West Indies, Aug 4, 1916, art. 1, 39 Stat. 1706 (purchase of the Virgin Islands from Denmark).

States to question the right of acquiring territory by treaty." *Wilson v. Shaw*, 204 U.S. 24, 32 (1907). There is no doubt that the United States can acquire territory, including the territorial sea, by treaty.

2. Assertion of Sovereignty by the President Acting Alone - Discovery and Occupation

The more difficult issue is whether the President, acting alone, may acquire territory for the United States. Because of several venerable, and unchallenged, historical examples of such acquisitions, we believe that he can, even though the practice may be subject to some constitutional question. First and foremost, it can be reasonably argued that President Washington and Secretary of State Jefferson in making the original claim to the territorial sea relied on the President's constitutional power as the representative of the United States in foreign affairs to proclaim sovereignty, and not simply jurisdiction, over unclaimed territory. Although we have not found any evidence of Jefferson's view of the nature of the rights of the United States in the territorial sea, both Chief Justice Marshall and Justice Story viewed the territorial sea as part of the territory of the United States. *See Church v. Hubbart*, 6 U.S. (2 Cranch) at 234 (Marshall, C.J.); *The Ann*, 1 F. Cas. at 926–27 (Story, J.).

Similarly, there are two instances in which the President acquired territory acting alone by discovery and occupation.[22] In 1869, "[t]he Midway Islands . . . were formally taken possession of in the name of the United States . . . by order of the Secretary of the Navy." S. Rep. No. 194, 40th Cong., 3d Sess. 1 (1869). *See also* S. Exec. Doc. No. 79, 40th Cong., 2d Sess. (1868). And "[t]he United States claim[ed] jurisdiction . . . over . . . Wake's Island . . . possession of which was taken by the U.S.S. Bennington on January 17, 1899." Letter from Mr. Hill, Assistant Secretary of State, to Mr. Page, Feb. 27, 1900, 243 MS Dom. Let. 246, *quoted in* 1 J. Moore, *International Law Digest* § 111, at 555 (1906) ("Moore").[23]

The acquisition of Midway and Wake Islands by the Navy confirms that the President has the constitutional authority to acquire territory by discovery and occupation. Professor Henkin, for example, has stated that the President can "acquire territory by discovery or prescription." Louis Henkin, *Foreign Affairs and*

[22] There is a third example of unilateral acquisition by the President by executive agreement. In this regard, President Fillmore entered into an executive agreement in 1850 in which Great Britain "cede[d] to the United States such portion of the Horseshoe Reef as may be found requisite" for a lighthouse in Lake Erie near Buffalo Protocol of a Conference Held at the Foreign Office, Dec 9, 1850, 18 Stat. (Part 2) 325–26. *See also* 5 *Treaties and Other International Acts of the United States of America* 905–28 (Hunter Miller ed., 1937) (describing the acquisition of Horseshoe Reef). The acceptance of the cession appears to have been made pursuant to the President's power as representative of the United States in foreign affairs.

[23] The acquisition of American Samoa is frequently cited as evidence of the executive's independent authority to acquire territory for the United States. *See, e g* , 1 Westel Woodbury Willoughby, *The Constitutional Law of the United States* § 240a (2d ed 1929) President McKinley did assert control over American Samoa by executive order in 1900. He acted, however, one month after the Senate ratified a treaty in which Great Britain and Germany renounced "in favor of the United States of America" any rights they had to claim the islands. Convention between the United States, Germany, and Great Britain, Dec. 2, 1899, art. II, 31 Stat. 1878, 1879 (1900). Prior to the treaty, the United States, Great Britain, and Germany had failed in an effort to jointly manage the Samoan Islands. *See generally American Samoa A General Report by the Governor* 22–43 (1927), Moore, *supra*, § 110. The existence of the treaty partially undermines the claim that the acquisition of American Samoa is an example of acquisition by executive action alone.

the Constitution 48 (1972). Another writer concluded that "[t]he President is competent to recognize the acquisition of territory by discovery and occupation." Q. Wright, *The Control of American Foreign Relations* § 197, at 274 (1922). Moreover, it appears that the power to acquire territory by discovery and occupation "flows from [the President's] constitutional position as the representative organ of the government" for purposes of foreign affairs. *Id.* § 73, at 134 n.12.[24]

Practical considerations also illuminate why the President's power to assert sovereignty as a matter of discovery and occupation has gone unchallenged. As our representative in foreign affairs, the President is best situated to announce to other nations that the United States asserts sovereignty over territory previously unclaimed by another nation. With Midway and Wake Islands, for example, the President—through the Navy—acted because there was no other governmental representative present who could assert sovereignty on behalf of the United States.

The President's authority to acquire territory by discovery and occupation suggests to us that the President may assert sovereignty over the contemplated extension of the territorial sea. When territory is acquired by discovery and occupation, it is acquired by the assertion of the acquiring nation that it is henceforth sovereign in that territory. Similarly, when a nation asserts sovereignty over an extended territorial sea, it acquires territory which is not subject to the sovereignty of another nation. Accordingly, the considerations which explain why the President's constitutional position as the representative of the United States in foreign affairs allows him to acquire territory by discovery and occupation counsel that the same constitutional status allows him to proclaim sovereignty over an extended territorial sea.

Justice Harlan's statement for the Court in *Louisiana* that the power to assert territorial rights in the sea derives from the President's power as the constitutional representative of the United States in foreign affairs also appears to affirm the President's authority to assert sovereignty over the territorial sea. Even though Justice Harlan expressed doubt whether the territorial sea was "territory,"[25] he

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[24] One writer, however, has concluded that the President cannot acquire territory without congressional approval *See* Lawson Reno, *The Power of the President to Acquire and Govern Territory*, 9 Geo Wash. L. Rev. 251, 285 (1941). Reno did not discuss the acquisition of Horseshoe Reef. He believed that legislative approval, albeit sometimes implicit, accompanied each of the other acquisitions of territory by the executive. He explained that the United States' sovereignty over Midway derived from the annexation of Hawaii, which had been sovereign over the island before annexation Reno, *supra*, at 275–76. He also asserted that the acquisition of Wake Island was unimportant because of the uncertainty surrounding the occupation by and claims of the United States in those territories *Id* at 276–77. Finally, he justified the United States' sovereignty over American Samoa as supported by implied congressional approval. *Id* at 279–81.

[25] Justice Harlan wrote, "The concept of a boundary in the sea," as opposed to one between two states on land, "is a more elusive one " *Louisiana*, 363 U S. at 33. He explained:

> The extent to which a nation can extend its power into the sea for any purpose is subject to the consent of other nations, and assertions of jurisdiction to different distances may be recognized for different purposes. In a manner of speaking, a nation which purports to exercise any rights to a given distance in the sea may be said to have a maritime boundary at that distance. But such a boundary, even if it delimits territorial waters, confers rights more limited than a land boundary. It is only in a very special sense, therefore, that the foreign policy of this country respecting the limit of territorial waters results in the establishment of a "national boundary "

Id at 34 (footnote omitted) Justice Harlan's view of the nature of the territorial sea as being something less than territory has since been rejected by the United States as well as modern international law scholars, *see supra* note 3

clearly indicated that the President has the power "to determine how far this country will claim territorial rights in the marginal sea *as against other nations*."[26]

In sum, we believe that the President may assert jurisdiction over an expanded territorial sea. Further, we believe that he may also assert sovereignty over an expanded territorial sea. To be sure, the historically more prevalent practice of territorial acquisition has been by treaty, but this in itself does not deny the authority of the President to make an assertion of sovereignty as a matter analogous to discovery and occupation. Nevertheless, to bolster the sufficiency of the proposed proclamation, we strongly recommend that the proclamation state both that it is asserting jurisdiction and that it is asserting sovereignty over the expanded territorial sea.[27] We believe that this formulation provides the best defense to any hypothetical challenge to the President's exercise of power—a challenge which, judging by the historical record, we would anticipate to be unlikely.

C. Congress' Power to Assert Sovereignty over the Territorial Sea

We next consider whether H.R. 5069, which provides for the establishment of a territorial sea twelve miles wide, is within the constitutional power of Congress. H.R. 5069 states, "The sovereignty of the United States exists in accordance with international law over all areas that are part of the territorial sea of the United States." H.R. 5069, 100th Cong., 2d Sess., § 101(b) (1988). Congress, however, has never asserted jurisdiction or sovereignty over the territorial sea on behalf of the United States.[28] Because the President—not the Congress—has the constitutional authority to act as the representative of the United States in foreign affairs, Congress may proclaim jurisdiction or sovereignty over the territorial sea for in-

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[26] *Id* at 35 (emphasis added). There may also be an argument that President Washington's unilateral assertion of sovereignty over the original territorial sea is now underpinned by longstanding congressional acquiescence. In addition, when the Senate ratified the Convention on the Territorial Sea, it agreed that the United States should have a territorial sea and it did not place a limit on its breadth. Further, it agreed that the United States was sovereign over the territorial sea —which as a matter of fact, for the United States, was the sea that President Washington had claimed on behalf of the United States Thus, there is at least arguable recognition by the legislature of the President's power in its explicit desire that the United States exercise full sovereignty over the territorial sea claimed by our first President.

[27] For example, the proclamation might state. "In order to assert jurisdiction as against foreign nations and to assert sovereignty on behalf of the United States . ."

[28] Congress has occasionally considered legislation to extend the territorial sea of the United States. *E.g.*, H.J. Res. 308, 91st Cong., 1st Sess. (1969), S.J. Res. 84, 91st Cong., 1st Sess (1969); S.J. Res 136, 90th Cong., 2d Sess (1968), H.R 10492, 88th Cong., 2d Sess (1964). None of these bills has been enacted

Of course, Congress has enacted statutes with respect to aspects of the United States' jurisdiction over the territorial sea and the high seas. A 1794 federal statute provided for federal court jurisdiction within the three-mile territorial sea. Act of June 5, 1794, ch 51, § 6, 1 Stat. 384. Many federal statutes govern conduct in various areas of our offshore waters. *See, e.g* , 14 U.S.C. § 89 (Coast Guard authority within waters over which the United States has jurisdiction for law enforcement purposes); 19 U.S.C. § 1581(a) (Customs authority within the "customs waters" as defined by 19 U S C. § 1401(j)) Additionally, Congress acted to implement President Truman's continental shelf proclamation for domestic law purposes by enacting the Outer Continental Shelf Act, 43 U.S C. §§ 1331–1356, which claimed submerged lands for the federal government. However, all these statutes were enacted after the President's initial proclamations of sovereignty or jurisdiction within the area on behalf of the United States.

ternational law purposes only if it possesses a specific constitutional power therefor.[29]

We have identified two instances in which the United States acquired territory by legislative action. In 1845, the United States annexed Texas by joint resolution. Joint Res. 8, 5 Stat. 797 (1845). Several earlier proposals to acquire Texas after it gained its independence from Mexico in 1836 had failed. In particular, in 1844 the Senate rejected an annexation treaty negotiated with Texas by President Tyler. 13 Cong. Globe, 28th Cong., lst Sess. 652 (1844). Congress then considered a proposal to annex Texas by joint resolution of Congress. Opponents of the measure contended that the United States could only annex territory by treaty. *See, e.g.*, 14 Cong. Globe, 28th Cong., 2d Sess. 247 (1845) (statement of Sen. Rives); *id.* at 278–81 (statement of Sen. Morehead); *id.* at 358–59 (statement of Sen. Crittenden). Supporters of the measure relied on Congress' power under Article IV, Section 3 of the Constitution to admit new states into the nation. *See, e.g.*, *id.* at 246 (statement of Sen. Walker); *id.* at 297–98 (statement of Sen. Woodbury); *id.* at 334–36 (statement of Sen. McDuffie). These legislators emphasized that Texas was to enter the nation as a state, and that this situation was therefore distinguishable from prior instances in which the United States acquired land by treaty and subsequently governed it as territories. Congress' power to admit new states, it was argued, was the basis of constitutional power to affect the annexation. Congress approved the joint resolution, President Polk signed the measure, and Texas consented to the annexation in 1845.

The United States also annexed Hawaii by joint resolution in 1898. Joint Res. 55, 30 Stat. 750 (1898). Again, the Senate had already rejected an annexation treaty, this one negotiated by President McKinley with Hawaii. And again, Congress then considered a measure to annex the land by joint resolution. Indeed, Congress acted in explicit reliance on the procedure followed for the acquisition of Texas. As the Senate Foreign Relations Committee report pronounced, "[t]he joint resolution for the annexation of Hawaii to the United States . . . brings that subject within reach of the legislative power of Congress under the precedent that was established in the annexation of Texas." S. Rep. No. 681, 55th Cong., 2d Sess. 1 (1898). This argument, however, neglected one significant nuance: Hawaii was not being acquired as a state. Because the joint resolution annexing Texas relied on Congress' power to admit new states, "the method of annexing Texas did not constitute a proper precedent for the annexation of a land and people to be retained as a possession or in a territorial condition." Andrew C. McLaughlin, *A Constitutional History of the United States* 504 (1936). Opponents of the joint resolution stressed this distinction. *See, e.g.*,

[29] Congress has certain constitutional powers that can affect the claims of the United States over the seas. For example, Congress has the power to regulate foreign commerce, art. I, § 8, cl. 3, the power to define and punish crimes committed on the high seas and offenses against international law, art. I, § 8, cl. 10, and the power to declare war, art. I, § 8, cl. 11. Congress also exercises considerable authority over the territory of the United States. The Constitution authorizes Congress to admit new states, art. IV, § 3, cl 1, and to dispose of and regulate the property of the United States, art. IV, § 3, cl. 2.

31 Cong. Rec. 5975 (1898) (statement of Rep. Ball).[30] Moreover, as one constitutional scholar wrote:

> The constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act. . . . Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature it is enacted.

1 Westel Woodbury Willoughby, *The Constitutional Law of the United States* § 239, at 427 (2d ed. 1929).

Notwithstanding these constitutional objections, Congress approved the joint resolution and President McKinley signed the measure in 1898. Nevertheless, whether this action demonstrates the constitutional power of Congress to acquire territory is certainly questionable. The stated justification for the joint resolution—the previous acquisition of Texas—simply ignores the reliance the 1845 Congress placed on its power to admit new states. It is therefore unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea.[31]

We believe that the only clear congressional power to acquire territory derives from the constitutional power of Congress to admit new states into the union. The admission of Texas is an example of the exercise of this power. Additionally, the Supreme Court in *Louisiana* recognized that this power includes "the power to establish state boundaries." 363 U.S. at 35. The Court explained, however, that it is not this power, but rather the President's constitutional status as the repre-

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[30] Representative Ball argued:

> Advocates of the annexation of Texas rested their case upon the express power conferred upon Congress in the Constitution to admit new States Opponents of the annexation of Texas contended that even that express power did not confer the right to admit States not carved from territory already belonging to the United States or some one of the States forming the Federal Union. Whether, therefore, we subscribe to the one or the other school of thought in that matter, we can find no precedent to sustain the method here proposed for admitting foreign territory.

31 Cong. Rec 5975 (1898). He thus characterized the effort to annex Hawaii by joint resolution after the defeat of the treaty as "a deliberate attempt to do unlawfully that which can not be lawfully done " *Id*

[31] Additionally, Congress has authorized the extension of United States' control to guano islands discovered and occupied by citizens of the United States The Guano Islands Act provided:

> Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.

48 U.S.C. § 1411. In *Jones v. United States*, 137 U.S. 202 (1890), the Supreme Court held that the statute was valid and that Navassa, a guano island claimed under that statute, "must be considered as appertaining to the United States," *Id.* at 224. The Guano Islands Act does not appear to be an explicit claim of territory by Congress.

sentative of the United States in foreign affairs, which authorizes the United States to claim territorial rights in the sea for the purpose of international law. The Court left open the question of whether Congress could establish a state boundary of more than three miles beyond its coast that would constitute an overriding claim on behalf of the United States under international law. *Id.* Indeed, elsewhere in its opinion the Court hints that congressional action cannot have such an effect. *Id.* at 51.

In the time permitted for our review we are unable to resolve the matter definitively, but we believe that H.R. 5069 raises serious constitutional questions. We have been unable to identify a basis for the bill in any source of constitutional authority. Because of these concerns, we believe that, absent a treaty, the proposed proclamation represents the most defensible means of asserting sovereignty over the territorial sea.

III. The Proclamation's Effect on Domestic Law

In this section, we consider what effect the proposed proclamation will have on domestic law. By its terms, the proclamation will make clear that it is not intended to affect domestic law. Congress may, however, have enacted statutes that are intended to be linked to the extent of the United States' territorial sea under international law. The issue, therefore, in determining the effect of the proclamation on domestic law is whether Congress intended for the jurisdiction of any existing statute to include an expanded territorial sea. Thus, the question is one of legislative intent.[32]

A. Statutory Intent

The statutes potentially affected by the proclamation are too numerous to consider individually in the time permitted. However, we can discuss some of the considerations relevant to a determination whether Congress intended the application of a statute to be affected by a change in the breadth of the United States' territorial sea, and then make such a determination with respect to the particular statute of interest to the inter-agency working group—the Coastal Zone Management Act, 16 U.S.C. §§ 1451–1464 ("CZMA" or "Act").

The most important consideration in determining whether Congress intended a statute to be affected by a change in the breadth of the territorial sea is the language of the statute. If a statute includes a provision that simply overlaps or coincides with the existing territorial sea—such as the provision "three miles seaward from the coast of the United States"—the operation of the statute will

[32] While the Constitution provides the President with the power to represent the United States in foreign affairs and thus to assert a claim under international law, *see supra* pp. 241–50, the Constitution grants Congress the power to enact statutes with domestic effect within the areas of its enumerated powers. Congress could enact legislation stating that the area affected by a statute could be expanded either by presidential or congressional action. The President can be delegated the authority to fill in the details of a statute, such as determining the extent of a statute's jurisdiction. Congress can always amend a statute, through passage of a new law, to expand its coverage.

probably not, in the absence of special circumstances, be affected by a change in the territorial sea. Indeed, the statute does not appear to invoke the concept of the territorial sea at all, except for denoting an area that coincides with the territorial sea. A similar case is presented by a statute that uses the term "territorial sea" but then defines it as "three miles seaward from the coast of the United States." Although the statute refers to the territorial sea, the definition reveals that Congress understood the area involved as the three-mile territorial sea in existence when the statute was enacted.

Of course, the more difficult cases will arise where Congress has used more ambiguous language. The best example is a statute which refers to the term "territorial sea" without further defining it. Congress could have intended the term to refer to the three miles that history and existing practice had defined or Congress could have intended the statute's jurisdiction to always track the extent of the United States' assertion of territorial sea under international law. A determination of congressional intent in these circumstances will therefore require further inquiry into the purpose and structure of a particular statute, and may include reference to the legislative history, the interpretation of the statute by the executive branch and the courts, and the meaning of similar statutes governing the same subject matter.

B. Coastal Zone Management Act

The CZMA was enacted in 1972 to provide a program of federal grants to the states for the purposes of (1) preserving and developing the Nation's coastal zone and (2) encouraging and assisting the states in exercising their coastal zone responsibilities through the development of management programs designed to achieve wise and coordinated use of coastal zone resources. 16 U.S.C. § 1452. Under the Act, the Secretary of Commerce may make various grants to states for the development, implementation and protection of management programs. 16 U.S.C. §§ 1454–1464.

The states establish management programs, subject to the approval of the Secretary, within the area of the coastal zone. The CZMA defines "coastal zone" as

> the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states . . . . The zone extends, in Great Lakes waters, to the international boundary between the United States and Canada and, in other areas, *seaward to the outer limit of the United States territorial sea.* The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters. Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.

16 U.S.C. § 1453(1) (emphasis added). Thus, the CZMA defines the coastal zone partly in terms of the "United States territorial sea."

The text of the CZMA does not expressly indicate whether Congress intended the coastal zone to be affected by an expanded claim of territorial sea under international law. Inferences from the purposes, structure, and legislative history of the Act, however, suggest that the better view is that Congress intended the coastal zone to be stationary.[33]

1. Statutory Purpose and Structure

There are several purposive and structural reasons why we believe Congress intended the reference to "territorial sea" in the CZMA to refer to the existing three mile area. First, Congress made numerous findings when enacting the CZMA. Congress stated that the coastal zone is rich in natural resources, that it is "ecologically fragile," that it has experienced a loss of living marine resources and nutrient-rich areas, and that present institutional arrangements for planning and regulating the coastal zone are inadequate.[34] 16 U.S.C. § 1451. These findings were based on empirical observation and investigation of the coastal zone that existed at the time the CZMA was enacted, and it was the coastal area out to three miles that was the focus of Congress' concern. These factual findings indicate that it is unlikely that the coastal zone was intended to change with the expansion of the territorial sea. Congress could not have known whether these findings would also be true of other areas over which the United States might assert its jurisdiction or sovereignty. Different conditions obviously could hold depending upon whether the President asserted a territorial sea of three, twelve, or two hundred miles.

Second, it is unlikely that Congress would have intended the CZMA's scope to expand beyond the clear limit of the states' jurisdiction. The central purpose of the CZMA was to assist and encourage the states to regulate use of the coastal zone,[35] and there is serious question whether the states can extend their regulatory jurisdiction beyond the limit of the three-mile belt. In this regard, there are two reasons why the states would not be able to regulate an expanded section of the territorial sea in the comprehensive way contemplated by the CZMA: the states do not have jurisdiction over the soil beneath the nine miles of the expanded territorial sea and it is very uncertain whether the states could assert jurisdiction

[33] In interpreting the CZMA, there are both the Act as originally passed in 1972 and the subsequent amendments to the Act to consider. *See* Pub. L. Nos. 94–370 (1976), 90 Stat. 1013 & 96–464, 94 Stat. 2060 (1980). The definition of coastal zone was included in the original Act, and has not been amended in any substantive respect. We accordingly look principally to the original Act in determining Congress' intent, and only consider the amendments to determine whether they were intended to alter the meaning of the original definition. *See Secretary of Interior v California*, 464 U.S. 312, 330 n.15, 331–32 (1984) (relying principally upon legislative history of the original CZMA, but also considering later provisions).

[34] *See also* S. Rep No. 753, 92d Cong., 2d Sess. 4 (1972) ("Why single out the coastal zone for special management attention? . . . The fact is that the waters and narrow strip of land within the coastal zone is where the most critical demands, needs and problems presently exist.")

[35] *See* 16 U.S.C. §§ 1451(i), 1452(2). Moreover, section 1455(d) of title 16 requires the Secretary of Commerce, prior to approving a state management program, to find that the State "has authority for the management of the coastal zone in accordance with the management program," including the power to administer land and water use regulations, to control development, and to condemn property, for the purpose of achieving compliance with the management program.

even to regulate the waters of that section. We discuss these points in turn.

States had for decades generally assumed that they at least controlled the land beneath the territorial sea. However, in *United States v. California*, the Supreme Court held—contrary to many states' assumption—that "the Federal Government rather than the state has paramount rights in and power over [the three mile marginal] belt, an incident to which is full dominion over the resources of the soil under that water area." 332 U.S. at 38–39. In response to vigorous state protests to this opinion, Congress in 1953 enacted the Submerged Lands Act, 43 U.S.C. §§ 1301–1315, which granted to the states the lands beneath the navigable waters within their boundaries, 43 U.S.C. § 1311(a), which boundaries were at a minimum to be set at "a line three geographical miles distant from [a state's] coast line." *Id.* § 1312.[36] In the same year, Congress also passed the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356 ("OCSLA"), which established claims for the federal government over the submerged lands which lay seaward of the submerged lands controlled by the states, *i.e.*, the submerged lands beyond the three-mile limit.[37] 43 U.S.C. §§ 1331(a), 1332(1) & 1333(a)(1). Accordingly, if the President extends the United States' territorial sea to twelve miles, the states could not exercise jurisdiction over the submerged lands of that area. These lands are controlled by the federal government pursuant to OCSLA.

Second, it is not clear whether the states could assert jurisdiction even over the waters of the expanded portion of the territorial sea. "[A]n assertion of a wider territorial sea by the United States . . . would not itself give rights in the additional zone to the adjacent States. Unless Congress determined otherwise, the zone between three and twelve miles would be under the exclusive authority of the Federal Government." Restatement Third § 512, reporters' note 2. It is therefore reasonable to assume that the states' boundaries and regulatory jurisdiction are fixed at their existing limits, and that states have no more power to assert jurisdiction over the expanded portion of the territorial sea than they do over other territories that are acquired by the United States. *See also Louisiana*, 363 U.S. at 35; *United States v. Maine*, 469 U.S. 504, 513 (1985).[38]

[36] More precisely, the Submerged Lands Act conferred land on the states based on state boundaries as they existed at the time the state became a member of the Union, or as approved by Congress. 43 U.S.C § 1301(b) States that had not asserted seaward boundaries of three miles were authorized to do so 43 U.S.C. § 1312. Moreover, the Act did not prejudice the existence of a further seaward boundary if one existed when the state was admitted to the Union or if the boundary had been approved by Congress, but limited the extent of seaward boundaries to three miles into the Atlantic and Pacific Oceans, and to approximately nine miles into the Gulf of Mexico *See United States v. Louisiana*, 363 U.S 1 (1960) (historical evidence supported Texas' claim to lands beneath navigable waters within nine miles of its coast in the Gulf of Mexico)

[37] President Truman had asserted jurisdiction over the continental shelf on behalf of the United States in 1945. Proc. No. 2667, 3 C F R. 67 (1943–1948) *See supra* p 245.

[38] However, this is not to say that the states might not attempt to expand their regulatory jurisdiction. The states might assert this power as an aspect of their sovereignty retained under the Tenth Amendment, at least to the extent that the jurisdiction did not conflict with international law, or the states might attempt to found the jurisdiction on historical grounds. *See Manchester v Massachusetts*, 139 U.S. 240, 264 (1891), *Skiriotes v Florida*, 313 U.S. 69, 77 (1941). *But see United States v. California*, 332 U S. at 37 (distinguishing *Manchester v Massachusetts*); *United States v. California*, 381 U.S. 139, 168–69 (1965) ("Although some dicta in [*Manchester*] may be read to support" the view that "a State may draw its boundaries as it pleases within limits recognized by the law of nations regardless of the position taken by the United States," "we do not so interpret the opinion The case involved neither an expansion of our traditional international boundary nor opposition by the United States to the position taken by the State.").

However, it is not necessary for present purposes to decide whether the states could assert jurisdiction to regulate the waters of the expanded section of the territorial sea. Thus, given the absence of any clear state authority over the soil beneath an expanded territorial sea and the uncertainty of state authority over the expanded water area, it is most unlikely that the Congress that enacted the CZMA would have simply assumed that state authority would expand if the United States' territorial sea expanded.

2. Legislative History

An examination of the legislative history of the definition of coastal zone also supports this conclusion. In particular, the CZMA represented a compromise between Senate and House bills. The bill reported by the Senate Committee on Commerce included a definition of the coastal zone similar to the final Act. It provided:

> The zone terminates, in Great Lake waters, at the international boundary between the United States and Canada and, in other areas, extends seaward to the outer limit of the United States territorial sea.

S. Rep. No. 753, 92d Cong., 2d Sess. 47 (1972).

The only relevant discussion of this provision in the Senate Report states that "[t]he outer limit of the [coastal] zone is the outer limit of the territorial sea, beyond which the States have no clear authority to act." *Id.* at 9. Thus, the Senate Report is consistent with the conclusion that the coastal zone was intended to extend only to the limit of the existing three mile territorial sea, the limit of state jurisdiction.

After issuance of the Report, however, the definition of coastal zone was amended on the floor of the Senate. Senator Spong was concerned that the bill "might have a prejudicial effect upon the matter of United States against Maine,"[39] in which the United States was seeking a determination against the thirteen Atlantic coastal states concerning control over the submerged lands "of the bed of the Atlantic Ocean more than three geographic miles from the coastline." 118 Cong. Rec. 14,185 (1972). Thus, he proposed an amendment, "the sole purpose of which is to assure that the bill will have no prejudicial effect upon the litigation." *Id.* The amendment changed the definition of coastal zone to the following:

> The zone terminates, in Great Lake waters, at the international boundary between the United States and Canada and, in other areas, extends seaward to the outer limit of the *legally recognized territorial seas of the respective coastal states, but shall not extend beyond the limits of State jurisdiction as established by the*

[39] *Cf United States v. Maine*, 420 U S. 515 (1975).

Submerged Lands Act of May 22, 1953 and the Outer Continental Shelf Act of 1953.

Id. at 14,185 (emphasis added to indicate changed language). Senator Hollings also spoke in support of the amendment. He stated:

> We have been trying to reconcile the amendments so that we would not interfere with any legal contention of any of the several States at the present time involved in court procedures. At the same time we wanted to make certain that Federal jurisdiction was unimpaired beyond the 3-mile limit in the territorial sea.

Id.[40] Thus, the change in the Senate bill language was not intended to have significant effect on the issue at hand, but was only included to avoid affecting pending litigation. The language in the House bill was virtually identical to that in the original Senate bill. The House bill provided:

> The zone extends, in Great Lakes waters, to the international boundary between the United States and Canada and, in other areas, seaward to the outer limit of the United States territorial sea.

H.R. Rep. No. 1049, 92d Cong., 2d Sess. 2 (1972). The House Report, however, adopted a different understanding of the provision. The House Report stated that the coastal zone extends outward

> to the outer limit of the territorial sea which, under the present posture of international law, means three miles from the base line from which the territorial sea of the United States is measured. *Should the United States, by future action, either through international agreement or by unilateral action, extend the limits of the United States territorial sea further than the present limits, the coastal zone would likewise be expanded, at least to the extent that the expanded water area and the adjacent shore lands would strongly influence each other*, consistent with the general definition first referred to above.[41]

[40] Senator Moss stated that "[t]his makes clear that this bill focuses on the territorial sea or the area that is within State jurisdiction, and preserves the Federal jurisdiction beyond, which is not to be considered or disturbed by the bill at this time. If we want to do something about that later, we will have another bill, and another opportunity." 118 Cong. Rec. 14,185 (1972).

[41] The "general definition" to which the House Report refers is as follows: "'Coastal Zone' means the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states." H.R. Rep. No. 1049, *supra*, at 2.

Id. at 13–14 (emphasis added). This language in the House Report expresses an intent that, at least in certain circumstances, the definition of coastal zone could be extended by a change in the breadth of the territorial sea.

The difference in the language between the House and Senate bills was resolved by the Conference Committee. The Conference Report stated:

> The Managers agreed to adopt the House language as to the seaward extent of the coastal zone, because of its clarity and brevity. At the same time, it should be made clear that the provisions of this definition are not in any way intended to affect the litigation now pending between the United States and the Atlantic coastal states as to the extent of state jurisdiction. Nor does the seaward limit in any way change the state or Federal interests in resources of the territorial waters or Continental Shelf, as provided for in the Submerged Lands Act and the Outer Continental Shelf Lands Act.

H.R. Conf. Rep. No. 1544, 92d Cong., 2d Sess. 12 (1972).

While it might be argued that the Conference Committee's adoption of the House bill language also adopted the explanatory language in the House Report, the Conference Report did not say so. Rather, it stated that the language was taken because of its "clarity and brevity." Moreover, the Conference Report then immediately went on to state what is in effect a paraphrase of the Senate bill—saying that the bill is not intended to affect the pending litigation and that the seaward limit is understood in accordance with the Submerged Lands Act and the OCSLA. Thus, the Conference Report appeared to make a special effort to clarify that despite its choice of the House language (which was also the language of the original Senate version), it accepted the Senate's understanding of the provision.[42]

Moreover, the Conference Report would appear to be inconsistent with the House Report's language concerning extension of the coastal zone. The third and final sentence in the Conference Report discussing the definition reiterates the congressional concern that CZMA do nothing to affect the statutory allocation of state and national responsibility in the area. *Id.* If the CZMA permitted an expansion of the coastal zone, and states asserted regulatory jurisdiction over the extended territorial sea, however, that balance of authority would be affected.[43]

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[42] The House bill had included various provisions extending the scope of the CZMA beyond the three-mile limit, but the Conference Committee had rejected all the provisions The language in the House Report may therefore be understood as indicative of the House's intent that the CZMA extend beyond the three-mile limit in certain circumstances. *See Secretary of Interior v. California*, 464 U S. 312 (1984) (discussed below). But because rejection of these provisions indicates that this intention was not adopted by the Conference Committee, we believe the better view is that the language in the House Report, like the provisions eliminated in the House bill, does not reflect the final congressional intent

[43] Extension of the coastal zone to the land and sea beyond the three-mile limit would have provided the states with additional control over OCS resources States would have the authority under section 307(c)(3) of the original act, 16 U S.C. § 1456(c)(3)(A), to veto (subject to a limited federal override) OCS activities that affected the waters of the new, extended coastal zone.

This understanding of the legislative history is bolstered by the Supreme Court's decision in *Secretary of the Interior v. California*, 464 U.S. 312 (1984). This case involved the interpretation of section 307(c)(1) of the CZMA, 16 U.S.C. § 1456(c)(1), which requires federal agencies to conduct activities "directly affecting the coastal zone" consistently with approved state management programs. The Court held that the only federal activities "directly affecting" the coastal zone were those conducted "on federal lands physically situated in the coastal zone but excluded from the zone as formally defined by the Act," and did not include activities conducted beyond the three-mile seaward limit of the coastal zone, as California had argued. 464 U.S. at 330. The Court based its holding that the ambiguous "directly affecting" language did not apply to activities seaward of the three-mile limit on a review of the legislative history. The Court concluded that "[e]very time it faced the issue in the CZMA debates, Congress deliberately and systematically insisted that no part of CZMA" was to extend beyond the three-mile limit. *Id.* at 324.

The Court noted the "repeated statements" in the floor debates in Congress that "the allocation of state and federal jurisdiction over the coastal zone and the [outer continental shelf] was not to be changed in any way" by the Act. *Id.* The Court listed nine statements, including: "This bill covers the territorial seas; it does not cover the Outer Continental Shelf." 118 Cong. Rec. 14,180 (1972) (remark of Sen. Stevens); "[T]his bill attempts to deal with the Territorial Sea, not the Outer Continental Shelf." *id.* at 14,184 (remark of Sen. Moss); "[W]e wanted to make certain that Federal jurisdiction was unimpaired beyond the 3-mile limit in the territorial sea." *id.* at 14,185 (remark of Sen. Hollings); "[T]he Federal Government has jurisdiction outside the State area, from 3 to 12 miles at sea." *id.* at 35,550 (remark of Rep. Anderson).

Moreover, the Court relied upon the fact that Congress "debated and firmly rejected" four proposals "to extend parts of CZMA" to the outer continental shelf. 464 U.S. at 325. The most significant of these proposals was contained in section 313 of the House bill, which would have required the Secretary of Commerce to develop a management program for "the area outside the coastal zone and within twelve miles" of the coast. This provision, however, was eliminated by the Conference Committee because, as explained in the Conference Report, "the provisions relating thereto did not prescribe sufficient standards or criteria *and would create potential conflicts with legislation already in existence concerning Continental Shelf resources.*" *Id.* at 327 (quoting H.R. Conf. Rep. No. 1544, *supra*, at 15 (emphasis supplied by Supreme Court)). Congress also rejected proposals to permit the Secretary of Commerce to extend established state coastal zone marine sanctuaries beyond the coastal zone, to require approval of state governors when federal agencies sought to construct or to license construction of facilities beyond the territorial sea,[44] and to invite the National Academy of Sciences to investigate environmental hazards attendant on offshore drilling on the Atlantic Outer Continental Shelf.[45] Viewing this evidence in its

[44] 118 Cong. Rec. 14,183–84 (1972).

[45] 118 Cong. Rec. 14,180–81, 14,191, 35,547 (1972).

totality, the Court concluded[46] that "Congress expressly intended to remove control of [outer continental shelf] resources from CZMA's scope." *Id.* at 324.[47]

The Supreme Court's understanding of Congress' intent also applies to the present issue. Congress' intention to exclude outer continental shelf resources from the scope of the CZMA, which required that the "directly affecting" provision be applied only to activities within the three-mile coastal zone, was based on a desire to limit the applicability of the CZMA to the three-mile limit. Therefore, the legislative history, as interpreted by the Supreme Court, also indicates that Congress did not intend for the coastal zone itself to be expanded beyond that three-mile limit.

3. Subsequent Amendments

Since 1972, Congress has passed legislation affecting the relationship between the federal and state authority contemplated by the original CZMA. While these amendments are of limited significance in interpreting the original CZMA, we discuss them because they are consistent with a continuing congressional intent to consider carefully any change in the balance of state and federal authority in this area.

The CZMA has been amended several times,[48] and OCSLA has also been substantially modified. In contrast to the original CZMA, these amendments expressly give the states a role concerning the federal governance of activities on the OCS. The amendments establish a complex, interconnected statutory scheme, which contains precise and detailed limits on state authority, varying in different circumstances. That Congress has enacted such a scheme suggests that it has considered and legislated on the role of the states very carefully, and would not desire any modification of that role in the CZMA in the absence of new legislation. We describe the amendments below.

The CZMA was first significantly amended by the Coastal Zone Management Amendments of 1976, Pub. L. No. 94–370, 90 Stat. 1013 (1976) ("1976 Amendment"). The 1976 Amendment effected two important changes in the role of the

[46] We also believe that section 307(c)(3) of the original Act, 16 U.S.C § 1456(c)(3)(A), did not, as originally enacted, apply to activities seaward of the coastal zone Section 307(c)(3) required activities "affecting land or water uses in the coastal zone" to be subjected to review for consistency with state management programs, and was a sister provision to section 307(c)(1) construed in *Secretary of Interior v California* Based on the logic and language of that case, the Court's statement that the Congress that passed the original CZMA "expressly intended to remove control of [outer continental shelf] resources from CZMA's scope" also applies to section 307(c)(3). We need not decide, however, whether the scope of this provision has been changed by amendments to the Act. *See e g* , Pub. L. No. 94–370, 90 Stat. 1018 (1976) (codified at 16 U.S.C. § 1456(c)(3)(B)).

[47] It is clear that Congress was concerned with more than whether a provision violated international law. The Conference Committee rejected section 313 of the House bill because it would have created potential conflicts with existing legislation governing the outer continental shelf, not because it would violate international law H.R. Conf. Rep. No. 1544, 92d Cong., 2d Sess. 15 (1972). Thus, Congress' decision to extend the coastal zone seaward only three miles was in part the product of its conscious coordination of the CZMA with other statutory provisions governing the outer continental shelf, provisions which would be unaffected by a change in the United States' territorial sea.

[48] The CZMA has been amended at least seven times. Here, we focus on the 1976 amendment because it contains the principal changes in federal and state authority. *See also* Coastal Zone Management Improvements Act of 1980, Pub L. No 96–464, 94 Stat 2060 (1980)

states, both of which recognize and attempt to address the effects of OCS activities on the coastal zones of the states. First, section 6 requires federal licenses for OCS exploration or development to attempt to conform to management plans of affected states. The Secretary of Commerce may override the state's determination that an activity is inconsistent with its plan only upon finding that the proposed activities are consistent with the objectives of the CZMA or are necessary in the interest of national security. 16 U.S.C. § 1456(c)(3)(B). Second, section 7 of the 1976 Amendment establishes a Coastal Energy Impact Program that provides financial assistance to states to meet needs resulting from and reflecting the impact of coastal energy activities, including OCS activities, which for technical reasons must be sited in or near the state's coastal zone. 16 U.S.C. § 1456a.

In 1978, Congress further modified the allocation of federal and state responsibilities through enactment of the Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95–372, 92 Stat. 629 ("OCSLA Amendment"). This amendment substantially changed the original OCSLA by including numerous provisions requiring state participation in OCS activities.[49]

Thus, the amendments to both the CZMA and the OCSLA establish a complex and detailed statutory scheme concerning the limits of state authority to affect OCS activities.[50] Over the years, Congress has provided the states with grants to respond to the effects of OCS activities, with the authority to review and make recommendations concerning OCS activities, and with the power to veto OCS activities subject to limited federal override. These detailed amendments to the CZMA and OCSLA are thus consistent with a congressional understanding of a coastal zone and state authority which would not automatically expand with the expansion of the territorial sea.

To summarize, on the basis of the purpose, structure and legislative history of the CZMA, we conclude that Congress did not intend the coastal zone to be affected by an expansion of the territorial sea under international law. The language in the House Report might suggest a contrary conclusion, but that language was not accepted by the Conference Committee and, in any case, is outweighed by

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[49] The OCSLA Amendment provides for various levels of state participation in the process of developing offshore oil. *Secretary of Interior v. California*, 464 U S. at 337. The Secretary of Interior must, while preparing a schedule for proposed lease sales on the OCS, solicit comments from states that might be affected, and must explain, in a report to Congress and the President, why a state recommendation was not accepted. 43 U S.C. § 1344(c) & (d) Second, the Secretary must accept state recommendations concerning the size, timing or location of proposed lease sales, if he determines that they reasonably balance national and state interests 43 U S C § 1345(a) & (c). Third, an applicant's exploration plan must certify that the proposed activities are consistent with state CZMA management programs unless the Secretary of Commerce finds that the proposed activities are consistent with the objectives of the CZMA or are necessary in the interest of national security 43 U.S.C. § 1340(c) Finally, the Secretary of Interior must accept state recommendations concerning development and production plans if they provide a reasonable balance between state and national interests. The plans must also be consistent with state CZMA management plans and will only be approved, absent state consent, if the Secretary of Commerce finds that the proposed activities are consistent with the objectives of the CZMA or are necessary for national security. 43 U.S.C. § 1351

[50] Writing of the relationship between the OCSLA Amendment and CZMA, the Supreme Court stated that "Congress has thus taken pains to separate various federal decisions" in the process of granting authority to conduct OCS development and to subject only the third and fourth stages to review for consistency with state management plans. *Secretary of Interior v California*, 464 U.S. at 340.

the structure of the Act and the legislative history, as interpreted by the Supreme Court.

We recognize, however, that this conclusion is not free from doubt, and that a court could construe the coverage of the CZMA—or other statutes which refer to the territorial sea—as expanding with the extension of the territorial sea. Such a result can be avoided. As discussed, whether the coverage of a statute which refers to the territorial sea is affected by the extension of the territorial sea is a question of legislative intent. Therefore, Congress could foreclose an individualized judicial assessment of each federal statute by enacting legislation which negates the expansion of the coverage of any domestic statute by the extension of the territorial sea for international purposes. An express declaration by Congress that the presidential proclamation extending the territorial sea has no effect on the operation of domestic statutes which rely upon the concept of the territorial sea would provide a simple and decisive rejoinder to any claim of automatic expansion. Thus, although we do not believe that the coverage of the CZMA should be construed to expand as a necessary result of the presidential proclamation, we recommend that the President seek legislation to conclusively preclude any contrary decision on the CZMA or any other statute by the courts.

Conclusion

We believe that the President may make an extended jurisdictional claim to the territorial sea from three to twelve miles by proclamation. We also find venerable historical evidence supporting the view that the President's constitutional role as the representative of the United States in foreign relations empowers him to extend the territorial sea and assert sovereignty over it, although most such claims in our nation's history have been executed by treaty. It is more doubtful, however, that Congress, acting alone, may extend the territorial sea beyond the present boundary for international purposes.

The domestic effect of the extension of the territorial sea on federal statutes that refer to the territorial sea must be determined by examining Congress' intent in passing each relevant statute. We have concluded that the better view is that the expansion of the territorial sea will not extend the coverage of the Coastal Zone Management Act, the statute which was identified to us as presenting special concern. However, we recognize that the effect of the proclamation on the CZMA and numerous other federal statutes will continue to be uncertain until final judicial resolution. We therefore recommend that the President seek legislation providing that no federal statute is affected by the President's proclamation to extend the breadth of the territorial sea from three miles to twelve miles.

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

Applicability of 18 U.S.C. § 207(c) to President-Elect's Transition Team

The one-year bar in 18 U.S.C. § 207(c), which prohibits certain former government employees from contacting the agencies where they worked, applies to persons who serve on a presidential transition team while receiving a salary from a private employer.

The bar in 18 U.S.C. § 207(c) does not apply to members of a presidential transition team who support themselves from their own resources or are compensated solely from appropriated funds.

November 18, 1988

LETTER FOR THE DIRECTOR
OFFICE OF GOVERNMENT ETHICS

This responds to your oral request of November 17, 1988, for our views on whether the one year bar prohibiting certain former government employees from contacting their former agency, contained in 18 U.S.C. § 207(c), applies to former government employees who are working for the President-elect's transition team. Presidential Transition Act ("Act"), 3 U.S.C. § 102 note, as amended by Pub. L. No. 100–398, 102 Stat. 985 (1988).

As you indicated, this is a novel and difficult question given the sui generis nature of a presidential transition. It is readily apparent that presidential transitions serve an important public function. Congress has endorsed their significance, stating, when it set forth the purposes of the Act:

> The national interest requires that such transitions in the office of the President be accomplished so as to assure continuity in the faithful execution of the laws and in the conduct of the affairs of the Federal Government, both domestic and foreign.

Id. § 2. We have no doubt that promoting the "orderly transfer of the executive power," *id.*, is one of the most important public objectives in a democratic society.

It does not follow from this that the restrictions of 18 U.S.C. § 207(c) do not apply at all to the transition. The conflict of interest laws also advance extremely important goals, including promoting public confidence in the integrity of the federal government and ensuring that corruption—and opportunities for corruption—are minimized. Thus, in evaluating the applicability of section 207(c), we believe that it is best to examine the actual status of a transition staff member in conjunction with the evils that the ethics laws were intended to combat.

At one end of the spectrum is the federal employee who is detailed by his agency to assist the transition team. He is clearly a federal employee, covered by all applicable portions of 18 U.S.C. §§ 201–209, and obviously his status raises no question under section 207(c). The Act specifically refers to such employees

and emphasizes that their status vis-a-vis the United States does not change while they are working with the transition team. Act, § 3(a)(2). Based upon this statutory recognition, we also agree with you that the prohibitions in section 203 and 205 do not apply to such detailed employees by virtue of the "official duties" exception to those provisions.

At the other end of the spectrum is an individual who recently occupied a high, policy making position in the executive branch and who is now employed by a company or law firm in the private sector. If such an individual, while still receiving his private sector salary, works for the transition team, he typifies the potential for abuse that we believe that section 207(c) was intended to guard against. He is not compensated by the federal government,[1] may not make decisions or participate in matters on behalf of the United States,[2] and his loyalties are not undivided.[3] Because the central purpose of section 207(c) was to preclude for one year a limited class of high-level government employees from contacting their former agencies unless the contact was clearly on behalf of the United States, we believe such individuals who receive compensation from the private sector for, or during, their work for the transition team are not exempt from the fairly absolute "no contact" rule, merely by virtue of their association with the transition. We therefore believe that such individuals are, notwithstanding their employment by the transition team, covered by 18 U.S.C. § 207(c), and barred from contacting their former department or agency for the statutory period.

It is less clear that section 207(c) should apply to those former high-level government officials who have been separated from their agencies less than one year who are either volunteers for the transition team and are supporting themselves from their own resources or who have severed their ties with private sector employment and are being compensated solely from funds appropriated under the Act. It is much more likely that those former officials who are supporting themselves and are acting solely in the interests of the President-elect[4] will not face the divided loyalties at which section 207(c) was aimed.

The same argument is true with respect to those whose salaries are paid out of appropriated funds: Congress has decided that it is in the interest of the United States (even if the actions of the transition team cannot be precisely said to be on behalf of the United States) that these individuals be paid with federal funds because they are advancing a federal interest. Our hesitation to apply section 207(c) to transition team members compensated with appropriated funds is bolstered by the fact that the Act was recently amended to provide significant amounts of fund-

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[1] The Act also makes clear that such staff members are not federal employees except for limited provisions not relevant here. Act, § 3(a)(2)

[2] We understand that the proposed Standards of Conduct for a transition worker make it clear that he cannot and should not attempt to interfere with the decision making functions of the agencies.

[3] A clear example would be a former Department of Defense officer who is now working for a defense contractor or a former Department of Justice official who is now representing companies whose interests would be affected by decisions of the Department

[4] This would seem to apply with special force to a former government official who had no private sector affiliation since leaving government, such as former government employees participating in the political campaign which led to the election of the President-elect

[5] Presidential Transitions Effectiveness Act, Pub. L. No. 100–398, 102 Stat. 985 (1988).

ing for some transition staff members.[5] In return for the funding, the President-elect must undertake certain steps to minimize the potential for conflicts of interest with respect to all transition personnel. Act, § 5(b), *as amended.* As the House Report on the recent bill notes:

> Once again, the unique circumstances of a Presidential transition require balancing the ability of a new President to conduct transition activities as completely and effectively as possible, and in a manner he desires, with the necessity of maintaining public confidence . . . .

H.R. Rep. No. 532, 100th Cong., 2d Sess. 6–7 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1372, 1376. Thus, Congress, notwithstanding the fact that these compensated staff members are not generally treated as federal employees, has made it clear that they occupy a unique position and one that is worthy of federal funding.

Second, with respect to both self-supporting and transition team members compensated solely with public funds, we are influenced by the fact that the Criminal Division has informally advised us that they would not prosecute such individuals under section 207(c) so long as their contacts with their former federal departments or agencies was only for transition purposes. If those who are charged with the direct enforcement of the objectives that section 207(c) was intended to achieve do not believe that those who are self-supporting volunteers or who are compensated solely out of appropriated funds fall outside the scope of section 207(c), we do not feel compelled to disagree.

We would note, in concluding, that former government employees within the scope of section 207(c), regardless of their funding source for the transition, may utilize the exception in 18 U.S.C. § 207(i) which permits former employees otherwise barred by section 207(c) from contacting their former agencies for one year to make or provide a statement to those agencies based on the employees' prior special knowledge, provided that no compensation is received. Thus, any former employee could assist the transition by supplying to the transition or his former department or agency for the transition an analysis based on his prior experience with and knowledge of his former department or agency, even if the considerations above preclude that individual's current contact with his former department or agency. Finally, it is of course apparent that section 207(c) does not prevent any covered former employee from contacting departments or agencies *other than* the one by which he was formerly employed.

DOUGLAS W. KMIEC
Assistant Attorney General
Office of Legal Counsel

Authority of the Customs Service to Seize or Forfeit Property Pursuant to 21 U.S.C. § 881

The Customs Service does not have independent authority to make seizures or forfeitures pursuant to 21 U.S.C. § 881. Accordingly, the Customs Service should seize or forfeit property pursuant to that section only under the supervision of the Drug Enforcement Administration and by direct or derivative designation of the Attorney General.

The proceeds of property forfeited after a seizure by the Customs Service must be deposited in the Customs Forfeiture Fund, rather than in the Department of Justice Assets Forfeiture Fund, when the seizure was made under a law administered or enforced by Customs, or custody was maintained by Customs, regardless of whether the forfeiture was handled by Justice.

November 23, 1988

MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

Introduction

This memorandum responds to your request that this Office consider (1) whether the United States Customs Service has independent authority to seize and forfeit property pursuant to 21 U.S.C. § 881; and (2) whether property forfeited under 21 U.S.C. § 881 may be deposited into the Customs Forfeiture Fund maintained under the authority of 19 U.S.C. § 1613b. These questions were first posed by the Administrator, Drug Enforcement Administration ("DEA"),[1] and have been the subject of memoranda from the DEA, the United States Customs Service ("Customs" or "Customs Service") and the Department of Treasury to this Office over the past year.[2] In addition, these questions have caused disagreement between field offices of DEA and Customs during the past several months, and the United States Attorneys in several districts have been called upon to mediate the disputes.

Section 881 of the Controlled Substances Act generally provides statutory authority to seize and forfeit the proceeds of drug transactions and the property used

[1] Memorandum for the Assistant Attorney General, Office of Legal Counsel, from John C. Lawn, Administrator, DEA, *Re: U S Customs Authority in Matters Relating to 21 U S C. § 881* (Nov 3, 1986).

[2] *See, e.g.*, Memorandum for Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, from Dennis F Hoffman, Chief Counsel, DEA, *Re U.S. Customs Authority in Matters Relating to 21 U S C § 881* (June 2, 1987) ("Hoffman Memo"); Memorandum for Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel, from Michael H. Lane, Acting Commissioner of Customs, *Re· Customs Seizures under 21 U S C § 881* (Apr. 5, 1988) ("Lane Memo"); Memorandum for Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel, from Selig S. Merber, Assistant General Counsel, Department of the Treasury, *Re. U S. Customs Service Use of 21 U.S.C. § 881* (June 6, 1988).

to facilitate such transactions. Although this Office has indicated in prior opinions that Customs does not have independent title 21 *seizure* authority,[3] and we have no basis to disturb that opinion, we have never specifically addressed whether Customs has independent *forfeiture* authority under 21 U.S.C. § 881 or the extent to which property forfeited under section 881 may be deposited in the Customs Forfeiture Fund ("Customs Fund"). The DEA contends that Customs has no independent forfeiture authority under section 881 because Congress has designated the Department of Justice as the authority responsible for enforcing the federal drug laws and because section 881 specifically confers forfeiture authority only upon the Attorney General. The DEA further contends that property forfeited under section 881 may not be deposited into the Customs Fund because Customs is not the proper authority to perform seizures under these drug laws. In contrast, Customs and the Department of Treasury maintain that section 881 provides Customs with independent forfeiture authority and that any property seized by Customs must be deposited into the Customs Fund.

For the reasons set forth below, we conclude that Customs does not have independent forfeiture authority under section 881. In 1973, Reorganization Plan No. 2 transferred drug enforcement authority to the Department of Justice. While Customs' limited independent authority to seize drugs under laws other than title 21 is acknowledged by this Plan, Customs is required to turn over to the Department of Justice all drugs and related evidence. Customs agents can only seize and forfeit property pursuant to section 881 when they assist the DEA under designation by the Attorney General. As we discuss below, the 1984 and 1988 amendments to section 881 confirm our conclusion that the Attorney General is solely responsible for seizing, forfeiting and, in the first instance, disposing of property forfeited under that statute.

The second issue, pertaining to the Customs Forfeiture Fund, poses a closer question. For the reasons set forth below, however, we conclude that under 28 U.S.C. § 524(c)(10) the proceeds of property forfeited after a seizure by Customs must be deposited in the Customs Fund when the seizure was made by Customs under a law administered or enforced by Customs, or custody was maintained by Customs, regardless of whether the forfeiture was handled by the Department of Justice under section 881.[4]

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[3] *See, e g* , Memorandum for the Attorney General, from Theodore Olson, Assistant Attorney General, Office of Legal Counsel, *Re Request by the Department of Justice for Assistance from the Department of Treasury in the Enforcement of the Controlled Substances Act, 21 U S C § 801 et seq , and the Controlled Substances Import and Export Act, 21 U S.C § 951 et seq* (Dec. 23, 1983) ("Olson Memo") (courts would probably uphold a grant of limited title 21 authority granted to Customs officials acting under the supervision of DEA personnel); Memorandum for the Deputy Attorney General from Douglas W Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel, *Re. United States Customs Service Jurisdiction over Title 21 Drug Offenses* (June 3, 1986) ("Kmiec Memo") (19 U.S C. §§ 1589 and 1589a provide warrant and arrest authority to Customs, but do not alter its drug-related authority under Reorganization Plan No. 2 of 1973).

[4] As this opinion was being finalized, the President signed into law the Anti-Drug Abuse Act of 1988, Pub L No. 100–690, 102 Stat 4181 (1988) ("1988 Drug Act") We have reviewed the new law's provisions, and incorporated them into our analysis.

Two provisions contained in the 1988 Drug Act are worthy of additional comment here Section 6078 of title VI provides for an addition to the end of part E of the Controlled Substances Act, 21 U.S.C. §§ 871–887, as follows:

Discussion

1. Forfeiture Authority Pursuant to 21 U.S.C. § 881

A. *Statutory Language*

Section 881 provides the Attorney General broad authority both to seize and to forfeit specified controlled substances as well as certain property connected with the manufacture, distribution or sale of those substances,[5] and further provides for the disposition of the forfeited property.[6] In addition, section 881 grants the Attorney General the authority to use the proceeds from the sale of forfeited property to pay many of the expenses pertaining to the seizure, maintenance, and sale of the property.

Property may be forfeited pursuant to 21 U.S.C. § 881 through two separate processes. Under some circumstances, property may be forfeited administra-

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[4] (. . . continued)

> The Attorney General and the Secretary of the Treasury shall take such action as may be necessary to develop and maintain a joint plan to coordinate and consolidate post-seizure administration of property seized under this title, title III, or provisions of the customs laws relating to controlled substances.

Similarly, section 6079 of title VI of the 1988 Drug Act provides that the Attorney General and the Secretary of the Treasury are to consult and prescribe regulations for expedited administrative procedures for certain seizures under several acts, including both the Controlled Substances Act and the Tariff Act of 1930

We believe that neither of these provisions constitutes a grant of additional seizure or forfeiture authority to Customs. It is significant in this regard that both provisions are procedural, and both specifically refer to the customs laws. The plain language of these provisions indicates that Congress has acknowledged here, as it has elsewhere, that Customs agents, acting under the customs laws, have some seizure authority in drug cases. Nothing in the provisions suggests that Congress meant to grant Customs seizure authority under section 881 We note that the complete legislative history of the 1988 Drug Act is not yet available for our review from the Department of Justice's Office of Legislative Affairs; we note further, however, that legislative history cannot be used to subvert the plain meaning of the statutory text.

[5] Section 881(a)(1) through (5) provides for the forfeiture of controlled substances, material and equipment, containers, conveyances, and records involved in drug trafficking. Section 881(a)(6) provides for the forfeiture of all assets—including moneys, negotiable instruments and securities—furnished or intended to be furnished in exchange for illegal drugs or traceable to such an exchange, as well as all such assets used or intended to be used to facilitate any drug violations. Section 881(a)(7) and (8), added as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473, tit. II, §§ 201-2304, 98 Stat. 1976–2193 (1984), grants authority to seize and forfeit real property used or intended to be used in a drug felony, and controlled substances possessed in violation of the Act. Section 881(a)(7) was further amended by the 1988 Drug Act to make clear that that section included leasehold interests. Section 881(a)(9), added as part of the 1988 Drug Act, grants authority to seize and forfeit certain chemicals, drug manufacturing equipment, and related items which have been or are intended to be imported, exported, manufactured, possessed or distributed in violation of specified felony provisions.

[6] Section 881(e)(1), as amended by the 1988 Drug Act, grants the Attorney General authority to retain the seized and forfeited property for official use, transfer the property pursuant to section 616 of the Tariff Act of 1930 to any federal agency, or to any state or local agency that participated directly in the seizure or forfeiture; sell the property; require the General Services Administration to handle the disposal; forward it to the DEA for disposition; or in certain circumstances, transfer the property or proceeds to foreign countries that participated in the seizure or forfeiture. Section 881(e)(2)(A) sets forth the permissible uses of proceeds from the sale of forfeited property, including certain property management and sale expenses and payments to informants Section 881(h) codifies the "relation back" doctrine, which holds that the government's interest in the seized property vests in the United States at the time of the act giving rise to the forfeiture under section 881. Section 881(i) provides for a stay of civil forfeiture proceedings when the government has filed a criminal action relating to the civil case.

tively, that is, forfeited without judicial action.[7] A judicial forfeiture proceeding may also be filed under section 881 by the United States Attorney in federal district court.[8]

We are advised informally by Customs that they may currently seek to rely on section 881 for forfeiture authority in a variety of situations. For example, Customs might stop and search a vessel pursuant to the customs laws,[9] find illegal drugs, and prepare an administrative forfeiture action pursuant to 21 U.S.C. § 881, even though in this circumstance, Customs has forfeiture authority not dependent on section 881.[10] In other cases, however, Customs may not have alternative forfeiture authority. For example, this situation may arise when Customs agents are conducting a search while investigating a suspected violation of a law enforced by Customs, such as the Currency and Foreign Transactions Reporting Act, 31 U.S.C. §§ 5311–5326, and agents discover cash that is evidence of a federal drug law violation. If no currency violations are found and the drug violation is the only viable case, Customs may desire to handle the forfeiture action administratively within Customs or, if the cash amount is over $100,000 or a claim and cost bond is filed, refer the action to the United States Attorney. In either case, the forfeiture is sought pursuant to section 881, the only forfeiture statute available under the facts of the case. Finally, contrary to our conclusion that Customs lacks title 21 enforcement authority, Customs agents in some federal districts may seek to conduct title 21 drug investigations without DEA designation, and forfeit property solely on the basis of their asserted authority under section 881.[11]

In determining whether Customs has the independent forfeiture authority under 21 U.S.C. § 881 that it would need to have in the above and analogous ex-

[7] Section 881(d) adopts by incorporation the procedures established under the customs laws; these procedures authorize the administrative forfeiture of property that does not exceed $100,000 in value, conveyances that are used to transport controlled substances, and illegally imported goods. 19 U.S.C. § 1607. However, anyone who files a timely claim and posts a cost bond in an administrative forfeiture proceeding can move the action into federal district court. 19 U S.C. § 1608.

[8] A civil judicial forfeiture proceeding is required where the value of the property exceeds $100,000 and the property is not a conveyance or an illegally imported item, 19 U.S.C. § 1610; where the defendant has filed a claim and cost bond in an administrative forfeiture proceeding, 19 U.S.C. § 1608; or if the United States Attorney decides that the property should not be seized until a warrant of arrest in rem is issued pursuant to the filing of a formal complaint.

[9] Pursuant to 19 U.S.C. § 1581(a), Customs officers may, at any time, board any conveyance (*e.g.*, a vessel or vehicle) within a customs-enforcement area and examine the manifest and other documents, as well as inspect and search every part of that conveyance. If, upon examination of the conveyance it appears to the Customs officers that a violation of federal laws is being or has been committed so as to render the conveyance or anything aboard it liable to forfeiture, the officers may, pursuant to 19 U.S.C. § 1581(e), seize the conveyance.

[10] Under 19 U.S.C. § 1595a(a), Customs is authorized to seize and forfeit any vessel, vehicle, animal, aircraft, or other thing used to facilitate the importation into the United States of any article contrary to law Because the importation of illegal drugs into the United States is contrary to law, a boat used to smuggle drugs into the United States may be seized by Customs under section 1595a(a).

[11] We are also apprised that, on occasion, Customs will "adopt" cases investigated and prepared by state or local law enforcement officers, forfeit the seized property administratively under section 881, and then transfer a portion of the proceeds to the state or local law enforcement authorities who made the seizure in accordance with 19 U.S C. § 1616a(c).

amples, we begin by examining the plain language of that statute.[12] The text of section 881 reveals that Congress intended the Attorney General, and not Customs, to handle the drug forfeiture functions outlined in that section. For example, section 881(b), which authorizes seizure of property subject to forfeiture under the Controlled Substances Act, specifically mentions only the Attorney General, not the Customs Service or any other federal agency. Similarly, section 881(c), providing for the custody of seized property, grants such authority only to the Attorney General. Moreover, section 881(e), authorizing the disposition of property seized under the Controlled Substances Act, grants this power specifically and solely to the Attorney General. The exclusive forfeiture role of the Attorney General under section 881 was reemphasized when, in 1984, Congress amended section 881, but continued to place all seizure and forfeiture responsibility under the Controlled Substances Act solely with the Attorney General. For example, Congress amended section 881(e)(1) to provide the Attorney General authority to transfer the custody or ownership of any forfeited property to any federal agency or to any state or local agency that directly participated in the seizure or forfeiture, yet continued to recognize that the Attorney General is in exclusive control of the forfeiture and disposition of forfeited property under the Controlled Substances Act. Similarly, amendments to section 881 contained in the 1988 Drug Act preserve the Attorney General's exclusive forfeiture authority.[13]

Congress' intent that the Attorney General hold exclusive authority to seize and forfeit property under section 881 is also evident in the broader statutory scheme of the Controlled Substances Act. No other section of the Act grants authority to the Customs Service to seize and forfeit property under the Act.[14] Indeed, section 878(a)(4) affirmatively grants authority to "make seizures of property pursuant to the [Controlled Substances Act]" only to officers and employees of the DEA or any state or local law enforcement officer designated by the Attorney General to make such seizures. Congress amended section 878 in 1986,[15] yet did not include Customs in this specific, affirmative grant of authority. Sim-

[12] The first rule of statutory construction is to examine the language of the statute itself. *See, e.g., Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978).

[13] We note that section 881(l), added as part of the 1988 Drug Act, authorizes the Attorney General to delegate certain of his section 881 functions, by agreement, to the Postal Service. The 1988 Drug Act also amended 18 U.S.C. § 3061 to grant the Postal Service seizure authority with respect to postal offenses, and "to the extent authorized by the Attorney General pursuant to agreement between the Attorney General and the Postal Service, in the enforcement of other laws of the United States, if the Attorney General determines that violations of such laws have a detrimental effect upon the operations of the Postal Service." Section 881(e)(2)(B), as amended by the 1988 Drug Act, provides that the proceeds of forfeitures conducted by the Postal Service shall be deposited in the Postal Service Fund.

[14] Part E, entitled "Administrative and Enforcement Provisions," contains several sections, none of which refers to anyone other than the Attorney General with respect to enforcement authority under the Controlled Substances Act. For example, section 871 empowers the Attorney General to delegate any of his functions under the Act to any officer or employee of the Department of Justice, and to promulgate and enforce any rules, regulations and procedures which he deems necessary for efficient execution of his functions under the Act. 21 U.S.C. § 871(a)-(b). Section 875 authorizes the Attorney General to hold hearings, sign and issue subpoenas, administer oaths, examine witnesses and receive evidence anywhere in the United States in carrying out his functions under the Act.

[15] 21 U.S.C. § 878 was amended in 1986 by Pub. L. No. 99-570.

ilarly, 21 U.S.C. § 873(b) vests only in the Attorney General the authority to request assistance from other federal agencies to carry out his functions under the Controlled Substances Act.[16]

The only part of section 881 that makes any reference to the Customs Service is section 881(d), which sets forth "other laws and proceedings applicable" to civil forfeiture proceedings under the Controlled Substances Act. Customs relies on that section to argue that it has section 881 forfeiture authority.[17] The argument is unavailing. Section 881(d) merely provides that the forfeiture procedures of the customs laws are applicable to forfeitures conducted under section 881; it does not confer on Customs itself any forfeiture authority. The statute reads as follows:

> The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, *except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.*

21 U.S.C. § 881(d) (emphasis added).

Contrary to Customs' position, section 881(d) is correctly read to be a procedural provision, and not an affirmative grant of authority. The first half of the section, which ends with the phrase "insofar as applicable and not inconsistent with the provisions hereof," mandates that the procedures governing the seizure and forfeiture of property under the customs laws shall also govern, to the extent not inconsistent, seizures and forfeitures arising under the Controlled Substances Act. Thus, section 881(d) explicitly incorporates by reference a statutory procedural scheme already in existence.[18] The second half of the section, up until the final phrase, states that the procedural duties connected with seizures and forfeitures under the Controlled Substances Act shall be handled by officers, agents,

[16] In the Olson Memo, we concluded that the Attorney General could likely designate Customs agents to exercise title 21 authority by virtue of this provision.

[17] *See* Lane Memo, *supra* note 2, at 3

[18] These procedural provisions are codified at 19 U.S.C. §§ 1602–1621.

or other persons authorized or designated by the Attorney General. The final phrase of section 881(d) merely qualifies that procedural mandate by providing that the incorporated Customs procedures shall be followed by the Attorney General's agents or designee with respect to seizures and forfeitures under the Controlled Substances Act except to the extent that such duties arise from seizures and forfeitures effected by any Customs officer, acting as a Customs officer, rather than as a designee of the Attorney General.[19]

Our interpretation of the exception clause in section 881(d) as a procedural provision is supported by the fact, discussed above, that the Controlled Substances Act as a whole places *all* enforcement authority under the Act's provisions with the Attorney General. Any limit to this broad and exclusive mandate would be a significant departure from the overall enforcement scheme. We therefore find the proposition that Congress would place within a clearly procedural section a substantive provision so significantly at odds with the Attorney General's title 21 authority to be untenable.

This interpretation is consistent with the realignment of drug enforcement and seizure authority which took place proximate to the enactment of the Controlled Substances Act (including section 881) in 1970. Prior to 1968, the Department of Treasury was the agency charged with primary responsibility for enforcing the federal drug laws. Within the Department of Treasury, the United States Customs Service had the responsibility for enforcing all laws pertaining to the smuggling of drugs into the United States, while Treasury's Bureau of Narcotics was charged with enforcing all laws relating to drug trafficking. Reorganization Plan No. 1 of 1968, 3 C.F.R. 1061 (1966–1970), *reprinted as amended in* 5 U.S.C. app. at 1334, *and in* 82 Stat. 1367 (1968), transferred the drug trafficking enforcement functions of the Department of Treasury's Bureau of Narcotics to the Attorney General, to be handled within the Department of Justice by a newly created Bureau of Narcotics and Dangerous Drugs. The responsibility for investigating smuggling, on the other hand, remained with Customs within the Treasury Department, thereby raising the possibility of jurisdictional disputes regarding the respective responsibilities of the Justice and Treasury Departments in the context of certain drug investigations. Because the Customs Service retained investigative jurisdiction to enforce the federal smuggling laws, it would have been entirely reasonable for Congress to include in the forfeiture provision of the Controlled Substances Act a proviso like that in the final clause of section 881(d), recognizing that the Attorney General's new, vast and exclusive seizure

[19] As already indicated in the text, Customs has no independent title 21 seizure or forfeiture authority. Therefore, for a seizure or forfeiture to be effected as suggested by the final clause, it must be pursuant to a source of Customs authority other than the Controlled Substances Act Nevertheless, it was important for Congress to include the final clause in section 881(d) to distinguish the situation where Customs acts on its own authority under the customs laws from the situation where Customs is designated by the Attorney General to seize and forfeit under the Controlled Substances Act. In the latter event, Customs—as an agent of the Attorney General—must follow the duties being incorporated in section 881(d) *so long as not inconsistent with the Act*, not the potentially inconsistent duties that the Act contemplates may separately be imposed on Customs by the customs laws.

and forfeiture authority under title 21 did not preclude Customs from pursuing seizures and forfeitures under the customs laws.

B. *Reorganization Plan No. 2 of 1973*

Customs also relies on Reorganization Plan No. 2 of 1973[20] as a basis for its claim to independent forfeiture authority under 21 U.S.C. § 881. That Plan transferred "all intelligence, investigative, and law enforcement functions" pertaining to "the suppression of illicit traffic in narcotics, dangerous drugs, or marihuana" from Customs to DEA.[21] The Plan also contained a clause (the "retention clause") which provided in part that "[t]he Secretary [of the Treasury] shall retain, and continue to perform [drug intelligence, investigative and enforcement] functions, to the extent that they relate to searches and seizures of illicit narcotics, dangerous drugs, or marihuana or to the apprehension or detention of persons in connection therewith, at regular inspection locations at ports of entry or anywhere along the land or water borders of the United States."[22] Customs contends that it is clear from the language in that clause that Customs officers were intended to enforce all federal drug laws, including section 881, in the border context.[23] The proviso immediately following the retention clause, however, states that any drugs or drug-related evidence seized by Customs at those points "shall be turned over forthwith to the jurisdiction of the Attorney General." Read in conjunction with one another, the retention clause and the proviso that follows it appear to recognize that Customs may legally seize drugs in the context of its role of enforcing the customs laws in the border context, but that any drugs or drug trafficking evidence Customs seizes must be turned over to the Attorney General for appropriate processing. Thus, under the 1973 Reorganization Plan, Customs retained only whatever seizure authority it had under laws other than title 21 with respect to drugs, and the Attorney General maintained control over the forfeiture of drug-related property and the disposition of that forfeited property.

In addition, in light of the fact that the 1973 Reorganization Plan was intended to consolidate federal drug law enforcement responsibility under a single agency within the Department of Justice, the DEA,[24] the most reasonable interpretation of the retention clause is that the words merely make clear that the transfer of drug enforcement functions does not disrupt Customs' authority to make seizures of drugs discovered in the course of Customs' enforcement of the smuggling laws.[25]

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[20] 3 C.F.R. 1158 (1971–1975), *reprinted as amended in* 5 U.S.C. app at 1355, *and in* 87 Stat. 1091 (1973).

[21] *Id.*

[22] *Id.*

[23] Lane Memo, *supra* note 2, at 4

[24] *See, e g.*, 5 U.S.C. app. at 1357 (Message of the President, transmitting Reorganization Plan No. 2 of 1973 to the Congress, in which the President noted that the newly created DEA would carry out "[t]hose functions of the Bureau of Customs pertaining to drug investigations and intelligence.").

[25] For example, as mentioned earlier, under 19 U S.C. § 1595a, Customs is authorized to seize and forfeit any vessel, vehicle, animal, aircraft, or other thing used to facilitate the importation into the United States of any article contrary to law. Because the importation of illegal drugs into the United States is contrary to law, a boat used

For the foregoing reasons, we find Customs' reliance on Reorganization Plan No. 2 of 1973 as a basis for its claim to independent forfeiture authority under 21 U.S.C. § 881 to be without merit. As we have held in the past, under the 1973 Reorganization Plan "Customs officials have authority [under customs laws and under title 21 when so designated by the Attorney General] only to search for and seize drugs at the borders and ports," and "[s]uspects and drug contraband are to be immediately turned over to DEA for investigation and prosecution."[26] We reached a similar conclusion in our memorandum of June 11, 1985, stating the view that Customs personnel must work under the supervision of the DEA and "may undertake drug enforcement investigations beyond the interdiction of drugs at the border, but only with the specific approval of, and under the supervision of, [the Department of Justice]."[27] We find no case law or subsequent executive or legislative action that would change these conclusions.

C. *Other Arguments Raised by the Customs Service*

Although we find, based on the language of the statute and Reorganization Plan No. 2 of 1973, that Customs does not have independent forfeiture authority under section 881, we briefly address below additional arguments raised by Customs in support of its assertion of section 881 authority.

1. 19 U.S.C. § 1589a

As evidence that it has section 881 authority in the border context, Customs cites 19 U.S.C. § 1589a(2), which permits a Customs officer to execute and serve "any order, warrant, subpoena, summons, or other process issued under the authority of the United States," and section 1589a(3), which generally provides that a Customs officer may make a warrantless arrest for any federal offense committed in his presence or any federal felony "committed outside the officer's presence if the officer has reasonable grounds to believe that the person to be arrested has committed or is committing a felony." In our June 3, 1986 opinion,[28] we specifically examined the question whether passage of section 1589a, and the nearly identical 19 U.S.C. § 1589,[29] altered the conclusions of this Office in the

[25] (. . continued)

to smuggle drugs into the United States may be seized lawfully by Customs under section 1595a. We believe that the retention clause in Reorganization Plan No. 2 of 1973 was intended to cover Customs seizures made pursuant to laws such as section 1595a This interpretation is consistent with our reading of the final clause in section 881(d) which, as we concluded above, was Congress' acknowledgement that, while the Attorney General has exclusive enforcement authority over federal drug violations even at the border, Customs retains its authority over enforcement of the customs laws

[26] Olson Memo, *supra* note 3, at 3. We confirmed this interpretation of the 1973 Reorganization Plan in our memorandum of June 3, 1986 *See* Kmiec Memo, *supra* note 3, at 7–9

[27] Memorandum for Joseph R Davis, Chief Counsel, DEA, from Ralph Tarr, Acting Assistant Attorney General, Office of Legal Counsel, *Re. Authority of the United States Customs Service to Participate in Law Enforcement Efforts Against Drug Violators* (June 11, 1985)

[28] Kmiec Memo, *supra* note 3.

[29] In October 1984, Congress passed the Comprehensive Crime Control Act of 1984, Pub. L No. 98–473, 98 Stat 2056 (1984), and the Tariff and Trade Act, Pub L. No. 98–573, 98 Stat 2988 (1984), which contain two provisions identical for all practical purposes and codified at 19 U S.C. §§ 1589a and 1589, respectively

Olson Memo that Customs does not have independent enforcement authority over title 21 drug offenses. We concluded that (1) the legislative histories behind sections 1589 and 1589a clearly state that the sections were not intended to change Customs jurisdiction over drug offenses or to alter the basic relationship between Customs and DEA established by Reorganization Plan No. 2 of 1973;[30] (2) Congress' intent in passing the sections was to clarify Customs authority in the face of case law questioning the validity of warrants pursued and arrests made by Customs officers in drug cases in which Customs officers act under the supervision of DEA;[31] and (3) while sections 1589 and 1589a acknowledge the authority of Customs officers to execute and serve warrants, and to make arrests, for a wide range of federal crimes, the provisions do not grant Customs additional authority to pursue and prosecute such offenses.[32] We have reexamined the Kmiec Memo in light of Customs' most recent memorandum and reaffirm our conclusions as outlined above. Accordingly, we find that sections 1589 and 1589a do not provide Customs with substantive authority to make seizures and forfeitures pursuant to 21 U.S.C. § 881.

2. Common Law Seizure Authority

Customs also argues that Customs officers can make seizures and forfeitures outside of the border context under common law authority, stating that it is a "well settled principle of common law that *anyone* may seize property for forfeiture to the Government and the seizure is valid if the Government adopts the act and proceeds to enforce the forfeiture," and therefore that there is "no reason why a Customs officer should be disabled from making seizures under 21 U.S.C. § 881 when even a private person could perform such seizures."[33] We address later in this opinion Customs' argument that their agents have common law authority for making seizures for forfeiture.[34] However, assuming arguendo that such authority exists, any common law authority is separate and apart from express statutory authority under section 881 and therefore provides no additional support to Customs' position that its agents have independent forfeiture authority under section 881.

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[30] Kmiec Memo, *supra* note 3, at 5–8

[31] *Id* at 5–7. In *United States v Harrington*, 520 F. Supp. 93, 95 (E D Cal. 1981), the court held that Reorganization Plan No. 2 of 1973 deprived Customs agents of any search or arrest authority with respect to the federal drug laws, and suggested that Customs agents accordingly lacked "secondary authority" to perform drug enforcement searches under the primary responsibility" of the DEA Although the district court's decision ultimately was reversed on appeal, 681 F 2d 612 (9th Cir 1982), *cert denied*, 471 U S. 1015 (1983), Congress clearly had the decision in mind when it passed sections 1589 and 1589a The relevant House Report stated. "Enactment of [this provision] would also make it clear that Customs officers may serve search and arrest warrants for any Federal offense including drug offenses. This would eliminate the problem raised in *U S. v. Harrington*, which . . questioned Customs authority to serve search warrants in joint DEA-Customs investigations away from the border." H R Rep. No. 845, 98th Cong., 2d Sess , pt. 1, at 28 (1984) (citation omitted).

[32] *See* Kmiec Memo, *supra* note 3, at 2.

[33] Lane Memo, *supra* note 2, at 4–5.

[34] *See infra* pp. 278–80.

3. 28 U.S.C. § 524(c)(10)

Finally, Customs cites 28 U.S.C. § 524(c)(10) as evidence of Congress' recognition that Customs has seizure authority under section 881 of title 21.[35] Section 524, enacted in 1984, established the Department of Justice Assets Forfeiture Fund, which serves as the depository for moneys realized from profitable forfeitures of property after the payment of certain expenses of forfeiture and sale.[36] Section 524(c)(4) requires "all amounts from the forfeiture of property under any law enforced or administered by the Department of Justice" to be deposited in that fund. Section 524(c)(10) provides:

> For the purposes of this section, property is forfeited pursuant to a law enforced or administered by the Department of Justice if it is forfeited pursuant to —
>
> (A) any criminal forfeiture proceeding;
>
> (B) any civil judicial forfeiture proceeding; or
>
> (C) any civil administrative forfeiture proceeding conducted by the Department of Justice,
>
> *except to the extent that the seizure was effected by a Customs officer or that custody was maintained by the United States Customs Service in which case the provisions of section 613A of the Tariff Act of 1930 (19 U.S.C. 1613a) shall apply.*

28 U.S.C. § 524(c)(10) (emphasis added).

The Customs Service apparently interprets the final clause of section 524(c)(10), underscored above, to demonstrate Congress' understanding that Customs has independent seizure authority under section 881.[37] However, nothing on the face of the provision indicates in the least that Customs has section 881 seizure or forfeiture authority. The general reference in the final phrase of section 524(c)(10) does not specify particular Customs seizure or forfeiture authority, and therefore cannot be said to enlarge or affect Customs' underlying

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[35] The provision relied upon by Customs, formerly 28 U.S.C. § 524(c)(8), now appears at section 524(c)(10) as a result of amendment by the 1988 Drug Act.

[36] The fund may be used to pay expenses incurred by the Department of Justice and assisting federal, state, and local law enforcement agencies for the detention, inventory, safeguarding, maintenance, and disposal of seized and forfeited property. *See The Attorney General's Guidelines on Seized and Forfeited Property*, as amended, at 17–26 (June 29, 1988)

[37] *See* Lane Memo, *supra* note 2, at 7.

substantive authority in any manner.[38] Accordingly, the language of 28 U.S.C. § 524(c)(10) does not support Customs' position that it has independent section 881 forfeiture authority.

D. *Summary: Section 881 Seizure and Forfeiture Authority*

For the reasons set forth above, we conclude that Customs does not have independent seizure or forfeiture authority under section 881. We base our conclusion on the prior opinions of this Office, the language of section 881(d) as viewed by itself and as examined in the context of section 881, the other provisions of the Controlled Substances Act, and Reorganization Plan No. 2 of 1973. After another thorough review of these laws and their legislative histories, we believe that Congress intended the Attorney General to be the sole administrator of section 881 and the other enforcement provisions of the Controlled Substances Act. In addition, nothing supports Customs' claim of independent forfeiture authority under section 881.

This is not to say, of course, that Customs can never make seizures or forfeit property pursuant to section 881. As we concluded in a prior opinion,[39] the Attorney General in all likelihood has the authority under 21 U.S.C. §§ 873(b) and 965 to provide Customs agents with substantive legal authority to assist the DEA in the enforcement of title 21 drug offenses, including the undertaking of law enforcement functions that Customs agents are not normally empowered to perform but which DEA agents are authorized to perform in executing the Controlled Substances Act.[40] We must emphasize, however, that absent any such grant of authority from the Attorney General, Customs would be operating without statutory authority to enforce title 21 drug offenses. Moreover, as we have cautioned in the past, DEA would be well-advised to exercise particular caution not to permit Customs officials to undertake independent, unsupervised enforcement responsibilities where a successful court challenge would seriously jeopardize a prosecution.[41]

Although our opinion is not intended to have retrospective impact, our conclusion that Customs does not have independent authority under 21 U.S.C. § 881 necessarily raises questions about the legality of any seizures and forfeitures already conducted by Customs under that section without a proper designation from the Attorney General or his designee. A comprehensive analysis of that issue is

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[38] We discuss the Department of Justice Assets Forfeiture Fund and the Customs Forfeiture Fund in more detail below, when we address the question of which fund should be the depository of proceeds from forfeiture under section 881.

[39] Olson Memo, *supra* note 2, at 5–9.

[40] 21 U.S.C. § 873(b) provides in pertinent part that "when requested by the Attorney General, it shall be the duty of any agency or instrumentality of the Federal Government to furnish assistance, including technical advice, to him for carrying out his functions under this subchapter." *See also* 21 U.S.C. § 965, which adopts the authority of section 873 by reference.

[41] Olson Memo, *supra* note 2, at 9–10. For example, we noted that the Economy Act, 31 U.S.C. § 1535, might prohibit Customs from exercising law enforcement services for DEA to the extent that Customs agents are not generally authorized to perform those services under their own substantive authorizing statute. *Id.* at 8.

beyond the scope of this memorandum. For the reasons discussed below, however, we believe that those seizures and forfeitures may be upheld under a theory of common law seizure authority.

The courts have long recognized that the United States may "adopt" seizures that have been made by private parties or other law enforcement agencies.[42] The United States Supreme Court articulated this principle in *Dodge v. United States*,[43] in which it stated that "anyone may seize any property for a forfeiture to the Government, and that if the Government adopts the act and proceeds to enforce the forfeiture by legal process, this is of no less validity than when the seizure is by authority originally given."[44] The *Dodge* Court based its holding on the rationale that the owner of the seized property suffers nothing as a result of an unauthorized seizure that he would not have suffered if the seizure had been authorized, as the seizure, however effected, brings the res within the power of the court, "which is an end that the law seeks to attain, and justice to the owner is as safe in the one case as in the other.[45]

The reasoning of the *Dodge* Court regarding seizures makes sense given the nature of a forfeiture proceeding. A civil forfeiture action under section 881 is an action in rem, brought against the property itself rather than the wrongdoer, and based on the legal fiction that the property itself is guilty. Just as in the case of a seizure, the forfeiture laws can be said to seek to bring the object within the power of the court. Thus, the *Dodge* Court's conclusion that it makes no difference to the owner who brought his property into the court's jurisdiction is as applicable in a forfeiture action as it is in the case of a seizure.

The holding in *Dodge* with respect to adoptive seizures is still followed today, even in cases involving section 881 forfeiture actions.[46] We must caution, however, that our preliminary view that common law authority may be used to jus-

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[42] *See, e g , United States v. One Ford Coupe Automobile*, 272 U.S. 321, 325 (1926); *Kieffer v United States*, 550 F. Supp. 101, 103 (E.D. Mich. 1982).

[43] 272 U.S. 530 (1926). *Dodge* involved a proceeding to forfeit a boat for violation of the National Prohibition Act, the initial seizure of which was made by state officers who were not authorized to make the seizure under the Act. *See also United States v One Ford Coupe Automobile*, 272 U.S. at 325 (adoption of seizure by United States for forfeiture permissible even when seizing party lacked authority to make seizure).

[44] *Dodge v. United States*, 272 U.S. at 532.

[45] *Id*

[46] *See, e g , United States v. One 1977 Mercedes Benz*, 708 F.2d 444, 450 (9th Cir. 1983) (in forfeiture action against automobile allegedly used to transport narcotics, jurisdiction of the court was secured by the fact that the res was in the possession of the party authorized to seize when the action was filed), *cert. denied*, 464 U.S. 1071 (1984); *Kieffer v United States*, 550 F. Supp. 101, 103 (E.D Mich. 1982) (upholding section 881 forfeiture action on basis that United States may "adopt" seizure by state officers who do not have seizure authority under section 881). In more recent years, however, courts have increasingly been asked to address the question expressly left open in *Dodge*: whether the fact that the property was obtained as the result of a search and seizure deemed unlawful as invading a person's constitutional rights bars the forfeiture action or deprives the court of jurisdiction to hear it. Although the United States Supreme Court has held that evidence derived from a search which violated the Fourth Amendment is inadmissible in a forfeiture proceeding, *One 1958 Plymouth Sedan v Pennsylvania*, 380 U.S. 693, 702 (1965), the general rule is that improper seizure does not jeopardize the government's right to secure forfeiture if the probable cause to seize the vehicle can be supported with untainted evidence. *See, e g., United States v United States Currency $31,828*, 760 F.2d 228, 230–31 (8th Cir. 1985); *United States v. "MONKEY", A Fishing Vessel*, 725 F.2d 1007, 1012 (5th Cir. 1984); *United States v. United States Currency Totaling $87,279*, 546 F. Supp. 1120, 1126 (S.D. Ga. 1982).

tify past seizures and forfeitures should not be read to suggest continued prospective reliance on that authority by Customs as the basis for future actions under section 881 without appropriate DEA authorization.

II. Department of Justice and Customs Forfeiture Funds

We turn now to the second issue we have been asked to address: must the proceeds of forfeitures resulting from lawful Customs Service seizures be deposited in the Customs Forfeiture Fund regardless of the statute under which the property was forfeited and regardless of whether the property was forfeited by the Department of Justice? The Department of Justice Assets Forfeiture Fund and the Customs Forfeiture Fund were created to allow those agencies to finance certain aspects of their respective forfeiture actions and other specified law enforcement activities from the proceeds of forfeited assets. *See* 28 U.S.C. § 524(c)(1) (Department of Justice Assets Forfeiture Fund); 19 U.S.C. § 1613b (Customs Forfeiture Fund). Congress provided that both the Justice and Customs Funds would receive amounts from the forfeiture of property under any law enforced or administered by the respective agencies. *See* 28 U.S.C. § 524(c)(4); 19 U.S.C. § 1613b(a), (c).

As we have discussed above,[47] 28 U.S.C. § 524(c)(10) defines what property is forfeited "pursuant to a law enforced or administered by the Department of Justice" for purposes of determining whether the proceeds from the sale of particular forfeited property are to be deposited in the Department of Justice Assets Forfeiture Fund. The definition includes any property forfeited under three specified forfeiture proceedings,[48] "*except to the extent that the seizure was effected by a Customs officer or that custody was maintained by the Customs Service in which case the provisions of section 613A of the Tariff Act of 1930 (19 U.S.C. § 1613a) shall apply*" (emphasis added). The Customs Forfeiture Fund provisions referenced in the clause of section 524(c)(10) underscored above provide in part that the Fund shall be the depository for "all proceeds from forfeiture under any law enforced or administered by the United States Customs Service."[49]

Customs takes the position that the language of 28 U.S.C. § 524(c)(10) provides that the proceeds of forfeiture (even those conducted by the Department of Justice under section 881) arising from any Customs seizure be deposited in the Customs Forfeiture Fund, which is codified at 19 U.S.C. § 1613b.[50] DEA disagrees with that interpretation, maintaining that the clause "refers only to non-drug-related seizures and forfeitures lawfully performed by Customs pursuant to [c]ustoms laws"[51] and that section 881(e) indicates that the Attorney General can-

[47] *See supra* pp. 277–78.

[48] The three proceedings specified in section 524(c)(10) are: (1) any criminal forfeiture proceeding; (2) any civil judicial forfeiture proceeding; and (3) any civil administrative forfeiture proceeding conducted by the Department of Justice. 28 U.S.C. § 524(c)(10)(A)-(C)

[49] 19 U.S C § 1613b(c). *See also infra* note 53.

[50] Lane Memo, *supra* note 2, at 7

[51] Hoffman Memo, *supra* note 2, at 10

not deposit moneys or proceeds from a forfeiture conducted by the Department under section 881 in any fund other than the Department of Justice Assets Forfeiture Fund.[52] For the reasons set forth below, we conclude that although the question is not entirely free from doubt, under the most reasonable interpretation of 28 U.S.C. § 524(c)(10), cash or proceeds of property forfeited as a result of a *seizure* made by the Customs Service pursuant to a law administered or enforced by Customs is to be deposited in the Customs Forfeiture Fund rather than in the Department of Justice Assets Forfeiture Fund, even though the property ultimately was *forfeited* by the Department of Justice under section 881.

Section 524(c)(10), standing alone, is unambiguous: the proceeds from forfeitures conducted pursuant to laws enforced or administered by the Department of Justice are to be placed in the Department of Justice Assets Forfeiture Fund *unless* the property was seized or custody maintained by the Customs Service, in which case the proceeds from the forfeiture are to be placed in the Customs Forfeiture Fund. Under section 524(c)(10), it appears that Customs may receive the proceeds from the forfeiture of the property it seizes even if it has no authority to forfeit that property. In addition, the clause applies to any seizure made by Customs, not just to nondrug-related seizures.

When, however, section 524(c)(10) is read in conjunction with 19 U.S.C. § 1613b, to which it makes specific reference, the meaning of the exception clause is not entirely clear. Section 1613b(a), establishing the Customs Forfeiture Fund,[53] provides, as amended by the 1988 Drug Act, that the Fund "shall be available to the United States Customs Service, subject to appropriation, with respect to seizures and forfeitures by the United States Customs Service and the United States Coast Guard under any law enforced or administered by those agencies." Similarly, section 1613b(c) provides for deposit in the fund of "all proceeds from forfeiture under any law enforced or administered by the United States Customs Service or the United States Coast Guard."

We believe that the final clause of 28 U.S.C. § 524(c)(10) clearly governs

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[52] *Id*

[53] As a preliminary matter, we note that the reference to the Customs Forfeiture Fund provisions in the final clause of section 524(c)(10) specifically refers to "the provisions of section 613A of the Tariff Act of 1930 (19 U.S.C. § 1613a)." However, 19 U.S.C. § 1613a, which was passed in 1984, Pub L. No. 98–473, 98 Stat. 2054, was repealed in 1986, Pub L. No 99-514, 100 Stat. 2924–25. The fund was recreated in 1987, Pub. L. No. 100–71, tit. I, 101 Stat. 438, and presently is codified at 19 U.S.C. § 1613b. Neither section 524(c)(10) nor its predecessor provision, section 524(c)(8), was ever amended to reflect these changes and, as a result, section 524(c)(10) now refers to a Customs Forfeiture Fund that is no longer in existence Thus, under a literal reading, the exception clause in section 524(c)(10) has no force and does not govern any deposits into the current Customs Forfeiture Fund.

Although in such cases no construction can ever be entirely free from doubt, Congress can be presumed not to have intended an absurd result. Rather, it can fairly be concluded that Congress intended to incorporate an accurate reference to the Customs Forfeiture Fund provision in 28 U S.C. § 524(c)(10). We believe this is true even though Congress' recreated Customs Forfeiture Fund is not codified at 19 U.S.C. § 1613a, as referenced in section 524(c)(10), but rather appears at section 1613b. *See United Steelworkers of Am v. Weber*, 443 U.S. 193, 201 (1979), (citing *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892)). We note further that although the amendments to section 524 contained in the 1988 Drug Act perpetuate the miscitation to the Customs Forfeiture Fund, the 1988 Drug Act, in section 7364, correctly cites 19 U.S.C. § 1613b as the provision that codifies the Customs Forfeiture Fund.

those cases in which Customs has explicit forfeiture authority but the Justice Department, by law, must play a role in the forfeiture of property seized by Customs. For example, the Department of Justice, through the United States Attorneys, must handle certain civil judicial forfeiture proceedings in federal court of property seized by Customs under the customs laws.[54] Thus, there is an overlap in the definitions of "those laws enforced or administered" by Customs and "those laws enforced or administered" by the Department of Justice because in certain instances Customs has authority over the seizures and the Department of Justice has authority over the forfeitures. The exception clause in section 524(c)(10) addresses the question of which fund should be used in such situations by providing that when a Customs officer seizes property or maintains custody of property under the customs laws, the proceeds of that forfeiture should be placed in the Customs Forfeiture Fund, regardless of whether Customs conducted the forfeiture.

The more difficult question is whether the final clause also pertains to cases in which Customs has seized property pursuant to the laws it enforces, but where the property is forfeited by the Department of Justice, either administratively or judicially, under 21 U.S.C. § 881 or another forfeiture statute under which Customs has no forfeiture authority. As section 1613b(c) refers only to *forfeitures* under "any law enforced or administered" by Customs, it can be argued that Congress intended that the Customs Forfeiture Fund be the depository only for proceeds from property that actually was forfeited under the customs laws. In light of our conclusion above that only the Department of Justice has independent statutory authority to seize and forfeit property under 21 U.S.C. § 881, such an interpretation necessarily would require that the proceeds from all section 881 forfeitures be placed in the Department of Justice Assets Forfeiture Fund. However, we believe that interpretation would be contrary to the language of the exception clause in section 524(c)(10), since it would prevent Customs from receiving proceeds from the forfeiture of property that it had *seized* under the customs laws. Accordingly, we conclude that the proceeds of property seized or held in custody by Customs under the customs laws must be placed in the Customs Forfeiture Fund even though the property was forfeited by the Department of Justice under 21 U.S.C. § 881.

Our interpretation of the exception clause is consistent with Reorganization Plan No. 2 of 1973, which reflects legislative and executive branch recognition of Customs' traditional law enforcement role at the border. As we have already discussed above, in Reorganization Plan No. 2 of 1973 Congress left undisturbed Customs' authority under the customs laws to perform all intelligence, investigative and law enforcement functions to the extent that they relate to searches and seizures of drugs at regular inspection locations at ports of entry or the bor-

[54] Customs must refer civil forfeiture cases to the United States Attorney (1) when the property seized exceeds $100,000 in value and is not an illegally imported item or a conveyance used to transport a controlled substance, or (2) when a claim and cost bond has been filed for the property in an administrative forfeiture proceeding *See* 19 U.S.C. §§ 1607, 1608, 1610.

der. Thus, Customs has retained search and seizure authority with respect to illegal drugs and related evidence encountered by Customs in the course of its enforcement responsibilities under the customs laws. In light of Congress' intent that Customs maintain those particular aspects of its traditional law enforcement role at the border, it is reasonable to interpret the words "seizure" and "custody" in section 524(c)(10) to refer to the functions that Customs expressly retained under Reorganization Plan No. 2 of 1973, that is, search and seizure authority under the customs laws.[55]

Moreover, to interpret the phrase "any law enforced or administered by the United States Customs Service" to include statutes under which Customs has either seizure or forfeiture authority, but not necessarily both, is consistent with the fact that seizure and forfeiture are separate and distinct law enforcement tools.[56] Thus, statutes under which Customs only has seizure authority clearly fall within the definition of "any law enforced or administered by the United States Customs Service." If Customs has *neither* seizure *nor* forfeiture authority, however, as we conclude it does not under section 881, the proceeds from seizures and forfeitures premised on that statute alone are to be deposited in the Department of Justice Assets Forfeiture Fund. This is true even if Customs has been properly designated by the Attorney General or his designee to exercise authority under that statute. Of course, the Attorney General has discretion to award the property to Customs in such joint enforcement efforts.[57]

One other point is worth mentioning. Section 881(e)(1), as amended by the 1988 Drug Act, provides that when property is forfeited under the Controlled Substances Act, the Attorney General has five options with respect to disposition of that property: he may (1) retain the property for official use or transfer the custody or ownership of the property to any federal agency, or any state or local law enforcement agency that participated directly in the seizure or forfeiture;[58] (2) sell the property; (3) require the General Services Administration to dispose of the property; (4) forward it to DEA for disposition; or (5) under certain circumstances, transfer forfeited personal property or the proceeds of the sale of forfeited personal or real property to any foreign country that participated in the seizure or forfeiture.[59] Pursuant to 21 U.S.C. § 881(e)(2)(B), the provisions of the Department of Justice Forfeiture Fund in 28 U.S.C. § 524(c) only apply to forfeitures under the Controlled Substances Act in the event of a cash seizure or

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[55] This interpretation of the final clause in section 524(c)(10) also is consistent with the legislative history of the funds, which reflects Congress' understanding that Customs has a role to play in drug enforcement efforts. *See, e.g.*, S. Rep. No. 225, 98th Cong., 1st Sess. 217–18 (1983).

[56] Most of the seizure and forfeiture provisions used by Customs in drug-related cases are contained in the part of the Tariff Act of 1930 entitled "Enforcement Provisions." *See, e.g.*, 19 U.S.C. §§ 1590, 1595, 1595a.

[57] *See infra* note 61.

[58] As amended by the 1988 Drug Act, section 881(e)(3) requires the Attorney General to assure that any property transferred to a state or local law enforcement agency under this provision of section 881(e)(1) has a value that bears a "reasonable relationship to the degree of direct participation" by the agency, and, for fiscal years beginning after September 30, 1989, that the transfer is not undertaken in order to circumvent any prohibition on forfeitures, or limitations on the use of forfeited property, under state law.

[59] 21 U.S.C. § 881(e)(1)(A)-(E)

the Attorney General's exercise of his option under 21 U.S.C. § 881(e)(1)(B) to sell the forfeited property.[60] Thus, section 524(c)(10) does not limit the Attorney General's authority under section 881(e) to retain, sell, or transfer property forfeited under section 881, and was intended to apply only to the Attorney General's authority over the treatment of forfeited property which could ultimately be deposited (as cash) in the Department of Justice Assets Forfeiture Fund. Thus, Customs may receive the proceeds from property seized by Customs under the customs laws and forfeited by the Department of Justice under section 881 only if the Attorney General does not first exercise his options under section 881(e) to retain the property for official use, transfer the property, or otherwise dispose of the forfeited property under section 881(e)(1).[61]

It is important to note, moreover, that even if proceeds from section 881 forfeitures are to be deposited in the Customs Forfeiture Fund in accordance with 28 U.S.C. § 524(c)(10), the Department of Justice first can collect costs for all property expenses of the forfeiture proceeding and sale, including expenses of maintenance and court costs. Section 881(e)(2)(B) provides that, unless the forfeiture was conducted by the Postal Service, the Attorney General shall deposit in accordance with 28 U.S.C. § 524(c) all cash and proceeds remaining after payment of such expenses.[62]

Conclusion

We conclude that Customs does not have independent authority to make seizures or forfeitures pursuant to 21 U.S.C. § 881. Accordingly, Customs agents should make seizures and forfeit property pursuant to that section only when they do so under the supervision of the DEA and by direct or derivative designation of the Attorney General. We further conclude that property forfeited after a Customs seizure is to be deposited in the Customs Forfeiture Fund when the seizure

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[60] 21 U.S.C. § 881(e)(2)(B), as amended by the 1988 Drug Act, provides:

> The Attorney General shall forward to the Treasurer of the United States for deposit in accordance with section 524(c) of title 28, any amounts of such moneys and proceeds remaining after payment of the expenses provided in subparagraph (A), except that, with respect to forfeitures conducted by the Postal Service, the Postal Service shall deposit in the Postal Service Fund, under section 2003(b)(7) of title 39, United States Code, such moneys and proceeds.

Subparagraph (A), in turn, only applies to moneys forfeited under this title and sales conducted under section 881(e)(1)(B).

[61] Of course, under 21 U.S.C. § 881(e)(1)(A), as amended by the 1988 Drug Act, the Attorney General has explicit authority to transfer the custody or ownership of any forfeited property to any federal agency, or to any state or local agency that participated directly in the seizure or forfeiture, pursuant to section 616 of the Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930) (codified as amended at 19 U.S.C. §§ 1202–1677). Thus, where a Customs officer has been working in cooperation with DEA in a joint investigation, or has been working under designation by the Attorney General, and property is seized and forfeited by the Department of Justice under section 881, it is within the Attorney General's discretionary authority to transfer that tangible property to the Customs Service

[62] Moreover, 19 U.S.C. § 1524 requires that reimbursable charges paid out of "any appropriation" for collecting Customs revenue shall be refunded.

was made by the Customs Service under the customs laws, even though the property ultimately was forfeited by the Department of Justice, either administratively or in a federal district court proceeding.[63]

DOUGLAS W. KMIEC
Assistant Attorney General
Office of Legal Counsel

[63] Thus, to return to one of the practical examples mentioned above, Customs may lawfully stop and search a vessel pursuant to 19 U.S.C. § 1581(a), find illegal drugs on board and seize the vessel under 19 U.S.C. § 1581(e). According to Reorganization Plan No. 2 of 1973, Customs must turn over to DEA the drugs and any related evidence, that is, the boat. DEA or the United States Attorney may then forfeit the boat under 21 U.S.C. § 881 or allow Customs to forfeit the boat under the smuggling laws. If the boat is forfeited under section 881, the Attorney General may retain the boat for official use, sell the boat or transfer it to the Customs Service. 21 U S.C. § 881(e)(1). If the Attorney General decides to sell the boat pursuant to section 881(e)(1)(B), the proceeds of sale remaining after payment of property management expenses to the Justice Department are to be transferred to the Customs Forfeiture Fund in accordance with 28 U.S.C. § 524(c)(10) because Customs made the lawful seizure of the property.

Applicability of Appointment Provisions of the Anti-Drug Abuse Act of 1988 to Incumbent Officeholders

Provisions of the Anti-Drug Abuse Act of 1988 requiring appointment by the President with the advice and consent of the Senate for certain positions within the Department of Justice do not affect the tenure of incumbent officeholders who were appointed by the Attorney General.

December 12, 1988

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION

Introduction and Summary

This memorandum responds to your request of November 30, 1988, for the opinion of this Office on the effect of provisions in the Anti-Drug Abuse Act of 1988 ("Act") requiring appointment by the President with the advice and consent of the Senate for certain positions within the Department of Justice.[1] Specifically, you would like our opinion on the effect of the new advice and consent requirement on those persons currently holding those positions under appointments from the Attorney General. For the reasons set forth in this memorandum, we believe that the tenure of the incumbent officeholders is unaffected by this legislation. Congress has not indicated an intention to apply the advice and consent requirements retroactively to the officers currently holding the affected positions. Moreover, we believe that any attempt by Congress to, in effect, remove an executive officer by the retroactive application of new requirements for appointment would be unconstitutional.

While we thus are confident that as a matter of law these incumbent officeholders have full authority to act, we recognize that this authority may be challenged. In order to avoid any risk that litigation would cast doubt on the validity of any action taken by incumbent officeholders, you may wish to recommend that the Attorney General issue a conditional designation of the incumbent officeholders as acting officials—a designation that would be employed only in the event that a vacancy were determined to exist in a judicial proceeding adverse to our conclusion. In this manner the Department would both preserve its position

[1] The affected positions are the Director of the Bureau of Justice Assistance, the Director of the Office for Victims of Crime, and the Director of the United States Marshals Service.

that the incumbent officeholders continue to occupy their offices and yet validate their actions in the unlikely event a court disagrees with this position.

Analysis

As part of the Anti-Drug Abuse Act, Congress changed the method of appointment of three officers of the Department of Justice. These officers, the Director of the Bureau of Justice Assistance, the Director of the Office for Victims of Crime, and the Director of the United States Marshals Service, previously were appointed by the Attorney General. Under sections 6071, 7123, and 7608 of the Act respectively these officers are to be appointed by the President, by and with the advice and consent of the Senate.[2] Although each of the provisions purports to "establish" an office, in point of fact the offices already exist either by explicit statutory enactment or by a delegation from the Attorney General pursuant to 28 U.S.C. § 510 and these provisions do not in any way purport to change the functions of these offices. Moreover, neither the language nor legislative history of these provisions suggests that Congress intended to abolish the existing offices and instantaneously replace them with "new" offices bearing the same titles and performing the same functions.[3] Accordingly, we believe that these provisions are not to be construed to effect a removal of incumbent officeholders and thus that the new advice and consent requirements do not apply retroactively to these officials, but only to their successors.

Moreover, a construction of the provisions that would effect a removal of the incumbent officeholders would raise the most serious constitutional questions. The Department has consistently maintained that Congress cannot terminate the terms of incumbent officeholders. *See, e.g.*, Letter for Senator William V. Roth, Jr., from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs (June 20, 1984) (legislation that would have required the reconfirmation of incumbent officeholders upon the election of a President was unconstitutional); Letter for David A. Stockman, Director, Office of Management and Budget, from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs (June 27, 1983) (legislation terminating terms of certain directors

[2] Section 6091 of the Anti-Drug Abuse Act of 1988, 134 Cong. Rec. 33,194 (1988), amends 42 U.S C. § 3741(b), which provided for the appointment of the Director of the Bureau of Justice Assistance by the Attorney General, by requiring that the Director "be appointed by the President, by and with the advice and consent of the Senate." Section 7123 of the Act, 134 Cong. Rec. 33,307 (1988), establishes within the Department of Justice an Office for Victims of Crime, to be headed by a Director "who shall be appointed by the President, by and with the advice and consent of the Senate." Section 7608 of the Act, 134 Cong Rec. 33,251 (1988), establishes the United States Marshals Service as a bureau within the Department of Justice. The Marshals Service is to be headed by a Director, "who shall be appointed by the President, by and with the advice and consent of the Senate."

[3] The only reference in the legislative history to Congress' intent regarding these provisions concerns the Director of the United States Marshals Service. A section-by-section analysis of the U.S Marshals Service Act of 1988, which eventually became section 7608 of the Anti-Drug Abuse Act of 1988, indicates that appointment of the Director was made subject to the advice and consent of the Senate because it was "consistent with the similar status accorded Assistant Attorneys General and heads of other major Department of Justice divisions." 134 Cong. Rec. 27,422 (1988). In addition, it was thought anomalous to have "an Attorney General appointee supervising the activities of 93 Presidentially appointed Marshals." *Id*

of Export Import Bank was unconstitutional). In particular, the Department has indicated that the retroactive application of an advice and consent requirement to an incumbent officeholder would unconstitutionally effect removal of that officer. *See* Memorandum for Fred F. Fielding, Counsel to the President, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel (Nov. 24, 1982); Letter for Representative Chet Holifield from Joseph T. Sneed, Deputy Attorney General (Mar. 5, 1973). Indeed President Nixon vetoed legislation that would have applied a new advice and consent requirement to the incumbent Director and Deputy Director of the Office of Management and Budget on the ground such retroactive application would amount to a "forced removal by an unconstitutional procedure." Veto Message of May 18, 1973, *Pub. Papers of Richard Nixon* 539 (1973).

We agree with this precedent and believe that retroactive application of Anti-Drug Abuse Act's advice and consent requirements would unconstitutionally effect a Congressional removal of officers of the United States who had been validly appointed by the Attorney General. *Myers v. United States*, 272 U.S. 52, 122 (1926), makes clear that the removal of officers of the United States prior to the expiration of their terms is vested exclusively in the President or in subordinate executive branch officials acting under his supervision. Indeed, the square holding of *Bowsher v. Synar*, 478 U.S. 714 (1986), is that Congress cannot remove officers of the United States by means other than impeachment.[4] Unless and until Congress chooses to invoke its impeachment power, it cannot interfere with the tenure of a validly-appointed executive officer.[5]

It is, of course, a cardinal principle of statutory construction that statutes should be construed, if possible, so as to avoid constitutional questions. *Association of Machinists v. Street*, 367 U.S. 740, 749 (1961); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936). In the absence of any indication of a legislative intent to apply these provisions retroactively, and mindful of the serious constitutional objections that would be raised by a contrary reading, we conclude that the advice and consent provisions have prospective effect only and thus do not apply to the incumbent officeholders.

Although we have full confidence in the foregoing analysis, we note also that the de facto officer doctrine, as least as traditionally understood, would place the acts of these officers beyond legal challenge regardless of defects in their titles.

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[4] Congress can, of course, enact legislation permanently abolishing an office, in which case the incumbent would no longer have a position to occupy.

[5] The fact that two of these offices (the Director of the United States Marshals Service and the Director of the Office for Victims of Crime) were created by order of the Attorney General rather than by specific statutory enactment does not change our analysis. *See* Att'y Gen. Order No. 516–73, 38 Fed. Reg. 12,917 (1973); Att'y Gen. Order No. 1079–84. Congress has by statute vested the Attorney General with the authority to take certain measures, including the creation of inferior offices within the Department of Justice, to carry out the functions of his office. 28 U.S.C. § 510. Congress has now chosen to give these offices a more explicit statutory basis. The fact remains, however, that these offices were originally created pursuant to statutory authority Moreover, Congress has not changed the functions of these offices· the Director of the United States Marshals Service and the Director of the Office for the Victims of Crime, have essentially the same tasks as they had before the enactment of the Anti-Drug Abuse Act Accordingly, these offices are analytically indistinguishable, for purposes of the retroactive application of the advice and consent requirement, from any office created explicitly by statute.

The courts have traditionally held that "[a] person actually performing the duties of an office under color of title is an officer de facto, and his acts as such officer are valid so far as the public or third parties who have an interest in them are concerned." *National Ass'n of Greeting Card Publishers v. United States Postal Service*, 569 F.2d 570, 579 (D.C. Cir. 1976) (quoting *United States ex rel. Doss v. Lindsley*, 148 F.2d 22, 23 (7th Cir.), *cert. denied*, 325 U.S. 858 (1945)), *vacated and remanded on other grounds*, 434 U.S. 884 (1977). There is doubt, however, about the continued viability of the traditional understanding of the doctrine, at least in the D.C. Circuit, as a result of Judge Wright's opinion in *Andrade v. Lauer*, 729 F.2d 1475 (D.C. Cir. 1984). There the court permitted a challenge to the acts of allegedly improperly appointed officers, holding that the purpose of the de facto officer doctrine (which the court identified as avoidance of wholesale invalidation of past actions through collateral attacks by third parties) could be served by requiring the plaintiff (1) to bring his suit at or around the time that the challenged government action is taken, and (2) to prove that the agency or department involved has had reasonable notice of the claimed defect in the officer's title. *Id.* at 1496–97, 1499.

Accordingly, in the event that our legal analysis is rejected the Department can no longer absolutely rely on the de facto officer doctrine to preclude legal challenges to actions taken by these officials. Although we believe the risk that a court would reject our analysis is slight, it may be determined that even this level of risk is unacceptable. In that event we recommend that the Attorney General, pursuant to his authority under 28 U.S.C. § 510, also designate the incumbent officeholders as acting officers. Because of our conclusion that the tenure of these incumbents has not been (and could not be) disturbed by the Anti-Drug Abuse Act, we stress that any designation of acting officer should be made conditional upon the existence of a vacancy in that office as determined by a final court order.

Conclusion

We conclude that the Anti-Drug Abuse Act of 1988 does not affect the tenure of the incumbent directors of the Marshals Service, the Bureau of Justice Assistance, and the Office for Victims of Crime and that these officeholders continue to have full authority to take any action necessary to fulfill their duties. We believe, however, that the Attorney General may wish to consider issuing a conditional designation of the incumbents as acting officers in the unlikely event that a final court order determines that the Anti-Drug Abuse Act has removed these officials.

DOUGLAS W. KMIEC
Assistant Attorney General
Office of Legal Counsel

Maintaining Essential Services in the District of Columbia in the Event Appropriations Cease

When the District of Columbia is otherwise prohibited by law from spending its appropriation, the District's Mayor is authorized under the Antideficiency Act to expend moneys necessary to maintain government services bearing a reasonable relationship to the safety of human life or the protection of property.

Under provisions of the District of Columbia Home Rule Act, the President has authority to employ the District of Columbia Metropolitan Police Force for purposes he deems necessary and appropriate where he has declared the existence of emergency conditions.

The President has inherent constitutional authority to use troops or police to preserve such order in the District of Columbia as may be necessary to protect federal property and functions.

December 15, 1988

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

I. Introduction and Summary

This memorandum responds to your request of November 30, 1988, for advice of this Office concerning the manner in which essential services may be maintained in the District of Columbia in the event that the District is prohibited from expending its appropriation. In particular, you are concerned that the failure of the Council of the District of Columbia to fulfill the requirements of the "Armstrong Amendment" to the most recent act of Congress appropriating money for the District of Columbia, Pub. L. No. 100–462, § 145, 102 Stat. 2269, 2269–14 (1988) may "have the effect of prohibiting the expenditure of appropriated funds by the District after December 31, 1988." In that event, you have asked us to advise you "about the Mayor's authority to continue essential services under the Antideficiency Act or other relevant statutes." You have also asked us to address the issue of the President's authority in such circumstances.

We conclude that in the event the District is prohibited from spending its appropriation, the Mayor will be able to maintain services that bear a reasonable relationship to the safety of human life or the protection of property. We further believe that should the President declare an emergency he would also have express statutory authority to employ the Metropolitan Police Force as he deems necessary and appropriate. In addition, we conclude the President has the inherent constitutional authority to protect federal property and functions.

II. Analysis

A. *Appropriations for the District of Columbia*

The annual budgets for the District of Columbia are proposed by the Mayor to the City Council. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 446, 87 Stat. 774 (1973) ("D.C. Home Rule Act"). If adopted, a budget is then sent by the Mayor to the President for submission to Congress. *Id.* The most recent appropriations bill for the District of Columbia establishes the following condition precedent to the expenditure of any funds by the D.C. government:

> (b) None of the funds appropriated by this Act shall be obligated or expended after December 31, 1988, if on that date the District of Columbia has not adopted subsection (c) of this section.

§ 145, 102 Stat. at 2269–14 ("Armstrong Amendment").[1]

First, the "funds appropriated by this Act" applies to the "total budget of the District of Columbia government," D.C. Home Rule Act § 603(a), not just the amounts contributed by the federal government, called the "federal payment." D.C. Home Rule Act § 501.[2] All of these funds—the District's total budget—are subject to the following prohibition: "[n]o amount may be obligated or expended by any officer or employee of the District of Columbia government unless such amount has been approved by Act of Congress, and then only according to such Act." D.C. Home Rule Act § 446. This language is substantially identical to the general federal Antideficiency Act, which prohibits officers of the District of Columbia government, among others, from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). In addition, the legislative history of section 603 of the D.C. Home Rule Act makes clear that it is

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[1] As set forth in section 145(c) of the Armstrong Amendment, the law the District of Columbia Council must approve by December 31, 1988, to receive its appropriations provides:

> (3) Notwithstanding any other provision of the laws of the District of Columbia, it shall not be an unlawful discriminatory practice in the District of Columbia for any educational institution that is affiliated with a religious organization or closely associated with the tenets of a religious organization to deny, restrict, abridge, or condition —
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> (A) the use of any fund, service, facility, or benefit; or
>
> (B) the granting of any endorsement, approval, or recognition, to any person or persons that are organized for, or engaged in, promoting, encouraging, or condoning any homosexual act, lifestyle, orientation, or belief

102 Stat. at 2269–14.

[2] Section 603(a) provides, in pertinent part:

> [N]othing in this Act shall be construed as making any change in existing law, regulation, or basic procedure and practice relating to the respective roles of the Congress, the President, the Federal Office of Management and Budget, and the Comptroller General of the United States in the preparation, review, submission, examination, authorization, and appropriation of the *total* budget of the District of Columbia government

89 Stat. at 814 (emphasis added).

intended to include "the standard anti-deficiency limitation now applicable to the District of Columbia under the Federal Budget and Accounting Act, restated so as to be applicable to the new city government. It requires all District officers and employers, including the Mayor and the Council, not to spend or authorize the expenditures of funds which would exceed available resources." H.R. Rep. No. 482, 93d Cong., 1st Sess. 38 (1973). *See also* H.R. Conf. Rep. No. 703, 93d Cong., 1st Sess. 46 (1973). Thus, absent a specific authorization, no monies may be spent by the District of Columbia government.[3]

B. *The Antideficiency Act's Exception for Emergencies*

As noted above, the Antideficiency Act prohibits officers and employees of the United States Government and the District of Columbia government from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A).[4] Thus, it would appear that if the D.C. Council were to fail to pass subsection (c) of the Armstrong Amendment by December 31, 1988,[5] the Mayor of the District of Columbia would be in violation of the Antideficiency Act if he were to expend any monies other than those authorized by law to keep open the D.C. government.

The only monies that the Mayor may spend are those authorized by an exception for emergencies. Section 1342 of title 31 of the U.S. Code, entitled "Limitation on Voluntary Services," prohibits:

> [a]n officer or employee of the United States Government or of the District of Columbia government [from] accept[ing] voluntary services for either government or *employ[ing] personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.*

31 U.S.C. § 1342 (emphasis added).[6]

This Office has previously opined that this section prohibits "government officers and employees [from] involv[ing] the government in contracts for *em-*

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[3] We do not here refer, of course, to items for which Congress has separately authorized and appropriated monies.

[4] Subsection (B) of section 1341 forbids any covered officer or employee from "involv[ing] either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(B).

[5] The constitutional validity of the Armstrong Amendment has recently been successfully challenged on First Amendment grounds in district court here in Washington. *See Judge Rebuffs Congress on D.C. Gay Rights*, The Washington Post, Dec. 14, 1988, at A1. This office has not examined the constitutional validity of the amendment.

[6] Despite the absence of this exception from the antideficiency provision in the D.C. Code, we believe that the exception in section 1342 applies to the District of Columbia as well. We base this conclusion on the language of section 1342 itself, which states that it applies to "officers of the D.C. government." Moreover, consistent with the maxim of statutory construction that repeals by implication are not favored, *see, e.g., Morton v. Mancari*, 417 U.S. 535 (1974), we think it best not to construe section 603(a) of the D.C. Home Rule Act as repealing the application of section 1342 to the District of Columbia.

ployment, i.e., for compensated labor, except in emergency situations." *Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations*, 5 Op. O.L.C. 1, 8 (1981) (citing 30 Op. Att'y Gen. 129, 131 (1913)).[7]

Thus, during a lapse in appropriations, government may use unappropriated funds to "employ personal services" for those activities bearing a "reasonable relationship . . . [to] the safety of human life or the protection of property." *Id.* at 10. This has been thought to include, among other things, legal investigations by the Federal Bureau of Investigation, legal services rendered by the Department of Agriculture in connection with state meat inspection programs and enforcement of the Wholesome Meat Act of 1967, the investigation of aircraft accidents by the National Transportation Safety Board, and the protection and management of commodity inventories by the Commodity Credit Corporation. *Id.*

Accordingly, the Antideficiency Act does not prohibit the expenditure of funds by the Mayor of the D.C. government to employ personnel for the police and fire departments, the inspection of buildings, and all other activities bearing a "reasonable relationship [to] the safety of human life or the protection of property." *Id.* at 10. We are hesitant to be any more specific in the absence of more concrete questions.

C. *The President's Authority to Maintain the Functioning of the Executive Branch*

In anticipation of emergencies, Congress has granted to the President express statutory authority to control and direct the Washington, D.C. police force. The D.C. Home Rule Act expressly provides that:

> Notwithstanding any other provision of law, whenever the President of the United States determines that special conditions of an emergency nature exist which require the use of the Metropolitan Police force for Federal purposes, he may direct the Mayor to provide him, and the Mayor shall provide, such services of the Metropolitan Police force as the President may deem necessary and appropriate.

D.C. Home Rule Act § 740(a). The plain meaning of the phrase "notwithstanding any provision of law to the contrary" convinces us that once the President de-

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[7] In addition, 31 U.S.C. § 1515(b)(1)(B) provides, in relevant part:

> [A]n official may make, and the head of an executive agency may request, an apportionment . . . that would indicate a necessity for a deficiency or supplemental appropriation only when the official or agency head decides that the action is required because of . . an emergency involving the safety of human life, the protection of property, or the immediate welfare of individuals when an appropriation that would allow the United States Government to pay, or contribute to, amounts required to be paid to individuals in specific amounts fixed by law or under formulas prescribed by law, is insufficient.

We have read this section as differing from section 1342 in small ways, but have said that "[any] distinction, however, is outweighed by the common practical effect of the two provisions." 5 Op. O.L.C. at 9 n.11

clares the existence of "special conditions of an emergency nature," he has specific statutory authorization that overrides the Antideficiency Act. Thus, even if the Mayor determines that police protection for federal property is not made necessary by the exception to the Antideficiency Act for emergency circumstances, the President may, as a matter of statutory law, demand and receive police protection.

Moreover, we believe that the President has the inherent authority to take steps to preserve such order in the District of Columbia as may be necessary to protect the functioning of the federal government. This Office has previously opined that a necessary adjunct of the President's power under Article II, Section 3 of the Constitution to "take Care that the Laws [are] faithfully executed" is the power "to protect federal property and functions." Memorandum for R. Kenly Webster, Acting General Counsel, Department of the Army, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel at 2 (Apr. 29, 1971) ("Rehnquist Memo") (citing Corwin, *The President: Office and Powers*, 130–38 (1957)). *See also* Memorandum for Robert E. Jordan III, General Counsel, Department of the Army, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel (May 11, 1970).

These opinions relied principally on *In re Neagle*, 135 U.S. 1 (1890). In that case, the Supreme Court approved the appointment and actions of a Marshal who was assigned to protect a Justice of the Supreme Court even in the absence of express statutory authority for that function. In doing so, the Court recognized the broad authority conferred on the President by the Constitution to protect the federal government. How far the President's inherent authority extends beyond safeguarding the physical safety of federal property and employees is a difficult question turning on specific facts and circumstances. We have previously opined that this power extends at least to "the use of troops [or police] to protect the functioning of the government by assuring the availability of federal employees to carry out their assigned duties and that troops may therefore be utilized to prevent traffic obstructions designed to prevent the access of employees to their agencies." Rehnquist Memo at 1.

DOUGLAS W. KMIEC
Assistant Attorney General
Office of Legal Counsel